

BLOG POST

Potentially Responsible Parties Take Notice: EPA's Enhanced Five-Year Scrutiny May Draw You Back into Superfund Process

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Often overlooked by Superfund lawyers and PRPs, CERCLA Five-Year Reviews (FYRs) may merit closer attention given recent US EPA initiatives to more closely scrutinize completed remedies. In particular, the Agency has emphasized, via internal guidance, that emerging issues such as vapor intrusion (VI) and institutional controls (ICs) must be given active consideration during FYR protectiveness reviews. With [last week's announcement](#) of sites up for review this cycle, together with heightened scrutiny on VI and ICs, PRPs (potentially responsible party) at sites with completed remedies may find themselves drawn back in to Superfund process with greater frequency.

The US EPA typically produces over 200 FYRs per year, and the Agency's attention to the reviews and their outputs has been regularly critiqued by the Office of Inspector General and other stakeholders. Prompted by concerns over thoroughness of reviews and incomplete protectiveness conclusions, the Office of Solid Waste and Emergency Response has taken steps both to tighten up the process and to emphasize the importance of certain substantive considerations. For example, the Agency's 2007 guidance, "Five-Year Review Program Priorities" (OSWER Directive 9200.2-110), established seven criteria for programmatic reform, including greater emphasis on actual implementation of FYR recommendations to secure protectiveness of remedies.

On a substantive basis, US EPA has made clear that it expects review teams to look closely at vapor intrusion and institutional controls as key elements during upcoming FYRs. In its 2013 guidance document, "Assessing Protectiveness at Sites for Vapor Intrusion" (OSWER Directive 9200.2-84), the Agency specifically calls for a site assessment where a vapor intrusion remedy has not been implemented. Projected sites include those where a VI pathway was not characterized during the CERCLA process and those circumstances where site conditions have changed and may have led to a complete VI pathway. Similarly, the OSWER guidance on institutional controls, "Recommended Evaluation of Institutional Controls" (OSWER Directive 9355.7-18), advises that changes in land use from those that were part of the remedy decision and actual changes in exposure pathways may result in additional efforts by the site's PRPs.

PRPs facing the prospect of EPA FYR investigations and potential calls for additional work generally should take some comfort in the relative flexibility (or vagueness, depending on perspective) in the Agency's VI guidance, leaving some room for negotiation and PRP-led actions. More challenging circumstances, however, may arise should an actual change in land use have occurred, leading to new exposure pathways and questionable IC utilization. What is

clear is that the current round of sites up for FYRs will be on the front line of EPA's emerging foray focused on vapor intrusion pathways and institutional controls effectiveness at previously completed CERCLA cleanups.

While PRPs reasonably may have enjoyed some period of repose at sites with high-profile histories, such as Tex-Tin and United Creosoting in Region 6, changes in the surrounding communities over the past five years in rapidly expanding urban areas, in combination with EPA's recent guidance on FYRs, may prompt in-house counsel and environmental directors to dust off their Superfund files and prepare to re-enter the CERCLA process.

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