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FEDERAL AND STATE PARTNERSHIP FOR ENVIRONMENTAL PROTECTION ACT OF 2013; REDUCING EXCESSIVE DEADLINE OBLIGATIONS ACT OF 2013; AND FEDERAL FACILITY ACCOUNTABILITY ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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FEDERAL AND STATE PARTNERSHIP FOR ENVIRONMENTAL PROTECTION ACT OF 2013; REDUCING EXCESSIVE DEADLINE OBLIGATIONS ACT OF 2013; AND FEDERAL FACILITY ACCOUNTABILITY ACT OF 2013

FRIDAY, MAY 17, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2123, Rayburn House Office Building, Hon. John Shimkus, (chairman of the subcommittee) presiding.

Present: Representatives Shimkus, Whitfield, Pitts, Murphy, Latta, Harper, Cassidy, McKinley, Bilirakis, Johnson, Barton, Tonko, Green, McNerney, Dingell, Schakowsky, and Barrow.

Staff Present: Nick Abraham, Legislative Clerk; Charlotte Baker, Press Secretary; Matt Bravo, Professional Staff Member; Jerry Couri, Senior Environmental Policy Advisor; David McCarthy, Chief Counsel, Environment/Economy; Brandon Mooney, Professional Staff Member; Tina Richards, Counsel, Environment; Chris Sarley, Policy Coordinator, Environment & Economy; Jacqueline Cohen, Minority Senior Counsel; Greg Dotson, Minority Staff Director, Energy and Environment; and Caitlin Haberman, Minority Policy Analyst.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. We call the hearing to order, and the chair recognizes himself for 5 minutes. Here in the Environment and Economy Subcommittee, our goal is to modernize some of the environmental laws that we oversee and make sure that the states are playing a significant role in implementing them. To do that, we began this Congress with a hearing on the role of states in protecting the environment. state environmental protection officials shared their experience and expertise with us and helped us better understand the complex partnership between states and the Federal Government as states implemented Federal laws such as the Solid Waste Disposal Act and EPA implements the Comprehensive Response Compensation and Liability Act, CERCLA, or the Superfund law, and the relation to state and environmental protection laws.

Today we consider three bills that are a logical outgrowth of that discussion. One, the Federal Facility Accountability Act, would

bring CERCLA waiver of sovereign immunity into conformity with Solid Waste Disposal Act, and for that matter the Clean Air Act, by requiring that all Federal Superfund sites comply with the same state laws and regulations as a private entity. This is not a new concept. Legislation has been introduced previously by my friends across the aisle to ensure that Federal agencies comply with all federal and state environmental laws.

The second bill, the Federal and state Partnership for Environmental Protection Act, does exactly what the title implies and would go a long way toward making the states partners with EPA in cleaning up hazardous waste sites. CERCLA is implemented by the EPA, but often states are in the best position to understand the sites in their state. This bill would allow states to play a larger role in the CERCLA process in several ways. The bill would allow states to list a site it believes needs to be on the National Priorities List every 5 years and would provide transparency to the states if they suggest a site for listing. The bill would also allow states to be consulted before EPA selects remedial action. The states are on the front lines, understand at the ground level how to prioritize in taking environmental action within their state, and they often come up with innovative solutions that better fit the local problem.

We heard examples in our earlier hearing on the role of the states in protecting the environment. CERCLA is a key example of a statute passed more than 30 years ago that we are in the perfect position to now update, and to strengthen the federal-state partnership and get these sites cleaned up. Besides, the states are required to sink their money in these cleanup projects, and while we understand there are budget constraints at all levels of government, if states have a significant cost, they should have more of a say in how the cleanup money is spent.

Continuing the theme of updating our environmental statutes passed in the 1970s and 1980s, the third bill, the Reducing Excessive Deadline Obligation, or the REDO Act of 2013, would give EPA flexibility by correcting a couple of arbitrary action deadlines that were written into the Solid Waste Disposal Act and CERCLA years ago. The mandate that EPA review and, if necessary, revise all RCRA regulations every 3 years has proven unnecessary and unworkable. The bill would allow the Administrator to review and, if necessary, revise regulations she thinks appropriate. It also reduces the requirement that only seems to be good for generating lawsuits against the EPA. In fact, they did some testimony, I would have people look at the testimony provided by the Environmental Protection Agency, and I quote that, "the current statutory provisions requiring review every 3 years can pose a significant resource burden on EPA, given the complexity and volume of EPA's RCRA regulations." So they are in agreement that this is overly burdensome and costly.

Shimkus and the EPA on the same side. It is a beautiful thing.

The bill also lists an action deadline in CERCLA requiring EPA to identify prior to 1984 classes of facilities for which to develop financial assurance regulations. More than 30 years passed without action from EPA. As we approach the 30th anniversary of the original deadline in CERCLA, a lawsuit and court order finally prompted EPA action of a few years ago; however, the states have long

since acted, putting in place strong financial assurance requirements of their own. That is why the bill also provides that if EPA does get around to establishing Federal financial assurance regulations, the state requirements should not be preempted.

We regret that it was not possible for a friend of this committee, Mr. Stanislaus, Assistant Administrator of the EPA, to be with us today, but as I quoted, we have his written statement and we will consult with him and his staff as these bills move through the legislative process.

Throughout that process, we also welcome suggestions from our witnesses today and other experts in the field, and that is why we are having this legislative hearing.

I want to lastly thank our witnesses for being with us today, and appreciate your willingness to travel to Washington to share your opinions on the three bills before us.

With that, the chair now recognizes the gentleman from New York, Mr. Tonko.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

Here in the Environment and the Economy Subcommittee our goal is to modernize some of these environmental laws that we oversee and make sure the states are playing a significant role in implementing them. To do that, we began this Congress with a hearing on the role of the states in protecting the environment. state environmental protection officials shared their experience and expertise with us and helped us better understand the complex partnership between the states and the federal government as states implement federal laws, such as the Solid Waste Disposal Act and EPA implements the Comprehensive Response, Compensation, and Liability Act (CERCLA or Superfund law), and the relation to state environmental protection laws.

Today we consider three bills that are a logical outgrowth of that discussion.

One, the Federal Facility Accountability Act, would bring the CERCLA waiver of sovereign immunity into conformity with the Solid Waste Disposal Act and for that matter, the Clean Air Act, by requiring that all federal superfund sites comply with the same state laws and regulations as a private entity. This is not a new concept. Legislation has been introduced previously by my friends across the aisle to ensure that federal agencies comply with all federal and state environmental laws.

The second bill, "The Federal and state Partnership for Environment Protection Act" does exactly what the title implies and would go a long way toward making the states partners with EPA in cleaning up hazardous waste sites. CERCLA is implemented by EPA, but often states are in the best position to understand the sites in their state. This bill would allow states to play a larger role in the CERCLA process in several ways. The bill would allow states to list a site it believes needs to be on the National Priorities List every five years and would provide transparency to the states if they suggest a site for listing.

The bill would also allow states to be consulted before EPA selects a remedial action. The states are on the front lines and understand at the ground level how to prioritize in taking environmental action within their state and they often come up with innovative solutions that better fit the local problem. We heard examples in our earlier hearing on the "Role of the states in Protecting the Environment." CERCLA is a key example of a statute passed more than 30 years ago that we are in the perfect position to now update and strengthen the federal-state partnership and get these sites cleaned up.

Besides, the states are required to sink their own money in these cleanup projects and while we understand there are budget constraints at all levels of government, if states have a significant cost they should have more of a say in how the cleanup money is spent.

Continuing the theme of updating environmental statutes passed in the 70s and 80s, the third bill, "the Reducing Excessive Deadline Obligations (REDO) Act of 2013" would give EPA flexibility by correcting a couple of arbitrary action deadlines that were written into the Solid Waste Disposal Act and CERCLA years ago. The mandate that EPA review and, if necessary, revise all RCRA regulations every three

years has proven unnecessary and unworkable. The bill would allow the administrator to review and, if necessary, revise regulations as she thinks appropriate. It also reduces a requirement that only seems to be good for generating lawsuits against EPA.

The bill also lifts an action deadline in CERCLA requiring EPA to identify, prior to 1984, classes of facilities for which to develop financial assurance regulations. More than 30 years passed without action from EPA. As we approach the 30th Anniversary of the original deadline in CERCLA, a lawsuit and court order finally prompted EPA action a few years ago. However, the states have long since acted, putting in place strong financial assurance requirements of their own. That is why the bill also provides that if EPA does get around to establishing federal financial assurance regulations, the states requirements would not be preempted.

We regret that it was not possible for a friend of this committee, the Honorable Mathy Stanislaus, Assistant Administrator of EPA, to be with us today, but we welcome his written statement and will consult with him and his staff as these bills progress through the legislative process. Throughout that process we also welcome suggestions of our witnesses today and of other experts in the field.

I want to lastly thank our witnesses for being with us today and appreciate their willingness to travel to Washington to share your opinions on the three bills before us.

# # #

OPENING STATEMENT OF HON. PAUL TONKO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. TONKO. Thank you, Mr. Chairman. Good morning to our witnesses.

And let me begin by saying how pleased I am that we were able to come to an agreement and that we will have an opportunity to receive testimony on the Superfund program from additional witnesses before we mark up our bills. I appreciate your willingness to accommodate the desire of the subcommittee members to hear from witnesses about the current status of this program.

The Comprehensive Environmental Response Compensation and Liability Act, commonly known as Superfund, is an important statute guiding the cleanup of contaminated sites throughout our country. It is fair to say that this law had a rough start. Over the years, it has been shaped by amendments, agency guidance, regulations and extensive litigation. Much of the dust has now settled. Cleanups are proceeding across the country. Many communities are safer as a result of this law, and contaminated, abandoned sites have been returned to productive reuse.

I want to thank the witnesses for appearing before our subcommittee this morning and for offering their views on the three bills before the subcommittee.

Mr. Chair, you characterized the bill as reforms to Superfund, and I am new to the committee but not new to the contamination problems that Superfund was enacted to address. "Simple" is not an adjective I usually associate with Superfund, and I hope we are not embarking on an effort that will negate the progress we have made on site cleanups and the reuse of brown fields.

One bill we will consider today, for instance, is couched as legislation designed to repeal so-called, I quote, excessive deadlines. Section 2 of this bill appears to be designed to block a lawsuit from coal ash recyclers to bring some certainty to their markets. Those recyclers have gone to court over EPA's failure to meet a statutory deadline that they say has, and I quote, constrained the recycling

of coal ash with the attendant result of wasted resources, adverse economic impacts, and increased environmental impacts that would otherwise be avoided through beneficial reuse, close quote.

Many of us support the beneficial reuse of coal ash, which is what the coal ash recycling industry does. This industry has gone to court to protect their rights and seek a legal remedy for their plight. We should not throw their case out of court by legislative fiat.

Other provisions we will consider today will delay cleanups in favor of litigation, will decrease the funding available for cleanup efforts, and will divert resources so that the most dangerous contaminated sites are not cleaned up first.

There are many questions that surround these bills. They may delay efforts to adopt financial responsibility requirements for environmentally damaging mining and they could preempt those requirements once adopted, but again I look forward to hearing what everyone has to share with us today.

And with that, I yield back, Mr. Chair.

[The prepared statement of Mr. Tonko follows:]

PREPARED STATEMENT OF HON. PAUL TONKO

Good morning.

Mr. Chairman, I am pleased that we were able to come to an agreement, and that we will have an opporiunity to receive testimony on the Superfund program from additional witnesses before we markup these bills. I appreciate your willingness to accommodate the desire ofthe Subcommittee members to hear from witnesses about the current status of this program.

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It is fair to say, this law had a rough start. Over the years, it has been shaped by amendments, Agency guidance, regulations, and extensive litigation. Much of the dust has now settled. Cleanups are proceeding across the country. Many communities are safer as a result of this law. And contaminated, abandoned sites have been returned to productive use.

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Many of us support the beneficial reuse of coal ash, which is what the coal ash recycling industry does. This industry has gone to court to protect their rights and seek a legal remedy for their plight. We should not throw their case out of court by legislative fiat.

Other provisions we will consider today will delay clean-ups in favor of litigation, will decrease the funding available for clean-up efforts, and will divert resources so that the most dangerous contaminated sites are not cleaned up first.

I have many questions about these bills. They may delay efforts to adopt financial responsibility requirements for environmentally-damaging mining, and they could preempt those requirements once adopted.

Mr. Chairman, the basic policy behind Superfund is that polluters should pay to clean up their pollution. I think we should be very careful about potentially creating new avenues for litigation that can allow polluters to delay cleanups and argue for

weaker protections. They have a financial incentive to do so, but that does not align with the public interest.

I appreciate the opportunity for the Subcommittee to examine the Superfund Program. The citizens living in communities with these sites are anxious to have them cleaned up and returned to safe, productive use. The responsible parties, whether public or private, want to accomplish those clean-ups in a cost-effective manner. These are goals we can all support, and the lens through which we should consider these three bills.

Mr. SHIMKUS. The gentleman yields back his time. Is there anyone on my side seeking time for an opening statement?

The chair now recognizes the Chairman Emeritus, Mr. Dingell, for 5 minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, thank you for your courtesy. I am giving a statement on behalf of myself, but I am using Mr. Waxman's time.

I have some familiarity with the subject matter before us today since I have chaired both the committee and the conference committee which lasted some 8 months when we considered the Superfund Amendments and Reauthorization Act of 1986. For many of the members of this subcommittee on both sides of the aisle that were not in the Congress in 1986, I would like to recall some of the events of that legislative effort resulting in the 1986 act and to describe the result of more than 3 years of legislative hearings and 5 years of oversight hearings.

The issue was enormously complex and bitterly controversial. It was also a fully bipartisan effort on the committee, and we worked very closely with the Reagan administration, which I saw was present at all the conference meetings. And the then chairman—rather, the then head of EPA was of valuable assistance to the committee and the conference committee in writing the final legislation. The Senate at that time was under Republican control. President Reagan signed the act on October 17, 1986, after overwhelming votes of 386 to 27 in the House and 88 to 8 in the Senate.

One of the interesting things about that was my difficulty was to see to it that the legislation was considered in a balanced and thoughtful way, but the pressures ofttimes were to go too far.

I am unaware that this committee has, or any of the subcommittees have conducted any oversight that has identified problems necessitating the amendments before us today. I believe every member of this committee can point out things that need to be done with regard to the legislation. I have some of my own.

The Superfund program, after a rocky start, has become a very successful and an enormously important public health program, cleaning up some devastatingly dangerous situations all around the country. And I would note that some of the worst difficulties that that agency confronts in administering this legislation is that there is no money. We have been both stingy in seeing to it that appropriated funds are available, but worse than that, we have allowed the tax revenues, which funded the original Superfund, to dry up

so the money is not available to see to it that the matter is properly handled.

And these are hideously technical and politically difficult questions. And I would suggest that before heading headlong into the resolution of problems that don't find any support in a factual record at this time, that the committee should gather the evidence from the states, from EPA, from local governments, from industry, and I think industry's comments will be very important, from the communities and from ordinary citizens so that we can understand what, if any, problems need to be addressed and how the interlocked and difficult questions, political, technical, environmental and financial, work together.

And I think that the tools necessary to ensure that Federal sites are properly listed and expeditiously cleaned up are available to us and can be perfected by a thoughtful and a decent approach to the legislation before us. And we can understand then perhaps why it has taken more than 25 years of fighting on all of these matters to establish financial responsibility requirements for industries that deal in hazardous substances.

My district is an industrial district where we have large numbers of old industrial sites, and these curse us all and require enormous amounts of effort, cooperation and understanding for us to solve the problems and clean them up, but we are making progress, and we will continue to do so if we don't screw these matters up by legislating in an unwise and irresponsible fashion.

I hope that my colleagues will try to understand the purpose of this hearing and the purpose of legislation and legislative change. And these are more than just to provide work for us or work for the staffs. And I think we have to worry, because the committee, or the subcommittee, seems to be doing well in creating a lot of staff work, but not a lot of thoughtful effort or understanding of the problems so that we can legislate well.

This is a massive health problem, a massive environmental concern, it is a tremendous financial problem, and it is something that does need our attention, but that attention must be thoughtful, it must be considerate of the concerns of everybody, but it must also address the question of facts and what really has to be done to achieve a balanced and perfected approach to this matter in which we will do the job better than we did the first time.

I yield back the balance of my time.

[The prepared statement of Mr. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL

Mr. Chairman, I have some familiarity with the subject matter before the Subcommittee today since I chaired the eight month long conference committee that resulted in the Superfund Amendments and Reauthorization Act of 1986. With one exception, the discussion draft amendments before the Subcommittee today are seeking to amend that Act.

For the many members on the Subcommittee on both sides of the aisle where were not in the Congress in 1986, I wish to inform them that legislative effort resulting in the 1986 Act was the result of more than three years of legislative hearings and five years of oversight hearings. It was a fully bipartisan effort on the Committee and we worked very closely with the Reagan Administration which was present at all conference meetings. The Senate, at the time, was under Republican control. President Reagan signed the Act on October 17, 1986 after overwhelming votes of 386–27 in the House and 88–8 in the Senate.

I am unaware that this Subcommittee has conducted any oversight that has identified problems necessitating the amendments before us today. The Superfund program, after a rocky start, has become a very successful and important public health program. At the non-federal Superfund National Priority Sites, the program completed all necessary construction activities at over 70 percent of the sites. At thousands of other sites, emergency or shorter-term removal actions have been completed.

Many of these amendments appear unnecessary and are without a factual basis or predicate. Others, such as the amendment to Section 113(h) of CERCLA, expand the opportunities for litigation before protective cleanup measures are taken. Such actions will delay cleanup for years while a federal judge sorts through the technical merits of a selected cleanup remedy. In 1986, the Conference Committee adopted a policy to put cleanups before lawsuits so communities would have relief while preserving the right to challenge agency action of the cleanup did not meet legal requirements or relevant standards.

If states had the capacity or financial ability to clean up these most seriously contaminated sites they would not be on the National Priorities List. states always have the first crack at cleaning up sites. To authorize lawsuits between the states and the federal government before cleanup is a fine idea if your goal is more litigation and lengthy cleanup delays—all coming at the expense of citizens and communities living nearby the site.

A number of the amendments seem to rest on the premise that EPA and state agencies are not communicating with each other. Where is the evidentiary record in support? These amendments appear to be solutions in search of a problem. I call my colleagues attention to Section 121(f) of the existing statute which sets forth in detail requirements for "substantial and meaningful involvement by each state in initiation, development, and selection of remedial actions."

Then there is an amendment in an amendment to Section 108. In this section, Congress wanted EPA to establish financial responsibility requirements for various classes of facilities so they would "maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." The agency has been extremely dilatory in implementing this provision. However, instead of calling EPA to task for failing to act, my republican colleagues' only goal seems to be to eliminate the one provision that was a mandatory duty forcing EPA to initiate action.

Before charging headlong into solving problems that are not backed up with a factual record, I recommend this Subcommittee gather a body of evidence from EPA, states, local governments, industry, and communities to better understand what, if any, problems need to be addressed regarding the state-federal relationship, the tools necessary to ensure federal sites are properly listed and expeditiously cleaned up, and why it has taken more than 25 years to establish financial responsibility requirements for industries that deal in hazardous substances. I fail to understand the purpose of this hearing or legislation other than to provide work for its members and staff. On that point, the Subcommittee has succeeded wonderfully.

Mr. SHIMKUS. The gentleman yields back his time. And I would just quickly note that, you know, I am not a spring chicken on this committee either, and my first piece of legislation was a response to the Superfund. When we got small business out of the liability regulations, the de minimis parties, and that was a successful piece of legislation that we were able to pick out what was wrong and how we could fix it and the like. And I would just refer folks to the EPA's testimony where it says, the current statutory provisions requiring review every 3 years can pose a significant resource burden on the EPA, given the complexity and volume of EPA's RCRA regulations. So it is not just us; it is even the EPA saying that this might be helpful.

So with that, I would like to recognize and welcome our witnesses, and I will just go in order. I already talked to you about votes being called soon. We will get through as many witnesses as we can, so then we can come back and go back to questions.

So first I would like to welcome Ms. Carol Hanson, Deputy Executive Director at Environmental Councils of the states. Your full testimony's in the record, and you are recognized for 5 minutes.

STATEMENTS OF CAROLYN HANSON, DEPUTY EXECUTIVE DIRECTOR, ENVIRONMENTAL COUNCIL OF THE STATES; JEFFERY STEERS, DIRECTOR, CENTRAL OFFICE DIVISION OF LAND PROTECTION AND REVITALIZATION, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, ON BEHALF OF THE ASSOCIATION OF STATE TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS; DANIEL S. MILLER, SENIOR ASSISTANT ATTORNEY GENERAL, NATURAL RESOURCES AND ENVIRONMENT SECTION, COLORADO DEPARTMENT OF LAW; ABIGAIL DILLEN, COAL PROGRAM DIRECTOR, EARTHJUSTICE; AND THOMAS DUCH, CITY MANAGER, GARFIELD, NJ

STATEMENT OF CAROLYN HANSON

Ms. HANSON. Thank you. Thank you for inviting me here today to talk about our organization's views on the bills before the committee. I am representing the Environmental Council of the states, or ECOS, whose members of the leaders of the state and territory——

Mr. SHIMKUS. Can you pull your microphone just a little bit closer and maybe lift it up?

Ms. HANSON. Sorry.

Mr. SHIMKUS. And pull it closer. There you go.

Ms. HANSON. I am representing—it is not staying on. There we go.

I am representing the Environmental Council of the states, ECOS, whose members are the leaders of the state and territorial environmental protection agencies. My main points today are, first, that ECOS supports concepts found in the three bills addressing RCRA and CERCLA issues. Second, in particular, ECOS supports the expansion of consultation with states as described in the bills, and also that ECOS especially acknowledges that the bills directly address concerns expressed by the states in two of ECOS's resolutions on Federal facilities' operations under RCRA and CERCLA. These resolutions were attached to our written testimony.

We are pleased that the committee has taken an interest in addressing RCRA and CERCLA in a manner that focuses on implementation issues that states and EPA regularly face. We are in an era where funds to implement our Nation's environmental statutes are tight, but the sites needing remediation these days are more complex than when the program started. We are in need of flexibility and efficiency more than ever both at the state and Federal level.

Overall, we support the changes that these bills seek and we believe they will improve the implementation of RCRA and CERCLA and help achieve the goals of those statutes more quickly.

First I will address the bill entitled the Reducing Excessive Deadline Obligations Act of 2013. Simply put, this bill allows EPA to emphasize the administrative priorities that warrant its atten-

tion and to establish in statute a longstanding practice at EPA regarding matters that it may undertake at its discretion.

The next bill I will address is entitled the Federal and state Partnership for Environmental Protection Act of 2013. The first part of this bill addresses consultation with the states. ECOS strongly approves this section, which addresses issues outlined in several ECOS resolutions. The second part of this bill addresses state credit for other contributions. It is our understanding that this bill does not expand the state's cost share for removal actions beyond what is currently required, and our comments are made with this understanding. This change will greatly assist during this time of tight budgets and should help move these projects along more quickly. Furthermore, assuming the legislation does not intend to create an additional cost share in removal actions, ECOS supports the legislation, because if a state performed an action, such as site stabilization, that the EPA later classified as a removal action, then there may be an opportunity to get credit for those state expenditures.

We also endorse Section 4. Placing the site on the National Priority List is important to a state, as its action must go all the way to the Governor's office. ECOS believes that EPA's policy has been to seek state concurrence when listing a site for the NPL; however, this is a policy, and we believe the nation would be better served if it were a requirement.

The last bill I will discuss is the Federal Facility Accountability Act of 2013. ECOS is especially pleased to see the committee address this longstanding issue. This bill directly addresses the concerns ECOS described in two of our resolutions. ECOS believes this legislation will help states assure environmental compliance on current and former Federal facilities.

The most important aspect of this legislation is that it sends a strong and appropriate message to all Federal agencies: you must follow the Nation's environmental rules the same as everyone else.

The legislation amends CERCLA to eliminate most, if not all, of the barriers that states have experienced in dealing with Federal agency compliance with the act. It is especially useful to states to see that compliance and cost sections change to conform with the experiences that non-Federal entities face every day.

Finally, we support the ability for a state to request a review by EPA to ensure consistency of some Federal action with the guidelines, rules, regulations or criteria established by EPA under Title I of CERCLA. The section closes a potential loophole in advance.

In summary, ECOS sees that these bills will assist in many ways, including holding Federal facilities to the same standards as other regulated entities, clarifying regulations and procedures, improving state-Federal communications, improving cleanup financing, and implementing state EPA concurrence on how to treat Superfund sites, to name a few.

Mr. SHIMKUS. Thank you.

[The prepared statement of Ms. Hanson follows:]

Testimony for Hearing on
Federal and State Partnership for Environmental Protection Act of 2013, the Reducing Excessive Deadline Obligations Act of 2013 and the Federal Facility Accountability Act of 2013

Subcommittee on Environment and the Economy
Committee on Energy and Commerce
Friday, May 17, 2013
by
Carolyn Hanson, Deputy Director
Environmental Council of the States

Main Points

1. ECOS supports the concepts found in the bills addressing RCRA and CERCLA issues.
2. In particular, ECOS supports the expansion of "consultation with states" as described in the bills.
3. ECOS especially acknowledges that the bills directly address concerns expressed by the states in two ECOS Resolutions on federal facilities operations under RCRA and CERCLA.

Testimony

Thank you for inviting me here today to talk about our organization's views on RCRA and CERCLA regarding the matters currently before the Committee. I am representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies. I am the Deputy Director of ECOS.

Unlike some of the other major environmental statutes such as RCRA, the states' role in implementing CERCLA is less than that of the U.S. Environmental Protection Agency's role. However, there are several important places within CERCLA implementation where the states' role is important. I will be discussing the RCRA and CERCLA impacts as ECOS sees them today.

We are pleased that the committee has taken an interest in addressing CERCLA and RCRA in a manner that focuses on implementation issues that states and EPA regularly face. We are in an era where funds to implement our nation's environmental statutes are tight, but the sites needing remediation these days are more complex than when the program started. We are in need of flexibility and efficiency more than ever, both at the state and federal level. Overall, we support the changes that these bills seek, and we believe they will improve the implementation of CERCLA and RCRA and help achieve the goals of those statutes more quickly, with more input to EPA, and with an improved partnership with the states.

I will be presenting our organization's views on three of the bills before the committee. ECOS agrees that Section 2 of "Reducing Excessive Deadline Obligations Act of 2013" will codify a long-standing practice of EPA and will empower the Administrator to focus on the issues that it deems are of greatest concern. We have no comment at this time on Section 3 of the bill.

Second, I will address the bill entitled "The Federal and State Partnership for Environmental Protection Act of 2013."

The first part of the bill addresses consultation with the states. ECOS strongly approves this section, which addresses issues outlined in several ECOS resolutions, including the one entitled "Environmental Federalism" (see Appendix). This bill will help states in their conversation with EPA on National Priority List (NPL) or "superfund" sites. Under the current system, the Agency is not obligated to listen to state input into decisions made about NPL sites. While states find our working relationship with EPA is usually positive, it is also true sometimes that it is not. The steps listed in the bill will help assure a mutually beneficial partnership between states and EPA on superfund sites.

The second part of this bill addresses "State Credit for Other Contributions." It is our understanding that this bill does not expand the states' cost share for removal actions beyond what is currently required, and our comments are made with this understanding.

This change will allow States to get credit towards the 10% cost share under CERCLA section 104(c)(3) for expenditures made for a removal action and also allows credit for in-kind contributions such as contributions of real property, equipment, goods, services that are provided for the removal or remedial action at the facility or amounts derived from materials recycled, recovered, reclaimed from the facility that are used to fund or offset all or a portion of the cost of a removal or remedial action. These changes will give credit to the states for their contributions and will greatly assist during this time of tight budgets.

Furthermore, assuming the legislation does not intend to create an additional cost share in Removal Actions, ECOS would support the legislation because if the State performed an action such as site stabilization that EPA later classified as a Removal Action, then there may be an opportunity to get credit for those expenditures.

Section 4 of this bill addresses a long-standing shortcoming of CERCLA – concurrence on NPL actions. Placing a site on the National Priority List is important to a state – as this action must go all the way up to the Governor's office. Requiring EPA to respond to a State explaining why a site proposed by the State is not included will help the State understand how to further address the site and support the impacted community. To our knowledge, there is not a current mechanism that allows States to designate a facility to the NPL that meets the criteria. That potential would make certain parties more willing to negotiate with the State in addressing their issues, and might result in clean-up that did not have to be funded by the Superfund.

ECOS believes that EPA's policy has been to seek state concurrence when listing a site for the NPL. However, this is a policy, and we believe the nation would be better served if it were a requirement.

The third bill I will discuss is "The Federal Facility Accountability Act of 2013." ECOS is especially pleased to see the Committee address this long-standing issue. This bill directly addresses the concerns ECOS described in our resolutions entitled "Clarification of CERCLA Sovereign Immunity Waiver for Federal Facilities" and "DSMOA and Federal-State Collaboration." (See Appendix). ECOS believes this legislation will help states assure environmental compliance on federal facilities and former federal facilities. For example, a State currently has little authority to cause action at formerly used defense sites that pose or may pose a threat to human health until the federal government (Department of Defense) is ready unless (1) the site is listed to the NPL, (2) the site can be addressed under RCRA, or (3) the State pursues another party that sues the federal government for contribution.

The most important aspect of this legislation is that it sends a strong and appropriate message to all federal agencies: you must follow the nation's environmental rules the same as everyone else. The legislation amends CERCLA 120(a)(4) to eliminate most, if not all, of the barriers that states have experienced in dealing with federal agency compliance with the Act. It is especially useful to states to see the "Compliance" and "Costs" sections changed to conform with the experiences that non-federal entities face every day.

Finally, we support the ability for a state to request a review by EPA to ensure consistency of some federal action with the guidelines, rules, regulations, or criteria established by EPA under Title I of CERCLA. This section closes a potential loop-hole in advance.

In summary, ECOS sees that these bills will assist in many ways, including holding federal facilities to the same standards as other regulated entities, clarifying regulations and procedures, improving state-federal communications, improving clean-up financing, and implementing state-EPA concurrence on how to treat superfund sites to name a few.

I am happy to take questions.

Appendix

Resolutions of the Environmental Council of the States

Pertaining to the Bills in Discussion at this Hearing

Resolution 00 - 1
Approved April 12, 2000
Philadelphia, Pennsylvania
Revised June 13, 2000
By mail vote
Revised April 4, 2003
Bymail vote
Revised April 11, 2005
Washington, DC
Revised September 8, 2005
Kennebunkport, Maine
Revised September 22, 2008
Branson, Missouri
Renewed September 26, 2011
Indianapolis, Indiana
Revised March 20, 2012
Austin, Texas

ON ENVIRONMENTAL FEDERALISM

WHEREAS, the states are co-regulators with the federal government in a federal system; and
WHEREAS, the meaningful and substantial involvement of the state environmental agencies as partners with the U.S. Environmental Protection Agency (U.S. EPA) is critical to both the development and implementation of environmental programs; and
WHEREAS, the U.S. Congress has provided by statute for delegation, authorization, or primacy (hereinafter referred to collectively as "delegation") of certain federal program responsibilities to states which, among other things, enables states to establish state programs that go beyond the minimum federal program requirements; and
WHEREAS, States that have received delegation have demonstrated to the U.S. EPA that they have the independent authority to adopt and they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies; and
WHEREAS, states have further demonstrated their commitment to environmental protection by taking responsibility for 96% of the primary environmental programs which can be delegated to states; and
WHEREAS, because of this delegation, the state environmental agencies have a unique position as co-regulators and co-funders of these programs; and
WHEREAS, the delegation of new federal environmental rules (issued as final and completed actions and published by the U.S. EPA) to the states to implement continues at a steady pace of about 28 per year since spring 2007, for a total of approximately 143 new final rules and completed actions to implement through fall 2011; and
WHEREAS, federal financial support to implement environmental programs delegated to the states has declined since 2005; and
WHEREAS, cuts in federal and state support adversely affects the states' ability to implement federal programs in a timely manner and to adequately protect human health and the environment; and
WHEREAS, states currently perform the vast majority of environmental protection tasks in America, including 96% of the enforcement and compliance actions; and collection of more than 94% of the environmental quality data currently held by the U.S. EPA; and
WHEREAS, these accomplishments represent a success by the U.S. EPA and the states working together in ways the U.S. Congress originally envisioned to move environmental responsibility to the states, not an indictment of the U.S. EPA's performance; and

WHEREAS, the U.S. EPA provides great value in achieving protection of human health and the environment by fulfilling numerous important functions, including; establishing minimum national standards; ensuring state-to-state consistency in the implementation of those national standards; supporting research and providing information; and providing standardized pollution control activities across jurisdictions; and

WHEREAS, with respect to program operation, when a program has been delegated to a state and the state is meeting the minimum delegated program requirements, the role of the U.S. EPA is oversight and funding support rather than state-level implementation of programs; and

WHEREAS, under some federal programs the U.S. EPA grants to states the flexibility to adjust one-size-fits-all programs to local conditions and to try new procedures and techniques to accomplish agreed-upon environmental program requirements, thereby assuring an effective and efficient expenditure of the taxpayers' money.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Affirms its continuing support for the protection of human health and the environment by providing for clean air, clean water, and proper handling of waste materials;

Affirms that states are co-regulators, co-funders and partners with appropriate federal agencies, including the U.S. EPA, and with each other in a federal environmental protection system;

Affirms the need for adequate funding for both state environmental programs and the U.S. EPA, given the vitally important role of both levels of government;

Affirms that expansion of environmental authority to the states is to be supported, while preemption of state authority, including preemption that limits the state's ability to establish environmental programs more stringent than federal programs, is to be opposed;

Supports the authorization or delegation of programs to the states and believes that when a program has been authorized or delegated, the appropriate federal focus should be on program reviews, and, further, believes that the federal government should intervene in such state programs where required by court order or where a state fails to enforce federal rules particularly involving spillovers of harm from one state to another;

Supports early, meaningful, and substantial state involvement in the development and implementation of environmental statutes, policies, rules, programs, reviews, joint priority setting, budget proposals, budget processes, and strategic planning, and calls upon the U.S. Congress and appropriate federal agencies to provide expanded opportunities for such involvement;

Specifically calls on U.S. EPA to consult in a meaningful, timely, and concurrent manner with the states' environmental agencies in the priority setting, planning, and budgeting of offices of the U.S. EPA **as** these offices conduct these efforts;

Further specifically calls on U.S. EPA to consult in a meaningful and timely manner with the states' environmental agencies regarding the U.S. EPA interpretation of federal regulations, and to ensure that the U.S. EPA has fully articulated its interpretation of federal regulations prior to the U.S. EPA intervention in state programs;

Believes that such integrated consultation will increase mutual understanding, improve state-federal relations, remove barriers, reduce costs, and more quickly improve the nation's environmental quality;

Noting the extensive contributions states have made to a clean environment, affirms its belief that where the federal government requires that environmental actions be taken, the federal government ought to fund those actions, and not at the expense of other state programs;

Affirms that the federal government should be subject to the same environmental rules and requirements, including the susceptibility to enforcement that it imposes on states and other parties;

Affirms its support for the concept of flexibility and that the function of the federal environmental agency is, working with the states, largely to set goals for environmental accomplishment and that, to the maximum extent possible, the means of achieving those goals should be left primarily to the states; especially as relates to the use of different methods to implement core programs, such as risk-based

inspections or multi-media environmental programs, and particularly in the development of new programs which will impact both states and the U.S. EPA; and
Directs ECOS staff to provide a copy of this resolution to the U.S. EPA Administrator.

Resolution Number 00-9
Approved April 12, 2000
Philadelphia, Pennsylvania
Retained April 4, 2003
By mail vote
Retained March 17, 2006
By mail vote
Revised March 23, 2009
Alexandria, Virginia
Revised March 20, 2012
Austin, Texas

CLARIFICATION OF CERCLA SOVEREIGN IMMUNITY WAIVER FOR FEDERAL FACILITIES

WHEREAS, current and former federal facilities have some of the most pressing environmental problems, such as hazardous substances, unexploded ordnance, radioactive materials, and abandoned mines; and
WHEREAS, problems associated with some of these federal facilities pose substantial threats to public health, safety, and the environment; and
WHEREAS, ECOS believes the States' regulatory role at federal facilities should be recognized and that federal agency environmental cleanup activities are subject to and should receive the same regulatory oversight as private entities; and
WHEREAS, for many contamination actions the federal agencies assert Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) lead agency authority under Executive Order 12580; and
WHEREAS, state experience for many contamination actions has shown that assertions of sovereign immunity and CERCLA lead agency authority have led to inappropriate and/or inconsistent interpretation of state law and have not supported cleanup to the same standards as private parties; and
WHEREAS, assertions of sovereign immunity and CERCLA lead agency authority hamper consistent state regulatory oversight and responsibility to its citizens; and
WHEREAS, a clarification of Executive Order 12580 and/or federal legislation would aid states in implementing regulations which have been duly enacted by the states; and
WHEREAS, this resolution fully supports Policy NR-03i (specifically Section 3.5 on "Natural Resources") executed by the National Governors' Association.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES (ECOS):
Requests the Administration revise Executive Order 12580 to clarify that federal facilities are subject to appropriate state regulations and are not unduly shielded by sovereign immunity and lead agency authority;
Encourages the U.S. Congress act to support the States by the implementation of specific legislation which will without equivocation acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities; and
Authorizes the transmittal of this resolution to the Administration, appropriate congressional committees, federal agencies, and other interested organizations and individuals.

Resolution Number 07-6
Approved March 21, 2007
Alexandria, Virginia
Revised March 24, 2010
Sausalito, California
Revised March 6, 2013
Scottsdale, Arizona

DSMOA AND FEDERAL-STATE COLLABORATION

WHEREAS, the Defense State Memorandum of Agreement (DSMOA) program was originally established to fund State oversight of cleanup activities at U.S. Department of Defense (DoD) sites; and
WHEREAS, DSMOA has been a successful program promoting cooperation between States and DoD on both environmental cleanup actions and development of policy and technology; and
WHEREAS, DSMOA has enabled States to prioritize resources to expedite implementation of remedies; and
WHEREAS, DSMOA has also supported the ability of States and DoD to promote streamlined investigative techniques and implement protective remedies, which has saved DoD hundreds of millions of dollars through mutual cooperation between States and DoD and has also helped reduce State enforcement by cooperation and coordination; and
WHEREAS, in the past, shifting DoD positions on managing the DSMOA program had created a strained relationship between DoD and States; and
WHEREAS, these shifting policy issues caused great concern to States prompting ECOS to approve the March 21, 2007 resolution requesting DOD change their policies to ensure the following:

- DoD does not condition DSMOA funding based on the manner in which a State exercises its enforcement authority, or its willingness to enter into dispute resolution prior to exercising that enforcement authority,
- DSMOA funding may be used for State staff costs to participate in national workgroups and other venues related to DoD environmental restoration program, and
- DERA funds may be used for any state association including the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) supporting State involvement in their collaborative work with DoD on activities related to DoD environmental cleanup activities, policy, and technology; and

WHEREAS, in response to ECOS and State concerns DoD has initiated the DSMOA Steering Committee composed of eight State representatives, Army, Navy, Air Force, Office of the Secretary of Defense, and Formerly Used Defense Program Headquarters environmental managers, and the Corps of Engineers DSMOA Grants Manager to evaluate these policy issues and work towards solutions mutually acceptable to all parties; and
WHEREAS, DoD has shown a new commitment to work with States to resolve the many concerns States have expressed with DSMOA and the initial DSMOA Steering Committee meetings are showing progress towards resolving States concerns.
WHEREAS, the DSMOA Steering Committee has made significant improvements to the DSMOA process by implementing the following actions:

- Streamlining the Joint Execution Plans (JEPs) and DMSOA performance reports,
- Improving open, transparent communication between DSMOA grant staff, States, and Service representatives by creating the DMSOA Webpage information center,
- Establishing clear reasonable eligibility criteria for funding DSMOA activities,
- Establishing policy criteria where States may use DSMOA funding to participate in national work groups working on DoD environmental restoration program issues; and

WHEREAS, currently unresolved are States concerns regarding the DoD policy requiring that dispute resolution must be used prior to a State exercising its enforcement authority or the State would trigger the withholding of DSMOA funding. The DSMOA Steering Committee established a Dispute Resolution

Work Group to evaluate the issue and propose solutions which at this time has had much constructive discussion but limited concrete progress; and

NOW, THEREFORE BE IT RESOLVED THAT:

ECOS applauds DoD for their commitment to improving State-DoD relationship by establishing the DSMOA Steering Committee and supporting the Committee's efforts to improve processes and resolve issues identified by the States.
ECOS supports continued State involvement in resolving DSMOA policy issues and will continue to track resolution of DSMOA policy issues.
ECOS requests that the DSMOA Steering Committee work towards a permanent solution on the DoD policy requiring dispute resolution prior to a State exercising its enforcement authority that does not condition DSMOA funding based on the manner in which a State exercises its enforcement authority, and does not impinge or create the appearance of impingement on the legitimate use of its enforcement authorities. The Steering Committee should work towards a more streamlined dispute resolution process that resolves disputes as soon as practical so cleanup progress is not delayed.
ECOS requests that DoD continue to work with States and the DSMOA Steering Committee to ensure that DSMOA and DERA funds may be used for any state association, including ASTSWMO, supporting State involvement in their collaborative work with DoD on activities related to DoD environmental cleanup activities, policy, and technology.
ECOS requests that as solutions are developed, DoD and States determine how to memorialize those policies in a permanent manner. Such solutions may include requesting U.S. Congress to make amendments to 10 USC 2701, if necessary

Mr. SHIMKUS. The chair now recognizes Mr. Jeffery Steers, Director of Central Office Division of Land Protection and Revitalization from the Virginia Department of Environmental Quality, on behalf of the Association of state Territorial Solid Waste Management Officials. Sir, welcome.

STATEMENT OF JEFFERY STEERS

Mr. STEERS. Good morning. And thank you, Mr. Chairman, and members of the subcommittee for allowing ASTSWMO, the Association of state and Territorial Waste Management Officials, to testify before you today regarding these three bills.

states value the relationship that we currently have with U.S. EPA, and together, through several types of cooperative agreements both as individual states and as an association, continue to make great strides in addressing some of the most contaminated land in the United states. While we can all agree that the Superfund program has success stories, 30 years of use necessitates some changes and updating. The decisions made by Congress and EPA can have a profound impact on state resources.

states share a common goal with the Federal Government in ensuring that risks to human health and the environment are mitigated and appropriately addressed. Our association is committed to ensuring that this is done in an efficient, cost-effective manner, and I will briefly summarize our position on each specific bill.

With respect to the Reducing Deadline Obligations Act of 2013, we support this bill. Specifically our interests surrounds the proposals that allow the individual states to maintain financial assurance requirements already in place so as not to allow Federal preemptions to override state financial assurance programs. Member states have enacted robust financial assurance requirements for various classes of facilities and other types of facilities under RCRA. The impacts of any new Federal requirement must be carefully coordinated and evaluated in the context of existing state laws and obligations.

ASTSWMO supports the provisions proposed in the Federal and State Partnership for the Environmental Protection Act of 2013, especially with respect to fund lead sites placed on the National Priorities List. Our members continue to be challenged with skyrocketing financial obligations, which include 10 percent cost share of the remedial action, and O&M in perpetuity. EPA consultation with states on removal actions, listing to the NPL and on remedy selection doesn't, in fact, occur regularly. The end result of this consultation is often problematic and inconsistently used across the EPA regions. The states have no interest in delaying emergency or time critical removal actions, for example; however, non-time critical removal actions are not viewed as urgently, and state concurrence and development of a plan for the status of some of these sites after a removal action is taken are needed.

With respect to NPL listing, ASTSWMO supports greater consistent consideration by EPA relative to state obligations to inclusion on the NPL. states are under a significant pressure to just concur with individual listing decisions. CERCLA authority is one tool to address contaminated lands. As states evaluate proposals for listing, we look for other opportunities, including economic rede-

velopment opportunities, to help drive cleanups. Oftentimes there is a prospective purchaser willing to adequately mitigate the environmental and human health risks on a contaminated property, provided they have future certainty and avoid the stigma of Superfund. state voluntary programs can in many circumstances serve as a substitute for the long and costly CERCLA Superfund process.

states should not be pressured into accepting at face value a listing on the NPL, especially where the fund is being used and resulting in significant state resources.

The provisions of this bill that seek to give states the ability to add sites to the NPL is fully supported by ASTSWMO. While there may be a perceived notion that there are dozens of state priorities that would be suggested for listing, this is simply not the case. states recognize the limited resources that we all have and understand that we have complex sites that have—we need to get the biggest bang for the buck.

ASTSWMO strongly supports a process for more concurrence with selected remedies, especially at fund lead sites. Many of our member states have sophisticated programs, and we can offer the technical fire power that ensures remedies will be effective. All too often we come across sites that are turned over to the states that are nothing more than a pig in a poke and the state is responsible for the long-term care.

An example of a $100,000 problem that our state and other states have seen is something as simple as piping that was clogged and was not able to be properly maintained during the time that EPA had a site under its control, and the state took the site over and had to re-fix a lot of the problems.

We strongly support the Federal Accountability Act of 2013. No entity, whether privately or publicly owned, should be given special treatment when it comes to protecting human health and the environment. Federal agencies playing the sovereign immunity card only serve to delay and put citizens in harm's way. states continue to believe that the Federal Government should be accountable to adherence with CERCLA, similar to what is required under the Clean Air Act, Clean Water Act and RCRA.

The universe of sites subject to CERCLA includes properties owned by Federal, state and local governments and private entities. The protection of our citizens should not be seen not through the color of ownership. Many states and localities are also limited with the resources that they can bring to bear, so we all need to work together in our obligations.

It is inherently wrong for the Federal Government to shirk its responsibilities due to cost considerations. It is important that Federal facilities and agencies be accountable to the same requirements as all other regulated entities, including state-specific requirements to ensure equal treatment and protection under the law.

In closing, let me just say that the CERCLA process is complex and we ought to take a page from business where they look at processes and quality improvement and using things such as value stream mapping and lien to look at the national contingency plan in the way that Superfund is managed.

I would like to thank you again for allowing me the opportunity to speak before you, and I will be available to answer any questions.

Mr. SHIMKUS. Thank you.

[The prepared statement of Mr. Steers follows:]

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

Hearing
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
May 17, 2013

Testimony of
Jeffery Steers
President
Association of State and Territorial Solid Waste Management Officials

Main Points:

- States value their relationship with US EPA and together through several types of cooperative agreements, both as individual States and ASTSWMO as a whole, continue to make great strides in addressing some of the most contaminated land in the United States.
- ASTSWMO supports the Reducing Deadline Obligations Act of 2013 and views this as a legislative win that ensures individual State financial assurance requirements already in place are not preempted by Federal actions.
- ASTSWMO supports the provisions proposed in the Federal and State Partnership for Environmental Protection Act of 2013. Especially with respect to fund-lead sites placed on the National Priorities List (NPL), our members continue to be challenged with the skyrocketing financial obligations incurred. Modernizing some of the aspects of CERCLA to recognize the sophisticated nature of the States' programs makes sense. EPA must

continue to actively recognize our role in the listing process and selecting a remedy to address contaminated property. Allowing States to offset these obligations with greater use of in-kind contributions where appropriate must be acknowledged and allowed for under Federal law.

- ASTSWMO strongly supports the Federal Facility Accountability Act of 2013. No entity, whether privately or publicly owned, should be given special treatment when it comes to protecting human health and the environment. Federal agencies playing the "sovereign immunity card" only serves to delay cleanup and put citizens in harm's way.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an association representing the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State program experts with individual responsibility for the regulation or management of wastes and hazardous substances, including remediation, tanks, materials management and environmental sustainability programs.

ASTSWMO appreciates the opportunity to provide testimony on the three bills under consideration. While States do not assume primary CERCLA authority, we do play a role in its implementation. The decisions made by Congress and those made by the United States Environmental Protection Agency (EPA) can have a profound impact on State resources. States share a common goal with the Federal government in ensuring that risks to human health and the environment are mitigated and appropriately addressed. Our Association is committed to ensuring that this is done in an efficient, cost-effective manner.

ASTSWMO recently provided testimony to this Subcommittee on the role States play in protecting the environment. We support any legislation that encourages greater State collaboration with our Federal partners while ensuring that our voice and opinions are not diminished. As mentioned in our previous testimony, ASTSWMO enjoys a positive working relationship with EPA and does not wish to discount these collaborative efforts. ASTSWMO offers the following comments on each specific bill.

Reducing Excessive Deadline Obligations Act of 2013

Due to the lengthy delay which has occurred in the establishment of CERCLA Financial Responsibility Requirements required by CERCLA 108(b), many States already have substantial rules and regulations governing various classes of facilities. It would be a very undesirable situation for these established protections to be pre-empted by yet-to-be-determined Federal requirements that may or may not be as robust as the State provisions already in place. Therefore, revisions to 108(b) are needed to ensure that existing programs are not automatically disrupted by the future establishment of Federal requirements. This would then provide the individual States which have such laws and requirements the opportunity to evaluate the new Federal requirements as they are established, and to work with their stakeholders to subsequently determine the fate of the existing State requirements in an informed and strategic manner.

Federal and State Partnership for Environmental Protection Act of 2013

Clarification of the importance of State concurrence in listing sites on the NPL, and the ability of States to periodically propose sites for expedited listing will serve to ensure appropriate State involvement in the process, and will enable States to more effectively and expeditiously address environmental concerns within their borders. EPA generally does a good job of coordinating with States, though our members do report inconsistencies from State-to-State and region-to-region. These changes would also ensure other Federal agencies must closely coordinate with the applicable States.

As State budgets continue to be challenged, closer consultation with EPA on all facets of listings and activities is becoming more imperative than ever before. Our members have numerous examples of skyrocketing costs associated with fund-lead cleanups, whereby individual States are assuming 10% cost share for the remedy implementation with operation and maintenance costs being assumed in perpetuity. EPA offers the opportunity for States to comment on both proposed listings and remedy selection. Oftentimes, however, our concerns or input are not fully utilized in a consistent manner across the country.

Regarding the NPL listing process, States are under significant pressure to "concur" with individual listing decisions. There are many occasions when States are asked for "Governor's concurrence" without even having the benefit of seeing the full Hazard Ranking Scoring (HRS) package. The HRS, while an enforcement sensitive document, helps to provide States a more complete understanding of the risks associated with a site. It should be noted that sharing this information is inconsistent across EPA regions. This issue serves as an example of the need for a transparent process of collaboration between the State and Federal governments.

There are many tools in the toolbox to address contaminated properties. While, there is no one size fits all approach, exerting CERCLA authority is one tool. As States evaluate proposals for listing on the NPL, we look for economic redevelopment opportunities to drive cleanups. Oftentimes there is a prospective purchaser willing to adequately mitigate the environmental and human health risks on a contaminated property. State voluntary programs can, in many circumstances, serve as a substitute for the long and costly CERCLA /Superfund process. States should not be pressured into accepting at face value a listing on the NPL, especially where the fund is being used resulting in the use of significant State resources.

States are best suited in understanding their environmental conditions and should therefore be able to offer priority sites for inclusion on the NPL. Most States have proven and sophisticated Superfund programs and have used their knowledge of local site conditions to assess and prioritize sites in need of remediation. While there may be a perceived notion that there are dozens of State priorities that would be suggested for addition to the NPL, this is simply not the case. States recognize the limited resources and understand the complexities and best opportunities to get the most bang for the buck.

The ability for States to offset its obligations for in-kind services should continue to be expanded into all facets of the CERCLA cleanup process. Some examples reported by our members include such things as residential water line installations and hookups, construction oversight to directly assist EPA oversight at NPL mining sites (with specific cooperative agreements in place) and EPA-approved yard removals at lead sites (with specific cooperative agreements). EPA has started to work with one State on considering in-kind costs for

Institutional Controls (IC); the requirement for an IC is commonly part of the Record of Decision (ROD), and as such should be part of in-kind contributions.

EPA has made it difficult to allow in-kind credit for work performed by States, so we commonly do not offer much assistance. One example cited by a State involved an existing recovery well being pumped at a former electroplating site. The well was installed by the owner of the site before he filed for bankruptcy. The State took over the pumping under an agreement with the city. This was being performed without the State getting credit. Once the well experienced operational problems, it was shut down due to the cost and lack of a cooperative agreement. It would be very helpful if EPA could make it easier to allow the States to get credit for time to inspect, track, and for operation of interim systems (which may likely be part of the final remedy). It is often very difficult to negotiate a cooperative agreement to get credit for in-kind work.

We frequently hear from our members that the requirement for the State to commit to paying 10% of the cost of the remedial action, and 100% of the cost of long term operation and maintenance (O&M), is increasingly preventing States from concurring with listing potential "fund-lead" sites on the NPL. This is a most undesirable and unfortunate situation since often it is the potentially fund-lead sites which are the most environmentally critical to be addressed using CERCLA NPL authorities; however, States must also be realistic about their fiscal solvency. Thus, it is imperative that States be able to get credit for whatever resources they are able to bring to bear.

Federal Facility Accountability Act of 2013

ASTSWMO has had a long-standing position of being in support of an updated standard of federal facility accountability under State and Federal environmental laws similar to the RCRA Federal Facilities Compliance Act. States continue to believe that the Federal government should be accountable to adherence with CERCLA, similar to what is required under the Clean Air Act, Clean Water Act and RCRA. The universe of sites subject to CERCLA includes properties owned by Federal, State and Local Governmental entities as well as private parties. The protection of our citizens should not be seen through the color of ownership. Many States and localities also are limited with the resources that can be used to meet their CERCLA obligations. It is inherently wrong for the Federal government to shirk its responsibilities due to cost considerations. It is important that federal facilities and agencies be accountable to the same requirements as all other regulated entities, including to State-specific requirements, to ensure equal treatment and protection.

As the result of existing delegations of authority, federal facilities under CERCLA are often self-regulating, which presents substantial opportunities for conflicts-of-interest, and inconsistent guidance, application and interpretation of program requirements. Experience with RCRA and other programs with more modern sovereign-immunity waivers show a higher degree of compliance and consistency between Federal agencies, and in comparison with private entity compliance.

Federal facilities are often home to some of the largest, most complex, and most challenging environmental issues in our nation, therefore it is critical that they live up to the same standard as other facilities. Though CERCLA currently provides (in section 120(a)(2)) that

other Federal agencies may not have policies, guidance, or rules which conflict with those established by EPA, there is no current provision for EPA or any other entity to conduct external reviews to ensure this is the case – the proposed change to Section 115 would correct this.

States have numerous examples where long drawn out legal debates have occurred with federal facilities over States' Applicable or Relevant and Appropriate Requirements (ARARs) that should be included during the development and implementation of a remedy or long term care. These debates only lead to prolonged cleanups, kicking the can down the road as it were, that simply allow the public to be potentially exposed to unacceptable human health or environmental risk. The time value of money should also not be discounted; the longer a Federal agency takes to invest in a cleanup, the more expensive it will become.

At the encouragement of EPA and other Federal agencies, many States have adopted laws and regulations based on the Uniform Environmental Covenants Act. However, as States have established those laws and regulations, which serve to enable and ensure the long-term protectiveness of risk-based remedial actions, they have found that, although the Federal agencies want these tools available to use for their advantage when addressing off-site contamination, the same Federal agencies often claim exemption or simply refuse compliance with these requirements when addressing contamination on Federal property. This application of such a double-standard is unacceptable.

Federal agencies use of sovereign immunity may delay cleanup at sites posing a significant threat to human health. Several years ago, a Formerly Used Defense Site (FUD) was the home to a school setting with documented human health issues. A claim of sovereign immunity on portions of school property and other neighboring properties subject to the

CERCLA process had the potential to delay decisions relative to the selection of a remedy and the implementation of long term monitoring and the use of institutional controls.

Summary

In summary, ASTSWMO supports the proposed bills, as we believe these provisions help to modernize an often archaic process aimed at cleaning up some of this country's most contaminated sites while ensuring that States' authorities are not usurped.

Mr. SHIMKUS. The chair now recognizes Mr. Dan Miller, Senior Assistant Attorney General, Natural Resources and Environmental Section of the Colorado Department of Law. Sir, you are welcome; you are recognized for 5 minutes.

STATEMENT OF DANIEL S. MILLER

Mr. MILLER. Thank you, Mr. Chairman, members of the subcommittee. I am here today on behalf of the Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment. That is the agency that works with EPA in implementing the Superfund program and it also implements the state equivalent of RCRA.

My written statement addresses all three bills, but——

Mr. SHIMKUS. If you can just pull that—just bend it so the mike's closer to your mouth. There you go.

Mr. MILLER. My written statement addresses all three bills, but due to time limits, I will probably just be able to focus on sovereign immunity and state rule and remedy selection today.

The Federal Facility Accountability Act broadens the CERCLA sovereign immunity waiver, a change Colorado and other states have long supported. There is simply no reason why Federal agencies should be above the law. Private entities have to clean up their mess, states and cities have to clean up their mess. There is no reason Federal agencies should be any different, especially since they have some of the most contaminated sites in the country, yet Federal agencies have relied on the current wording of the CERCLA waiver to argue that they are immune from the application of state laws at sites that they once contaminated but no longer own. They have also used it to argue that state laws do not apply at Federal facilities that are listed on the Superfund National Priorities List.

On a cursory review, the bill before us appears to resolve these concerns; however, sovereign immunity is a very complex area of the law and we would welcome the opportunity to work with the committee—subcommittee and the committee to be sure that the proposed bill really does accomplish its intended purpose and addresses the issues that the states commonly face in cleaning up Federal facilities.

One of these issues that I would like to call out is Federal agency reluctance to comply with what is known as state institutional control laws, laws like environmental covenant laws. These are legal mechanisms that restrict land use at remediated sites and help limit exposure to residual contamination or protect the engineered components of a remedy. We don't have any problem getting private entities to comply with these laws, but Federal agencies have long resisted their application.

Turning to the state role in CERCLA remedy selection, our main concern is that CERCLA's cost sharing structure creates incentives for EPA to choose remedies that cost less for the initial cleanup at the expense of more costly long-term maintenance. Under the current statute and regulations, EPA pays 90 percent of upfront remedy costs and states pay the remaining 10 percent, but after 10 years states have to pay all of the operation and maintenance costs, which can be substantial. At historic mining sites, for exam-

ple, EPA remedies often rely on water treatment plants that must essentially be operated in perpetuity. These plants may cost millions of dollars a year to run. Over the decades, these operation and maintenance costs will eventually overwhelm the amount of money that was spent on the remedy and change the fundamental balance of the Superfund program cost share from predominantly Federal to predominantly state funded.

A second concern we have is that EPA and other Federal agencies implementing CERCLA sometimes resist Colorado's efforts to have its state laws designated as ARARs, the CERCLA term for cleanup standards that a particular cleanup has to meet. Once again a common area of dispute is the state's environmental covenant law, which is frequently ignored in removal actions and sometimes even at remedial actions.

With these concerns in mind, let's turn to the Federal and state Partnership for Environmental Protection Act. Section 2 emphasizes CERCLA's existing mandate that EPA consult with affected states in remedy selection. While we agree that EPA certainly sometimes views its obligation to consult rather narrowly, we are concerned, based on our understanding of the congressional process, that because this bill proposes to amend Section 104 and Section 120, it could open the door to other more controversial amendments to these sections. Perhaps there is a procedural way to limit the scope of any amendments.

Section 5 of the bill creates a new exception to CERCLA's bar on pre-enforcement judicial review of remedies. This is one of the key provisions of the statute. The pre-enforcement bar prevents litigation from delaying needed cleanup actions. The proposed amendment undermines this fundamental protection by allowing any person to challenge a remedy before implementation whenever a state has simply objected in writing to the proposed remedy.

We don't think this is the proper response to address the concerns we have cited above. Instead, we would address a concern about the fiscal impact to states of expensive long-term O&M by revisiting the cost sharing allocation in the statute and regulations. If legislation is needed to address the concern that EPA doesn't consistently recognize state laws as ARARs or otherwise limits state input on cleanup decisions, it should be possible to craft a narrow legislative solution that does not undermine the bar on pre-enforcement judicial review.

Thank you.

Mr. SHIMKUS. Thank you.

[The prepared statement of Mr. Miller follows:]

WRITTEN TESTIMONY OF
DANIEL S. MILLER, SENIOR ASSISTANT ATTORNEY GENERAL
COLORADO DEPARTMENT OF LAW

BEFORE THE CUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
OF THE U.S. HOUSE ENERGY AND COMMERCE COMMITTEE
FRIDAY, MAY 17, 2013

SUBMITTED ON BEHALF OF
HAZARDOUS MATERIALS AND WASTE MANAGEMENT DIVISION
COLORADO DEPARTMENT OF PUBLIC HEALTH AND THE ENVIRONMENT

The Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment is the state agency that works with EPA in implementing the federal Superfund program It also administers the Colorado Hazardous Waste Act, the state equivalent of RCRA. Our testimony will touch on the subjects addressed by each of the draft bills: sovereign immunity and federal facility cleanups; state role in remedy selection; and financial assurance requirements.

Colorado has long been a state in the forefront of efforts to get federal agencies to comply with state environmental laws, and to clean up contamination at federal facilities to the same standards to which we hold private industry. We were strong advocates for passage of the Federal Facility Compliance Act in 1992. That law was passed a few months after a Supreme Court decision (*U.S. Department of Energy v. Ohio*, 503 U.S. 607) holding that neither the Clean Water Act nor RCRA had waived the federal government's sovereign immunity from civil and administrative fines and penalties.

The Federal Facility Compliance Act amended the RCRA waiver of sovereign immunity so states may now assess penalties against federal agencies for violating state hazardous waste requirements. However, the Clean Water Act was never amended, so states still cannot penalize federal agencies for violating state water quality rules. EPA enforcement data for the decade since 1992 shows that since the RCRA waiver was broadened, federal agencies steadily improved their compliance with hazardous waste requirements, while compliance with water quality requirements has decreased. The gap has since narrowed somewhat, but federal agencies' compliance with hazardous waste requirements remains well above their compliance with water quality requirements.

The lesson is clear: strong independent state enforcement authority improves the environmental performance of federal agencies.

The Federal Facility Accountability Act of 2013 would broaden Section 120(a)(4) of CERCLA, the CERCLA sovereign immunity waiver. States, including Colorado, have supported broadening this waiver. In the past, the federal government has argued that the wording of section 120(a)(4) means the federal government does not have to comply with state cleanup laws at federal facilities that are listed on the CERCLA National Priorities List. The bill appears to address this particular issue. It also appears to address the

argument the Defense Department has sometimes made that the CERCLA waiver does not apply to "formerly used defense sites." However, sovereign immunity is a highly complex area of the law. We would welcome the opportunity to work with the Committee to be sure the proposed bill addresses the issues that states commonly face in cleaning up federal facilities.

One of these issues is a widespread reluctance to comply with state laws requiring the use of "institutional controls" – legal mechanisms, such as statutory environmental covenants, that impose binding land use restrictions on remediated sites to prevent unsafe exposure to residual contamination, or to protect engineered aspects of a remedy, such as a landfill cap. Properly designed and implemented, institutional controls help improve the protectiveness of cleanups, limit cleanup costs, and make property more marketable. Most private responsible parties at contaminated sites welcome the use of institutional controls for these reasons. However, federal agencies have frequently resisted the imposition of these controls, particularly if they perceive them to be an interest in property. In Colorado, we've had good responses from the Departments of Energy and Defense, but the land management agencies – the Department of Interior, and the Department of Agriculture's Forest Service – have refused to comply with our law. Additional Congressional oversight in this area, and potentially legislation, could be helpful in eliminating federal agencies' reluctance to comply with these requirements.

Turning to the state role in CERCLA remedy selection, Colorado generally has a good relationship with EPA Region 8. Nonetheless, we do see areas for improvement. One issue that causes us great concern is that, while the statute expresses a preference for permanent remedies, the cost-sharing structure creates incentives for EPA to choose remedies that may have a lower up-front cost, but that have substantial operation and maintenance costs. Current budgetary pressures can only exacerbate these incentives. At historic mining sites, for example, EPA remedies often rely on water treatment plants that must essentially be operated in perpetuity. The cost of operating these plants runs into millions of dollars per year. Once ten years have passed following remedy completion, all of the O&M costs are borne by the State. Over decades, these O&M costs will eventually overwhelm the amount of money originally spent on the remedy, and change the fundamental balance of the state-federal cost-share from a predominantly federally-funded program to a predominantly state-funded program.

A second concern we have is that EPA sometimes resists Colorado's efforts to have its state laws considered and applied as "applicable or relevant and appropriate requirements," – "ARARs" – CERCLA's term for cleanup standards or requirements that a particular cleanup should meet. Once again, a common area of dispute is the state's environmental covenant law. This particular requirement has often been ignored in removal actions, and sometimes in remedial actions – though we recently have made substantial progress in resolving this disagreement with Region 8 in the area of remedial actions.

Part of the problem is that EPA does not consider "procedural" requirements to be ARARs, and some people in EPA view environmental covenants as procedural

requirements. It is true that an environmental covenant is basically a piece of paper with words written on it. But without it, there is no legally effective restriction on the use of the remediated property. That's why states have been adopting environmental covenant laws – to create legally binding mechanisms to use in conjunction with treatment and containment strategies to protect human health and the environment at contaminated sites. The NCP recognizes the importance of institutional controls such as environmental covenants. *See, e.g.,* 40 C.F.R. §300.430(a)(1)(iii)(D). It's simply bizarre that EPA would not consider institutional controls to be ARARs at CERCLA sites.

With these concerns in mind, let's consider the proposed amendments. Section 2 of the "Federal and State Partnership for Environmental Protection Act of 2013" appears to emphasize CERCLA's existing mandate that EPA consult with affected states in the remedy selection process. While we agree that EPA's obligation to consult with the states deserves more emphasis, we are concerned, based on our understanding of the Congressional legislative process, that because the bill proposes amending sections 104 and 120 of the statute, it could open the door to other, more controversial amendments. This seems like an area where management oversight within EPA, and perhaps additional Congressional oversight of EPA's implementation of these obligations, could be another effective means of achieving the desired outcome that would not risk creating a lot of legislative controversy.

Section 5 of the bill creates a new exception to CERCLA section 113(h) – the statutory bar on pre-enforcement judicial review of remedies. This is one of the key provisions of the statute. By limiting the ability to challenge a remedy before it has been implemented, this section prevents litigation from delaying needed actions to address releases of hazardous substances that threaten human health and the environment. The proposed amendment undermines this fundamental protection by allowing any person – a responsible party, an environmental group – to challenge a remedy before implementation whenever a state has simply objected in writing to the proposed remedy.

We do not think this is the proper response to address the concerns we have cited above. Instead, we would advise directly addressing the concern that Colorado and other states have with shouldering the financial burden that exists at sites with substantial, long-term operation and maintenance costs by revisiting the cost-sharing allocation in the statute and regulations. We also think that Section 5 of the bill is far more heavy-handed than needed to address the concern that EPA does not consistently recognize state institutional controls laws and other standards as ARARS. If enhanced management attention from EPA headquarters – perhaps stimulated by Congressional inquiry – is not adequate to resolve the issue, it should be possible to craft a narrow legislative solution that does not undermine the bar on pre-enforcement judicial review.

The "Reducing Excessive Deadline Obligations Act of 2013" states that financial assurance regulations promulgated under CERCLA section 108 will not preempt pre-existing state financial assurance regulations. This provision appears to conflict with section 114(d) of the statute, which provides limited preemption.

Colorado has participated in discussions with EPA regarding the proposed rulemakings under CERCLA 108. It's our view that EPA has the flexibility under the existing statute to draft rules that accomplish the purpose of section 108 – ensuring that firms in selected industry sectors have financial assurance mechanisms sufficient to address the possible costs associated with releases of hazardous substances – without preempting those existing state financial assurance requirements that adequately address regulatory compliance with state hazardous waste, mining, and other natural resource and environmental protection laws. Properly constructed, CERCLA financial assurance mechanisms should not impose excessive burdens on industry. Attached is a letter from the Colorado Department of Law on behalf of the Division of Reclamation Mining and Safety that provides additional detail on this issue. We believe in this instance that if additional legislation is necessary, it should provide EPA more specific guidance to chart the rulemaking waters as described above and in the attached letter.

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February 28, 2011

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RE: CERCLA Financial Assurances: Colorado Division of Reclamation Mining and Safety's Position Regarding Preemption; Suggestions for Drafting the Upcoming Rule

Dear Mr. Berlow,

Colorado's Division of Reclamation Mining and Safety ("DRMS") appreciates the opportunity to provide preliminary input regarding EPA's forthcoming financial assurance rule for hardrock mining. DRMS administers a robust regulatory program under Colorado's Mined Land Reclamation Act ("MLRA") (C.R.S. § 34-32-101 et. seq.). The MLRA minimizes the adverse impacts of hardrock mining in Colorado by requiring every operator to obtain a permit and adhere to rigorous reclamation standards, both during and after the mining activity. Many of the MLRA's reclamation standards are designed to prevent the release of hazardous substances into the environment. Each operator must submit a financial warranty sufficient to assure compliance with applicable reclamation standards, as incorporated in the operation's reclamation permit. *See* C.R.S. §34-32-117.

Financial warranties are essential to DRMS's ability to effectively regulate hardrock mining in Colorado. DRMS understands that EPA is in the process of developing its own financial assurance requirements for hardrock mining facilities. EPA's entry into this field raises important questions related to preemption. This letter explains DRMS's position that MLRA financial warranties can co-exist with CERCLA financial assurance requirements, and are not the type of financial assurances that require preemption. It also provides suggestions intended to help EPA satisfy its rulemaking mandate, address important policy issues, and avoid unintended negative consequences for state programs such as Colorado's.[1] Although this letter is specific to Colorado, DRMS believes that it provides viable nationwide solutions to the difficult questions raised by EPA's upcoming rulemaking.

[1] David Berry, Director of the Colorado Office of Reclamation Mining and Safety, provided letters to EPA on October 8 and November 15, 2010, which explain certain technical details of Colorado's regulatory program. This letter builds upon Mr. Berry's letters in some respects.

THE PREEMPTION ISSUE

CERCLA directs EPA to "promulgate requirements that classes of facilities ... establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b). This rulemaking directive raises important preemption questions related to § 114(d), which states that owners or operators of facilities subject to CERCLA financial responsibility requirements "shall not be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such facility." 42 U.S.C. § 9614(d).

In order to understand the preemption question, we must analyze CERCLA using the same rules of construction employed by the courts. When courts consider a question of statutory construction, their foremost goal is to effectuate the intent of Congress. To determine intent, courts first examine the plain language of a statutory provision, with the presumption that Congress "says what it means" and "means what it says." *See Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992). Courts interpret statutes so as to give meaning to every word, avoiding interpretations that render any language superfluous. *See Montclair v. Randall*, 107 U.S. 147, 152 (1883) (holding that "[I]t is the duty of the court to give effect, if possible, to every clause and word of a statute"); *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (holding that statutes are to be construed, where possible "so as to avoid rendering superfluous any parts thereof"). Courts analyze specific provisions in light of the language and design of the statute as a whole, because "meaning, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *See also United states v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850) (holding that courts should not focus solely on "a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

When we examine the "plain language" of § 114(d), it is clear Congress intended that CERCLA financial assurance requirements would preempt only those state financial assurance requirements that are connected with *liability* for the release of a hazardous substance. As instructed by the *Montclair* and *Astoria* cases, we cannot gloss over the term "liability." By referring to liability, Congress ensured that the provision would not broadly prohibit states from imposing financial assurance requirements in connection with the release of hazardous substances, but would only prohibit state financial assurances that are specifically connected to liability.[2] With the presumption that Congress meant what it said, we must avoid interpreting § 114(d) in such a manner that renders the term liability meaningless.

[2] It is important to note the incredibly broad definitions of the terms "release" and "hazardous substance." CERCLA defines "release" as including any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment..." *See* 42 U.S.C. § 9601(11). CERCLA defines "hazardous substance" as including substances designated by CERCLA § 102, CWA § 311(b)(2)(a) and 307(a), RCRA § 3001, CAA § 112, and TSCA § 7. *See* 42 U.S.C. § 9601(14). Over 800 different substances fall within the definition of a CERCLA hazardous substance. *See* http://www.epa.gov/oem/content/hazsubs/cercsubs htm. If we were to ignore the term "liability," the practical result would likely be the preemption of all state financial assurance requirements related to hardrock mining.

It is also important to examine § 114(d)'s plain language within the broader context of the statute. CERCLA's fundamental statements of policy regarding its relationship to other law dictate a narrow interpretation of its preemption provisions. Section 114(a), instructs that CERCLA "shall not be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Section 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to the releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). The Tenth Circuit has held that, in these two statements of policy, "Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993). Free-standing and contextual analysis of § 114(d) indicates that Congress intended to preempt only those state financial assurances that are connected to liability.

Having established that Congress intended to preempt only state financial assurances in connection with liability, we must now determine what it means for a financial responsibility requirement to be "in connection with liability" in the context of CERCLA. CERCLA's liability scheme is retroactive. It allows the federal government and other parties to recover certain cleanup costs from potentially responsible parties ("PRPs") associated with facilities from which there has been a release, or a threatened release which causes the incurrence of response costs. *See* 42 U.S.C. § 9607(a). CERCLA also authorizes EPA to order PRPs to perform certain remedial actions, subject to severe damages and fines if the order is not obeyed. *See* 42 U.S.C. § 9606. Unlike regulatory statutes such as RCRA or Colorado's MLRA, which proscribe standards for planning and operational practices, CERCLA does not impose liability until a release or a threatened release causes someone to incur response costs. Accordingly, CERCLA § 114(d) preempts only those state financial assurances connected with an operator's ability to pay for response costs caused by the release of a hazardous substance.

A court has been called upon to consider § 114(d) preemption on only one occasion. In *Chemclene v. Commonwealth of Pennsylvania*, the Pennsylvania Commonwealth Court held that federal financial assurance requirements did not preempt state financial assurance requirements that were related to hazardous substances but were not connected to an operator's ability to pay for response costs. *Chemclene v. Commonwealth of Pennsylvania*, 497 A.2d 268 (Pa. Commw. 1985). In *Chemclene,* a group of motor carriers claimed that bonds required under the Pennsylvania Solid Waste Management Act ("SWMA") were preempted by CERCLA § 114(d) because motor carriers were also subject to federal financial assurance requirements implemented by the U.S. Department of Transportation ("DOT") pursuant to CERCLA § 108(b)(5).[3] The *Chemclene* court denied the preemption claim, reasoning that:

[3] CERCLA § 108(b)(5) provides that financial assurance requirements for "motor carriers" be set by the Motor Carrier Act of 1980. Financial assurance requirements under the Motor Carrier Act were implemented by DOT through regulations discussed in greater detail below.

> *The term 'financial responsibility' as used in Section 114(d) of CERCLA contemplates an insurance program designed to pay the costs of cleaning up accidental spills of hazardous waste or hazardous materials and the claims resulting therefrom. In contrast, the bond required by Section 505(e) of the SWMA is a compliance bond. Its purpose is to insure the performance by a transporter of hazardous waste of all the obligations imposed by the SWMA, rules and regulations promulgated by DER, and the terms and conditions of the license; it is not intended to cover costs incurred by an accidental discharge of hazardous waste.*

Chemclene, at 272. The *Chemclene* case demonstrates that federal financial assurance requirements do not prohibit states from using financial assurances as a regulatory tool related to hazardous substances, so long as those financial assurances are not in connection with an operator's ability to pay for response costs.

Colorado's financial warranties do not address an operator's ability to pay for response costs. They assure compliance with reclamation requirements. In this respect, MLRA financial warranties are directly analogous to the "compliance bonds" at issue in *Chemclene*. Under the MLRA, reclamation must be conducted, both during and after the mining operation, in accordance with a reclamation plan that meets certain performance standards. Many of those standards are designed to prevent releases of hazardous substances and prevent adverse impacts on surrounding properties. *See* C.R.S. § 34-32-116 (requiring measures to minimize disturbance to the hydrologic balance, protect outside areas from damage, and control erosion and attendant air and water pollution). MLRA financial warranties assure that DRMS can complete reclamation according to those standards if the operator is unwilling or unable. C.R.S. § 34-32-117(1).

The MLRA addresses response to emergency releases via a mechanism completely separate from financial warranties. *See* C.R.S. § 34-32-122(b)(3) (describing a cash fund for release response, funded by grants, donations, and appropriations). MLRA financial warranties are a vital part of a regulatory program designed to prevent the release of hazardous substances, but they do not assure an operator's ability to pay for potential response costs. Accordingly, DRMS does not believe that MLRA financial warranties will be preempted by EPA's upcoming financial assurances rule.

FINANCIAL ASSURANCE RULEMAKING

Throughout its correspondence with the states, EPA has indicated that it hopes to fulfill its rulemaking mandate in the most direct and efficient manner possible. To that end, DRMS suggests that the upcoming rulemaking addresses only those requirements necessary to assure that operators of hardrock mining facilities demonstrate their ability to pay for response costs. DRMS believes that this strategy is not only the most direct and efficient way of satisfying EPA's rulemaking mandate, but is also the most effective solution to avoid unintended negative consequences for the states. Like Colorado, most other states use financial assurances to secure reclamation obligations.[4] By focusing on operators' ability to pay for response costs, EPA can

[4] DRMS is aware of only one state, South Dakota, which requires financial assurances in connection with an operator's ability to pay for response costs.

fill a discrete gap, complement existing state programs, and provide an additional layer of protection for the taxpayer.

EPA's § 108(b) mandate is to create a program whereby operators provide "insurance" against potential response costs. Section 108(b) financial assurances are not intended to assure compliance with regulatory requirements or operational practices; they are intended to protect the Superfund, and ultimately federal taxpayers, from incurring response costs. Congress has directed EPA to consult sources of information that will be helpful in developing an insurance model rule.[5] *See* 42 U.S.C. § 9608(b)(2) (instructing EPA to consider "the payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction"). Consistent with the insurance concept, Congress provided that parties may assert claims directly against financial warrantors if there is no financially-viable PRP. *See* 42 U.S.C. § 9608(c)(2). Elsewhere in § 108, Congress made direct reference to liability coverage, requiring operators of vessels to submit financial assurances "to cover the liability prescribed..." and "to cover such liabilities recognized by law." 42 U.S.C. §9608(a). Each of these factors indicates that Congress intended for § 108 financial assurances to serve as an insurance policy rather than to ensure compliance with an undefined set of regulatory requirements or operational practices.[6] It would be a mistake to borrow financial assurance models from regulatory contexts such as RCRA and lose sight of the ultimate objective of § 108 financial assurances.

An insurance model rule is not only the most appropriate means of accomplishing EPA's statutory directive - it also allows EPA to avoid costly facility-by-facility analysis. Regulatory financial assurances require enormous expertise, and must be established by fact-intensive case-by-case review.[7] In contrast, insurance model financial assurances can be accomplished using industry-wide risk data that may already be available from the various sources that Congress has instructed EPA to consider. The financial responsibility requirements for motor carriers implemented by DOT (as delegated by CERCLA § 108(b)(5)) provide a helpful example. DOT has promulgated implementing regulations that define "financial responsibility" as financial reserves (e.g., insurance policies or surety bonds) sufficient to cover public liability." 49 C.F.R. § 387.5. DOT regulations explain that "public liability" includes, among other things:

> *environmental restoration restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary*

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[5] Congress did not direct EPA to consider sources of information that would be helpful to develop a regulatory model of financial assurances similar to RCRA or the MLRA. DRMS believes that this provides a significant indication of Congress's intent, as well as a pragmatic reason to align the rulemaking with these sources of helpful information.

[6] The *Chemclene* Court also characterized CERCLA § 108(b) financial assurances as an "insurance program." *Chemclene* at 272.

[7] DRMS calculates the financial warranties that secure MLRA reclamation requirements by developing and aggregating task-by-task costs estimates using current reference materials as well as the significant regional expertise of its staff. Applicants may submit initial estimates; however, those estimates must be subjected to a rigorous review. DRMS is also charged with continuously ensuring the adequacy of financial warranties using the same methods.

measure taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

49 C.F.R. § 387.5. The minimum levels of financial assurances required to satisfy public liability are documented in a schedule that references the type of carriage and the commodity transported. 49 C.F.R. 387.9; *See also* http://www.fmcsa.dot.gov/forms/print/MCS-90.htm (containing links to online forms and guidance). Hardrock mining is clearly more complicated than transportation of hazardous substances via motor carrier. Nonetheless, the DOT example demonstrates that insurance model financial assurances can be established using industry-wide data and effectively implemented without costly case-by-case review.

An insurance model rule addresses the fundamental problems that have raised the public profile of CERCLA financial assurances in recent years. The federal court for the Northern District of California cited two significant Government Accountability Office ("GAO") reports in its order directing EPA to publish the notice that led to the upcoming rulemaking. *See Sierra Club v. Johnson,* 2009 WL 482248, 6 (N.D. Cal. 2009). In each report, the GAO criticized EPA's failure to adopt CERCLA financial assurance requirements, stating that, "as a result of EPA's inaction, the federal treasury continues to be exposed to potentially enormous cleanup costs..." *US GAO, Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations*, GAO-05-658 (Aug. 2005). The GAO explained that, in the absence of financial assurance requirements, businesses can limit or avoid responsibility for liabilities by organizing or restructuring in ways that limit their ability to pay for cleanups or by filing for bankruptcy. *US GAO, Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public*, GAO-06-900T (Jun. 2006). An insurance model rule prevents operators from avoiding liability by specifically addressing an operator's ability to pay response costs. DRMS encourages EPA to focus on the fundamental issues raised in the GAO reports by adopting a targeted rule, rather than adopt overly-broad requirements that produce less overall benefit by unintentionally undercutting states' ability to implement existing regulatory programs.

In addition to sound legal and fiscal rationale, there are important federalism justifications for an insurance model rule. The standing Executive Order on federalism directs federal agencies to consult with and defer to states where possible when formulating policies that will have "substantial direct effects on the states." 64 Fed. Reg. 43255, 43256 (1999). The Order further instructs federal agencies to avoid action that "limits the policymaking discretion of the states except where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." *Id.* DRMS appreciates EPA's ongoing effort to request and consider the states' input on the upcoming rulemaking. While there can be no doubt that CERCLA financial assurances will address a problem of national significance, the statutory directive does not contemplate a rule that would overlap with state regulatory programs like the MLRA.[8] A targeted insurance model rule allows

[8] President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on May 20, 2009, strongly discouraging federal actions that preempt state law. http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption. Thankfully, EPA has not indicated that it intends to purposely preempt state law. Nonetheless, it is worth noting that an overly-broad federal rule could effectively disable existing state programs by creating unmanageable ambiguity and litigation burdens.

EPA to address important policy issues while avoiding action that could have negative federalism implications. In fact, such a rule would likely complement and bolster existing state regulatory programs.

SUGGESTIONS FOR DEVELOPING THE RULE

Consistent with the analysis above, DRMS submits the following suggestions for EPA to consider in developing its financial assurances rule for hardrock mining. DRMS is aware that the following suggestions may be somewhat premature at this early juncture and is happy to continue working with EPA as the issues are more fully developed.

- Include language in the preamble explaining that the rule is intended to assure that all operators are able to pay for response costs that could be incurred as the result of a release or threatened release of hazardous substance, and is not intended to prevent states from imposing financial assurance requirements related to reclamation planned and permitted as part of a permitted mining operation.
- Reference the "insurance" concept described in this letter.
- Explain the phrase "in connection with liability" by referencing response costs.
- Avoid using RCRA financial assurances as a template as they represent a regulatory approach to financial assurance.
- Avoid creating or implying standards for reclamation or operational practices.
- Reference the sources of input listed in CERCLA § 108 when developing standards for establishing levels of financial responsibility, as those sources make it clear that the rule is intended to provide insurance for response costs.

DRMS sincerely hopes that you will find this letter helpful as EPA moves forward with its rulemaking process. DRMS believes that appropriate CERCLA financial assurances can provide tremendous value to both the taxpayer and the environment. DRMS hopes that it can serve as a helpful resource as we move forward.

Sincerely,

FOR THE ATTORNEY GENERAL

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February 28, 2011

Jim Berlow
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RE: CERCLA Financial Assurances: Colorado Division of Reclamation Mining and Safety's Position Regarding Preemption; Suggestions for Drafting the Upcoming Rule

Dear Mr. Berlow,

Colorado's Division of Reclamation Mining and Safety ("DRMS") appreciates the opportunity to provide preliminary input regarding EPA's forthcoming financial assurance rule for hardrock mining. DRMS administers a robust regulatory program under Colorado's Mined Land Reclamation Act ("MLRA") (C.R.S. § 34-32-101 et. seq.). The MLRA minimizes the adverse impacts of hardrock mining in Colorado by requiring every operator to obtain a permit and adhere to rigorous reclamation standards, both during and after the mining activity. Many of the MLRA's reclamation standards are designed to prevent the release of hazardous substances into the environment. Each operator must submit a financial warranty sufficient to assure compliance with applicable reclamation standards, as incorporated in the operation's reclamation permit. *See* C.R.S. §34-32-117.

Financial warranties are essential to DRMS's ability to effectively regulate hardrock mining in Colorado. DRMS understands that EPA is in the process of developing its own financial assurance requirements for hardrock mining facilities. EPA's entry into this field raises important questions related to preemption. This letter explains DRMS's position that MLRA financial warranties can co-exist with CERCLA financial assurance requirements, and are not the type of financial assurances that require preemption. It also provides suggestions intended to help EPA satisfy its rulemaking mandate, address important policy issues, and avoid unintended negative consequences for state programs such as Colorado's.[1] Although this letter is specific to Colorado, DRMS believes that it provides viable nationwide solutions to the difficult questions raised by EPA's upcoming rulemaking.

[1] David Berry, Director of the Colorado Office of Reclamation Mining and Safety, provided letters to EPA on October 8 and November 15, 2010, which explain certain technical details of Colorado's regulatory program. This letter builds upon Mr. Berry's letters in some respects.

THE PREEMPTION ISSUE

CERCLA directs EPA to "promulgate requirements that classes of facilities ... establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b). This rulemaking directive raises important preemption questions related to § 114(d), which states that owners or operators of facilities subject to CERCLA financial responsibility requirements "shall not be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such facility." 42 U.S.C. § 9614(d).

In order to understand the preemption question, we must analyze CERCLA using the same rules of construction employed by the courts. When courts consider a question of statutory construction, their foremost goal is to effectuate the intent of Congress. To determine intent, courts first examine the plain language of a statutory provision, with the presumption that Congress "says what it means" and "means what it says." *See Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992). Courts interpret statutes so as to give meaning to every word, avoiding interpretations that render any language superfluous. *See Montclair v. Randall*, 107 U.S. 147, 152 (1883) (holding that "[I]t is the duty of the court to give effect, if possible, to every clause and word of a statute"); *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (holding that statutes are to be construed, where possible "so as to avoid rendering superfluous any parts thereof"). Courts analyze specific provisions in light of the language and design of the statute as a whole, because "meaning, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *See also United states v. Boisdore 's Heirs*, 49 U.S. 113, 122 (1850) (holding that courts should not focus solely on "a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

When we examine the "plain language" of § 114(d), it is clear Congress intended that CERCLA financial assurance requirements would preempt only those state financial assurance requirements that are connected with *liability* for the release of a hazardous substance. As instructed by the *Montclair* and *Astoria* cases, we cannot gloss over the term "liability." By referring to liability, Congress ensured that the provision would not broadly prohibit states from imposing financial assurance requirements in connection with the release of hazardous substances, but would only prohibit state financial assurances that are specifically connected to liability.[2] With the presumption that Congress meant what it said, we must avoid interpreting § 114(d) in such a manner that renders the term liability meaningless.

[2] It is important to note the incredibly broad definitions of the terms "release" and "hazardous substance." CERCLA defines "release" as including any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment..." *See* 42 U.S.C. § 9601(11). CERCLA defines "hazardous substance" as including substances designated by CERCLA § 102, CWA § 311(b)(2)(a) and 307(a), RCRA § 3001, CAA § 112, and TSCA § 7. *See* 42 U.S.C. § 9601(14). Over 800 different substances fall within the definition of a CERCLA hazardous substance. *See* http://www.epa.gov/oem/content/hazsubs/cercsubs htm. If we were to ignore the term "liability," the practical result would likely be the preemption of all state financial assurance requirements related to hardrock mining.

It is also important to examine § 114(d)'s plain language within the broader context of the statute. CERCLA's fundamental statements of policy regarding its relationship to other law dictate a narrow interpretation of its preemption provisions. Section 114(a), instructs that CERCLA "shall not be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Section 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to the releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). The Tenth Circuit has held that, in these two statements of policy, "Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993). Free-standing and contextual analysis of § 114(d) indicates that Congress intended to preempt only those state financial assurances that are connected to liability.

Having established that Congress intended to preempt only state financial assurances in connection with liability, we must now determine what it means for a financial responsibility requirement to be "in connection with liability" in the context of CERCLA. CERCLA's liability scheme is retroactive. It allows the federal government and other parties to recover certain cleanup costs from potentially responsible parties ("PRPs") associated with facilities from which there has been a release, or a threatened release which causes the incurrence of response costs. *See* 42 U.S.C. § 9607(a). CERCLA also authorizes EPA to order PRPs to perform certain remedial actions, subject to severe damages and fines if the order is not obeyed. *See* 42 U.S.C. § 9606. Unlike regulatory statutes such as RCRA or Colorado's MLRA, which proscribe standards for planning and operational practices, CERCLA does not impose liability until a release or a threatened release causes someone to incur response costs. Accordingly, CERCLA § 114(d) preempts only those state financial assurances connected with an operator's ability to pay for response costs caused by the release of a hazardous substance.

A court has been called upon to consider § 114(d) preemption on only one occasion. In *Chemclene v. Commonwealth of Pennsylvania*, the Pennsylvania Commonwealth Court held that federal financial assurance requirements did not preempt state financial assurance requirements that were related to hazardous substances but were not connected to an operator's ability to pay for response costs. *Chemclene v. Commonwealth of Pennsylvania*, 497 A.2d 268 (Pa. Commw. 1985). In *Chemclene*, a group of motor carriers claimed that bonds required under the Pennsylvania Solid Waste Management Act ("SWMA") were preempted by CERCLA § 114(d) because motor carriers were also subject to federal financial assurance requirements implemented by the U.S. Department of Transportation ("DOT") pursuant to CERCLA § 108(b)(5).[3] The *Chemclene* court denied the preemption claim, reasoning that:

[3] CERCLA § 108(b)(5) provides that financial assurance requirements for "motor carriers" be set by the Motor Carrier Act of 1980. Financial assurance requirements under the Motor Carrier Act were implemented by DOT through regulations discussed in greater detail below.

> *The term 'financial responsibility' as used in Section 114(d) of CERCLA contemplates an insurance program designed to pay the costs of cleaning up accidental spills of hazardous waste or hazardous materials and the claims resulting therefrom. In contrast, the bond required by Section 505(e) of the SWMA is a compliance bond. Its purpose is to insure the performance by a transporter of hazardous waste of all the obligations imposed by the SWMA, rules and regulations promulgated by DER, and the terms and conditions of the license; it is not intended to cover costs incurred by an accidental discharge of hazardous waste.*

Chemclene, at 272. The *Chemclene* case demonstrates that federal financial assurance requirements do not prohibit states from using financial assurances as a regulatory tool related to hazardous substances, so long as those financial assurances are not in connection with an operator's ability to pay for response costs.

Colorado's financial warranties do not address an operator's ability to pay for response costs. They assure compliance with reclamation requirements. In this respect, MLRA financial warranties are directly analogous to the "compliance bonds" at issue in *Chemclene*. Under the MLRA, reclamation must be conducted, both during and after the mining operation, in accordance with a reclamation plan that meets certain performance standards. Many of those standards are designed to prevent releases of hazardous substances and prevent adverse impacts on surrounding properties. *See* C.R.S. § 34-32-116 (requiring measures to minimize disturbance to the hydrologic balance, protect outside areas from damage, and control erosion and attendant air and water pollution). MLRA financial warranties assure that DRMS can complete reclamation according to those standards if the operator is unwilling or unable. C.R.S. § 34-32-117(1).

The MLRA addresses response to emergency releases via a mechanism completely separate from financial warranties. *See* C.R.S. § 34-32-122(b)(3) (describing a cash fund for release response, funded by grants, donations, and appropriations). MLRA financial warranties are a vital part of a regulatory program designed to prevent the release of hazardous substances, but they do not assure an operator's ability to pay for potential response costs. Accordingly, DRMS does not believe that MLRA financial warranties will be preempted by EPA's upcoming financial assurances rule.

FINANCIAL ASSURANCE RULEMAKING

Throughout its correspondence with the states, EPA has indicated that it hopes to fulfill its rulemaking mandate in the most direct and efficient manner possible. To that end, DRMS suggests that the upcoming rulemaking addresses only those requirements necessary to assure that operators of hardrock mining facilities demonstrate their ability to pay for response costs. DRMS believes that this strategy is not only the most direct and efficient way of satisfying EPA's rulemaking mandate, but is also the most effective solution to avoid unintended negative consequences for the states. Like Colorado, most other states use financial assurances to secure reclamation obligations.[4] By focusing on operators' ability to pay for response costs, EPA can

[4] DRMS is aware of only one state, South Dakota, which requires financial assurances in connection with an operator's ability to pay for response costs.

fill a discrete gap, complement existing state programs, and provide an additional layer of protection for the taxpayer.

EPA's § 108(b) mandate is to create a program whereby operators provide "insurance" against potential response costs. Section 108(b) financial assurances are not intended to assure compliance with regulatory requirements or operational practices; they are intended to protect the Superfund, and ultimately federal taxpayers, from incurring response costs. Congress has directed EPA to consult sources of information that will be helpful in developing an insurance model rule.[5] *See* 42 U.S.C. § 9608(b)(2) (instructing EPA to consider "the payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction"). Consistent with the insurance concept, Congress provided that parties may assert claims directly against financial warrantors if there is no financially-viable PRP. *See* 42 U.S.C. § 9608(c)(2). Elsewhere in § 108, Congress made direct reference to liability coverage, requiring operators of vessels to submit financial assurances "to cover the liability prescribed..." and "to cover such liabilities recognized by law." 42 U.S.C. §9608(a). Each of these factors indicates that Congress intended for § 108 financial assurances to serve as an insurance policy rather than to ensure compliance with an undefined set of regulatory requirements or operational practices.[6] It would be a mistake to borrow financial assurance models from regulatory contexts such as RCRA and lose sight of the ultimate objective of § 108 financial assurances.

An insurance model rule is not only the most appropriate means of accomplishing EPA's statutory directive - it also allows EPA to avoid costly facility-by-facility analysis. Regulatory financial assurances require enormous expertise, and must be established by fact-intensive case-by-case review.[7] In contrast, insurance model financial assurances can be accomplished using industry-wide risk data that may already be available from the various sources that Congress has instructed EPA to consider. The financial responsibility requirements for motor carriers implemented by DOT (as delegated by CERCLA § 108(b)(5)) provide a helpful example. DOT has promulgated implementing regulations that define "financial responsibility" as financial reserves (e.g., insurance policies or surety bonds) sufficient to cover public liability." 49 C.F.R. § 387.5. DOT regulations explain that "public liability" includes, among other things:

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[5] Congress did not direct EPA to consider sources of information that would be helpful to develop a regulatory model of financial assurances similar to RCRA or the MLRA. DRMS believes that this provides a significant indication of Congress's intent, as well as a pragmatic reason to align the rulemaking with these sources of helpful information.

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[7] DRMS calculates the financial warranties that secure MLRA reclamation requirements by developing and aggregating task-by-task costs estimates using current reference materials as well as the significant regional expertise of its staff. Applicants may submit initial estimates; however, those estimates must be subjected to a rigorous review. DRMS is also charged with continuously ensuring the adequacy of financial warranties using the same methods.

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An insurance model rule addresses the fundamental problems that have raised the public profile of CERCLA financial assurances in recent years. The federal court for the Northern District of California cited two significant Government Accountability Office ("GAO") reports in its order directing EPA to publish the notice that led to the upcoming rulemaking. *See Sierra Club v. Johnson,* 2009 WL 482248, 6 (N.D. Cal. 2009). In each report, the GAO criticized EPA's failure to adopt CERCLA financial assurance requirements, stating that, "as a result of EPA's inaction, the federal treasury continues to be exposed to potentially enormous cleanup costs..." *US GAO, Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations*, GAO-05-658 (Aug. 2005). The GAO explained that, in the absence of financial assurance requirements, businesses can limit or avoid responsibility for liabilities by organizing or restructuring in ways that limit their ability to pay for cleanups or by filing for bankruptcy. *US GAO, Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public*, GAO-06-900T (Jun. 2006). An insurance model rule prevents operators from avoiding liability by specifically addressing an operator's ability to pay response costs. DRMS encourages EPA to focus on the fundamental issues raised in the GAO reports by adopting a targeted rule, rather than adopt overly-broad requirements that produce less overall benefit by unintentionally undercutting states' ability to implement existing regulatory programs.

In addition to sound legal and fiscal rationale, there are important federalism justifications for an insurance model rule. The standing Executive Order on federalism directs federal agencies to consult with and defer to states where possible when formulating policies that will have "substantial direct effects on the states." 64 Fed. Reg. 43255, 43256 (1999). The Order further instructs federal agencies to avoid action that "limits the policymaking discretion of the states except where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." *Id.* DRMS appreciates EPA's ongoing effort to request and consider the states' input on the upcoming rulemaking. While there can be no doubt that CERCLA financial assurances will address a problem of national significance, the statutory directive does not contemplate a rule that would overlap with state regulatory programs like the MLRA.[8] A targeted insurance model rule allows

[8] President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on May 20, 2009, strongly discouraging federal actions that preempt state law. http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption. Thankfully, EPA has not indicated that it intends to purposely preempt state law. Nonetheless, it is worth noting that an overly-broad federal rule could effectively disable existing state programs by creating unmanageable ambiguity and litigation burdens.

EPA to address important policy issues while avoiding action that could have negative federalism implications. In fact, such a rule would likely complement and bolster existing state regulatory programs.

SUGGESTIONS FOR DEVELOPING THE RULE

Consistent with the analysis above, DRMS submits the following suggestions for EPA to consider in developing its financial assurances rule for hardrock mining. DRMS is aware that the following suggestions may be somewhat premature at this early juncture and is happy to continue working with EPA as the issues are more fully developed.

- Include language in the preamble explaining that the rule is intended to assure that all operators are able to pay for response costs that could be incurred as the result of a release or threatened release of hazardous substance, and is not intended to prevent states from imposing financial assurance requirements related to reclamation planned and permitted as part of a permitted mining operation.
- Reference the "insurance" concept described in this letter.
- Explain the phrase "in connection with liability" by referencing response costs.
- Avoid using RCRA financial assurances as a template as they represent a regulatory approach to financial assurance.
- Avoid creating or implying standards for reclamation or operational practices.
- Reference the sources of input listed in CERCLA § 108 when developing standards for establishing levels of financial responsibility, as those sources make it clear that the rule is intended to provide insurance for response costs.

DRMS sincerely hopes that you will find this letter helpful as EPA moves forward with its rulemaking process. DRMS believes that appropriate CERCLA financial assurances can provide tremendous value to both the taxpayer and the environment. DRMS hopes that it can serve as a helpful resource as we move forward.

Sincerely,

FOR THE ATTORNEY GENERAL

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Mr. SHIMKUS. The chair now recognizes Ms. Abigail Dillen, Coal Program Director from Earthjustice.

STATEMENT OF ABIGAIL DILLEN

Ms. DILLEN. Thank you. Good morning, Chairman Shimkus, and members of the subcommittee. Thank you for the opportunity to offer testimony this morning. I will be addressing the proposed amendment of RCRA, Section 2002(b) under the Reducing Excessive Deadline Obligations Act of 2013.

I am Abigail Dillen. I direct the Coal Program at Earthjustice and I am also a managing attorney there. Earthjustice is a nonprofit public interest law firm dedicated to protecting the environment.

RCRA, Section 2002(b) provides for periodic review and revision of the regulations implementing RCRA, as you know. And to be clear, the Environmental Protection Agency always enjoys the discretion to determine when revisions are necessary. As this provision is currently written, it strikes a careful balance, ensuring that regulations are updated to address evolving waste management issues while still leaving EPA broad discretion to manage RCRA programs as it sees fit and determine regulatory priorities.

This bill would upset that balance in order to derail three parallel lawsuits that were filed to compel an EPA decision on badly needed regulation of coal ash and other waste from coal-fired power plants.

As EPA acknowledges, regulation of coal ash is already long overdue, but the agency continues to delay issuance of final regulations. This delay is harming the many communities around the country that are contending with water contamination, fugitive ash dust and the risk of catastrophic collapse of ash impoundments in the absence of effective safeguards.

At the same time, ongoing regulatory uncertainty is bad for business, according to the coal ash recycling industry. And that is why the ash recycling industry and conservation groups are both suing under Section 2002(b) to prompt overdue action by EPA. This bill would deliberately undercut those lawsuits, leaving coal ash regulated indefinitely. More broadly, it would upset a longstanding statutory scheme for updating RCRA that has never proven to be unworkable.

This bill's supporters are claiming that current law requires EPA to review or promulgate regulations within time frames that have proven unworkable and that this provision has, quote, only led to lawsuits for failure to meet these deadlines. However, in the 37 years since Congress established Section 2002(b), a total of three lawsuits have been filed, and those are the three lawsuits pertaining to regulation of coal ash. One has been brought by conservation groups represented by Earthjustice. And, again, the others have been brought by Headwaters Resources and Boral Material Technologies, two of the leading companies that market coal ash to make commercially valuable building products.

The transparent intent of this bill is to undercut these lawsuits and prevent a Federal court from imposing needed deadlines: one, for coal ash regulations that EPA has acknowledged are needed; and, two, for a decision on the threshold question whether coal ash

should be regulated as a hazardous waste under RCRA, subtitle (c) or as a solid waste under RCRA, subtitle (d).

I want to underscore, it is simply not the case that this deadline has ever proven unworkable. And to Chairman Shimkus, your point about EPA's testimony, we have not had the benefit of seeing it yet, but I am not surprised the agency is eager to avoid any deadlines whenever possible. Of course it is an agency that contends with many deadlines, but if there is one thing that many of us can agree upon in this room is that without deadlines, work doesn't get done.

And I can't overstate the importance of addressing longstanding environmental harms that are associated with the regulatory failure to address coal ash. In 2000, 13 years ago, following years of study in the 1990s, EPA concluded that establishment of national standards under RCRA, subtitle (d) was necessary, quote, to ensure a consistent level of protection of human health in the environment. But in the 13 years since EPA made that formal finding, EPA has yet to undertake any of the requisite regulatory revisions that are needed to end the unsafe dumping of coal ash. This delay poses an unacceptable threat to the environment and it perpetuates regulatory uncertainty that is unacceptable to the ash recycling industry.

In short, this bill would eliminate a statutory provision that has operated for 37 years without incident, only to exacerbate the problems caused by EPA's inexcusable delay in regulating coal ash.

Thank you.

Mr. SHIMKUS. Thank you.

[The prepared statement of Ms. Dillen follows:]

Testimony of
Abigail Dillen, Coal Program Director
Earthjustice
Before the Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
Legislative Hearing on "Federal and State Partnership for Environmental Protection Act of 2013;" the "Reducing Excessive Deadline Obligations Act of 2013;" and the "Federal Facility Accountability Act of 2013."
May 17, 2013

Chairman Shimkus and Members of the Subcommittee, thank you for the opportunity to present testimony on the proposed legislation entitled "Reducing Excessive Deadline Obligations Act of 2013." This bill would amend two sections that now establish deadlines in the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Emergency Response Compensation and Liability Act (CERCLA). My testimony today addresses Section 2 of the bill, which would amend RCRA Section 2002(b), 42 U.S.C. §6912.

I am Abigail Dillen, the director and managing attorney of the coal program at Earthjustice, a national non-profit, public interest law firm dedicated to protecting natural resources and wildlife, and to defending the right of all people to a healthy environment.

RCRA section 2002(b) provides for periodic review of the regulations implementing RCRA and for revisions of those regulations, if the Environmental Protection Agency ("EPA") concludes that revisions are "necessary." 42 U.S.C. §6912. This provision strikes a careful balance, ensuring that regulations effectively address evolving waste management issues while leaving EPA broad discretion to manage RCRA programs and determine regulatory priorities. This bill would upset that balance in a misguided effort to derail three parallel lawsuits that were filed to compel an EPA

decision on badly needed regulation of coal ash and other wastes from coal-fired power plants. As EPA acknowledges, regulation of coal ash is already long overdue, but the agency continues to delay issuance of final regulations. This delay is harming the many communities around the country that are contending with water contamination, fugitive ash dust, and the risk of catastrophic collapse of ash impoundments in the absence of effective safeguards. At the same time, ongoing regulatory uncertainty is bad for business according to the coal ash recycling industry. That is why the ash recycling industry and conservation groups are both suing under Section 2002(b) to prompt action by EPA. This bill would deliberately undercut those lawsuits, leaving coal ash unregulated indefinitely. More broadly, it would upset a 37-year-old statutory scheme for updating RCRA that has never proven to be unworkable.

I. THE BILL IMPROPERLY TARGETS A SINGLE COURT CASE

The sponsors of the bill seek, on behalf of the coal industry, to amend RCRA to remove the basis for an ongoing court case that may finally put EPA on a reasonable schedule to establish safeguards for coal ash disposal. The bill's supporters claim that "current law requires EPA to review or promulgate regulations within timeframes that have proven unworkable" and that this provision has "only led to lawsuits for failure to meet these deadlines." http://energycommerce.house.gov/press-release/subcommittee-unveils-group-bills-modernize-federal-environmental-law-and-increase. However, in the 37 years since Congress established the periodic review requirement in section 2002(b), a total of three lawsuits have been filed — one by conservation groups represented by Earthjustice and two by the leading companies that market coal ash to make

commercially valuable building products.[1] All three of these lawsuits, which are being heard in a single consolidated case, are relying on RCRA Section 2002(b) to elicit a long overdue decision from EPA on regulation of coal ash. The transparent intent of this bill is to undercut these lawsuits and prevent a federal court from imposing needed deadlines: (1) for coal ash regulations that EPA has acknowledged are needed; and (2) for a decision on the threshold question whether coal ash should be regulated as a hazardous waste under RCRA subtitle C.

The bill purportedly is designed to address logistical concerns raised by the requirement that regulations be reviewed and revised when necessary every three years. However, it is not the case that "[t]he three year deadline has proven to be impracticable" and that "missing the statutory deadline will lead to litigation in which the EPA may be forced to establish unworkable deadlines for the completion of the review/revision process." http://docs.house.gov/meetings/IF/IF18/20130517/100845/HHRG-113-IF18-20130517-SD003.pdf. Given that Section 2002(b) leaves EPA broad discretion in structuring and implementing the required regulatory review and in undertaking any revisions that are necessary — again, a question that is left to the agency's discretion — there is no reason why the deadline is inherently impracticable and no evidence that it has proven to be impracticable in the past.

[1] *Appalachian Voices, et al. v. Jackson,* Civ. No. 1:12-cv-00523-RBW (D.D.C. filed on April 5, 2012); *Headwaters Resources, Inc. v. Jackson*, No. 1:12-cv-00585-RBW (D.D.C. filed on April 13, 2012); *Boral Material Technologies, Inc. v. Jackson*, No. 1:12-cv-00629-RBW (D.D.C. filed on April 20, 2012) (attached).

Similarly, there is no history of litigation under Section 2002(b) that gives credence to the stated concern that EPA will be subjected to many, if any, additional lawsuits, much less that the Courts in adjudicating such suits will subject the agency to unreasonable schedules. In any deadline enforcement case, the agency has ample opportunity to advocate for a reasonable schedule, and there is no reason to believe that the courts will impose unworkable deadlines over the agency's objection.

Further, EPA is not facing litigation over narrowly missed deadlines. As noted above, the *only* three lawsuits in which parties have ever sought to enforce Section 2002(b) are all going forward together in a single proceeding that concerns the regulation of coal ash, and that proceeding arises out of an extraordinary and egregious history of agency delay. In 2000, following years of study in the 1990s, EPA concluded that the establishment of national standards under the RCRA subtitle D regulations was necessary to "ensure a consistent level of protection of human health and the environment."[2] But in the 13 years since EPA made that formal finding, EPA has yet to undertake any of the requisite regulatory revisions that are needed to end the unsafe dumping of coal ash.

In response to the legal claims put forward by conservation and industry groups under Section 2002(b), EPA has now acknowledged that "it has an obligation to conclude review, and any necessary revision, of certain regulations within 40 C.F.R. Part 257 pertaining to coal combustion residuals."[3] However, the agency has expressly declined to suggest *any* schedule for concluding this review and revision process. Absent the

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[2] U.S. EPA, *Notice of Regulatory Determination on Wastes From the Combustion of Fossil Fuels*, 65 Fed. Reg. 32,214, 32,215 (May 22, 2000)

[3] EPA's Combined Opposition to Plaintiffs' Motions for Summary Judgment, and Memorandum in Support of EPA's Cross-Motion for Summary Judgment in Case Nos. 1:12-cv-00585 and 1:12-cv-00629, and for Partial Summary Judgment and Order to Govern Further Proceedings in Case No. 1:12-cv-00523, No. 1:12-cv-00523 (filed October 11, 2012).

reasonable requirements for regulatory review and revision established by Section 2002(b), EPA's delay may well continue indefinitely.

As discussed below in detail, delay poses an unacceptable threat to the environment and perpetuates regulatory uncertainty that is unacceptable to the ash recycling industry. In short, this bill would eliminate a statutory provision that has operated for 37 years without incident in order to exacerbate the problems caused by EPA's inexcusable delay in regulating coal ash.

II. THE PRESSING NEED FOR COAL ASH REGULATION

More than twenty-nine million tons, approximately thirty-nine percent of the toxin-laden coal ash that is disposed annually in the U.S., is placed in surface impoundments, the majority of which (about sixty-two percent) are unlined or inadequately lined.[4] As of 2012, EPA had identified approximately 1,000 active and retired coal ash surface impoundments and more than 300 active and retired coal ash landfills in the U.S.[5] About thirty-two percent of active landfills are also unlined, as well as eighty-two percent of the nation's retired coal ash landfills.[6] The exact number of structural fills (often unlined gravel quarries) and fills in active and abandoned coal mines (always unlined) is not known, but industry reports that 9.1 million tons of coal ash

[4] U.S. EPA, *Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities*, 75 Fed. Reg. 35,128, 35,151 (June 21, 2010).
[5] *See* U.S. EPA, Information Request Response from Electric Utilities, Database of Survey Responses, Database Results (Apr. 12, 2012), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm; U.S. EPA, Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry 63 (Apr. 2010), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0003 (filed May 6, 2010); *see also* U.S. EPA, Response to Freedom of Information Act Request (June 26, 2012) (attached to Lee Decl., Ex. 3).
[6] *See id.*

were placed in structural fills in 2010,[7] and EPA has acknowledged that in 2008, 10.5 million tons of coal ash were placed in mines.[8] According to the U.S. Department of Energy in 1993, there may also be as many as 750 additional "retired" coal ash impoundments and landfills.[9]

Toxic metals pollution from coal ash commonly occurs when leaks, seeps, and other failures in surface impoundments, landfills, mines, and fill projects allow coal ash-contaminated water to drain into groundwater, lakes, rivers and streams, either directly or when these surface water bodies are hydrologically connected to surface water.[10] Toxic pollution also occurs when coal ash is placed directly into contact with groundwater.[11] EPA and environmental groups have identified 156 sites in thirty-four states where coal ash has polluted groundwater and/or surface water.[12] In addition, at twenty-nine more

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[7] *See* American Coal Ash Association, 2010 Coal Combustion Product (CCP) Production & Use Survey Report, *available at* http://acaa.affiniscape.com/associations/8003/files/2010_CCP_Survey_FINAL_102011.pdf (attached to Lee Decl., Ex. 4).
[8] *See* 75 Fed. Reg. at 35,151.
[9] *See* U.S. Dept. of Energy, Coal Combustion Waste Management Study ES-1 (Feb. 1993), *available at* http://www.fossil.energy.gov/programs/powersystems/pollutioncontrols/coal_waste_report.pdf.
[10] U.S. EPA, Office of Solid Waste and Emergency Response, Office of Resource Conservation and Recovery, Human and Ecological Risk Assessment of Coal Combustion Wastes (draft) 2-7–2-11 (April 2010), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0005 (May 6, 2010); Nat'l Research Council of Nat'l Academies, Managing Coal Combustion Residues in Mines 81–104 (2006), *available at* http://books.nap.edu/catalog.php?record_id=11592#toc (attached to Lee Decl., Ex. 1).
[11] *Id.*
[12] *See* 75 Fed. Reg. at 35,234–39 (Table of EPA's Proven Damage Cases); U.S. EPA, Office of Solid Waste, Coal Combustion Waste Damage Case Assessments (July 9, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/07sludge_EPA.pdf (attached to Lee Decl., Ex. 5); Comments of Earthjustice, Environmental Integrity Project, Sierra Club, Natural Resources Defense Council, Southern Alliance for Clean Energy, Southern Environmental Law Center, Physicians for Social Responsibility, ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-6315 (filed Nov. 19, 2010) ("Earthjustice Comments") (citing Environmental Integrity Project, Earthjustice, Out of Control: Mounting Damages from Coal Ash Waste Sites (Feb. 24, 2010), *available at* earthjustice.org/library/reports/ej-eipreportout-of-control-final.pdf; Environmental Integrity Project, Earthjustice, Sierra Club, In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment (Aug. 26, 2010), *available at* http://www.earthjustice.org/sites/default/files/files/report-in-harms-way.pdf); Environmental Integrity Project, Risky Business: Coal Ash Threatens America's Groundwater Resources at 19 More Sites (Dec. 12, 2011), *available at* http://www.environmentalintegrity.org/documents/121311EIPThirdDamageReport.pdf (attached to Lee Decl., Ex. 6).

facilities in sixteen additional states, electric generating utilities have admitted finding coal ash contaminants in groundwater at levels that exceed federal drinking water standards or state groundwater criteria.[13] In fact, levels of toxic metals such as arsenic in groundwater near coal ash disposal sites have been found to exceed EPA's threshold for hazardous waste.[14] Due to the large volume of coal ash disposed and the frequent absence of liners at impoundments and landfills, it is likely that many more sites have been contaminated, but, since the majority of coal ash disposal sites are not adequately monitored, the release of contaminants may easily go undetected. EPA has estimated that, in 2004, ten percent of coal ash landfills and fifty-eight percent of surface impoundments lacked groundwater monitoring.[15] Where monitoring is in place, dangerous levels of contamination have been found.[16] In fact, EPA has listed four contaminated coal ash disposal sites on the National Priorities List, the Agency's list of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§ 9601 *et seq.*).[17]

Fundamentally, the widespread release of toxic contaminants from coal ash disposal sites can be attributed to the absence of federal regulations requiring the use of effective pollution controls such as liners, caps, groundwater monitoring systems, leachate collection systems, and engineering standards for structural stability. A number of states require some controls, but basic safeguards are often missing. For example,

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[13] U.S. EPA, Response to Freedom of Information Act (Mar. 15, 2012) (attached to Lee Decl., Ex. 7).
[14] U.S. EPA, Characterization of Coal Combustion Residues from Electric Utilities – Leaching and Characterization Data, EPA-600/R-09/151, viii–xiv (Dec. 2009), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0329 (filed May 18, 2010).
[15] *See* 75 Fed. Reg. at 35,151.
[16] *See id.* at 35,172.
[17] *See id.;* U.S. EPA, Superfund, Glossary, *available at* http://www.epa.gov/superfund/programs/reforms/glossary.htm.

according to EPA, based on data submitted to the agency by the Association of State and Territorial Solid Waste Management Officials ("ASTSWMO") on a subset of coal ash-generating states, thirty-six percent of the states surveyed do not have minimum liner requirements for coal ash landfills, and sixty-seven percent do not have liner requirements for coal ash surface impoundments.[18] In addition, nineteen percent of the states surveyed do not have minimum groundwater monitoring requirements for landfills and sixty-one percent of the states do not have groundwater monitoring requirements for surface impoundments.[19] Lastly, EPA noted that only thirty-six percent of the states surveyed regulate the structural stability of surface impoundments, and only thirty-one percent of the states require financial assurance for surface impoundments.[20] In sum, the majority of coal ash-generating states do not require all landfills and ponds to monitor groundwater to detect toxic releases, to install leachate collection systems to control contaminant migration, to take timely corrective action to remediate contamination, to maintain financial assurance to pay for cleanup and closure, and to regularly inspect coal ash ponds for leaks and structural stability.[21]

A. Health Risks Posed by Exposure to the Toxic Components of Coal Ash

EPA has determined that people living near unlined coal ash surface impoundments have as much as a one in fifty chance of getting cancer from drinking

[18] Association of State and Territorial Solid Waste Management Officials, Letter to Matt Hale, Director, ORCR, US EPA, CCW Phase I Survey Report 2 (Apr. 1, 2009), *available at* http://www.astswmo.org/Files/Policies_and_Publications/Cross-program/Coal_Combustion_Residuals/ASTSWMO_CCW_PhaseI_Survey_Report.pdf; 75 Fed. Reg. at 35,133.

[19] 75 Fed. Reg. at 35,133.

[20] *Id.*

[21] Earthjustice Comments, ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-6315 (filed Nov. 19, 2010); *see also* U.S. EPA, Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry 43–50 (Apr. 30, 2010), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0010 (filed May 6, 2010).

water contaminated by arsenic[22]—a higher cancer risk than that associated with smoking a pack of cigarettes a day.[23] This risk is 2,000 times greater than what EPA has identified as the target level of protection for human health, an incremental lifetime cancer risk of no greater than one in 100,000.[24]

In addition to the risks posed by exposure to arsenic, EPA has identified significant risks to human health and ecological receptors from exposure to antimony, boron, cadmium, lead, molybdenum, selenium, and thallium released from unlined or clay-lined surface impoundments and landfills.[25] Arsenic is a known human carcinogen that causes cancer of the skin, bladder, and lungs.[26] Boron exposure can cause stomach, intestinal, kidney, liver, and brain damage, negative effects on male reproduction, and even death.[27] Cadmium exposure can result in diarrhea, stomach pains, severe vomiting, bone fracture, adverse reproductive effects, nerve damage, and immune system damage. 75 Fed. Reg. at 35,169.[28] Chromium is a known carcinogen and may also cause irritation and ulcers of the stomach and small intestine, sperm damage, and skin ulcers.[29] Lead is a very potent neurotoxicant that can cause developmental delays, hypertension, reduced

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[22] U.S. EPA, Human Health and Ecological Risk Assessment of Coal Combustion Wastes (draft) (Apr. 2010), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0005 (filed May 6, 2010).
[23] Earthjustice Comments, ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-6315 (filed Nov. 19, 2010), Appx. E (Comments of Jeffrey A. Foran, Ph.D. on the Draft U.S. EPA Human Health and Ecological Risk Assessment of Coal Combustion Wastes 2 (Feb. 5, 2008)).
[24] *See* 75 Fed. Reg. at 35,145. U.S. EPA, Human Health and Ecological Risk Assessment of Coal Combustion Wastes (draft) ES-5, ES-8 (Apr. 2010), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0005 (filed May 6, 2010).
[25] *Id.* at ES-4 to ES-10.
[26] 75 Fed. Reg. at 35,168.
[27] U.S. EPA, Integrated Risk Information System: Boron and Compounds (CASRN 7440-42-8), http://www.epa.gov/iris/subst/0410.htm; International Programme on Chemical Safety, Environmental Health Criteria 204: Boron (1998), http://www.greenfacts.org/en/boron/l-3/boron-5.htm#0p0.
[28] U.S. EPA, Integrated Risk Information System: Cadmium (CASRN 7440-43-9), http://www.epa.gov/iris/subst/0141.htm; Agency for Toxic Substances & Disease Registry, Toxicological Profile for Cadmium, http://www.atsdr.cdc.gov/toxprofiles/tp.asp?id=48&tid=15.
[29] 75 Fed. Reg. at 35,169; U.S. EPA, Integrated Risk Information System: Chromium (VI) (CASRN 18540-29-9), http://www.epa.gov/iris/subst/0144.htm; Agency for Toxic Substances & Disease Registry, Toxicological Profile for Chromium, (CAS ID #: 7440-47-3), http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=17.

hearing acuity, impaired hemoglobin synthesis, and male reproductive impairment.[30] Mercury is also a neurotoxicant, and exposure can result in developmental abnormalities, reduced IQ, mental retardation, and behavioral problems.[31] Methylmercury can accumulate to high concentrations in fish and become a major pathway for human exposure to mercury.[32] Molybdenum exposure can result in excess fatigue, headaches and joint pains, and chronic ingestion can cause diarrhea, slowed growth, low birth weight, infertility, and lung, kidney, and liver damage.[33] Exposure to high levels of thallium can result in adverse nervous system effects such as numbness of extremities, and ingestion can lead to vomiting, diarrhea, and temporary hair loss, along with adverse effects on the lungs, heart, liver, kidneys, and reproductive system.[34]

Other metals and compounds present in coal ash pose additional risks to humans and aquatic organisms. Selenium, for example, is a bioaccumulative pollutant that is harmful to freshwater fish and other aquatic life at very low levels.[35] Selenium at more elevated levels impedes the growth and survival of juvenile fish, and offspring of adult

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[30] 75 Fed. Reg. at 35,169. U.S. EPA, Integrated Risk Information System: Lead and compounds (inorganic) (CASRN 7439-92-1), http://www.epa.gov/iris/subst/0277.htm; Agency for Toxic Substances & Disease Registry, Toxicological Profile for Lead (CAS ID #: 7439-92-1), http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=22.

[31] U.S. EPA, Integrated Risk Information System: Mercury, elemental (CASRN 7439-97-6), http://www.epa.gov/iris/subst/0370.htm; Agency for Toxic Substances & Disease Registry, Toxicological Profile for Mercury (CAS ID #: 7439-97-6), http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=24.

[32] *Id.*

[33] U.S. EPA, Integrated Risk Information System: Molybdenum (CASRN 7439-98-7), http://www.epa.gov/iris/subst/0425.htm.

[34] 75 Fed. Reg. at 35,169; U.S. EPA, Integrated Risk Information System: Thallium (I), soluble salts; CASRN Various, http://www.epa.gov/iris/subst/1012.htm; Agency for Toxic Substances & Disease Registry (ATSDR), U.S. Dep't of Health & Human Services, ToxFAQs for Thallium (Sept. 1995), http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=308&tid=49.

[35] 75 Fed. Reg. at 35,172; Nat'l Research Council, Nat'l Academies, Managing Coal Combustion Residues in Mines 81–104 (2006), *available at* http://books.nap.edu/catalog.php?record_id=11592#toc (attached to Lee Decl., Ex. 1); *see also* Rowe C.L., Hopkins W.A., Congdon J.D., Ecotoxicological Implications of Aquatic Disposal of Coal Combustion Residues in the United States: A Review, Environmental Monitoring and Assessment 80: 207–276 (2002).

fish that were exposed to excessive selenium suffer skeletal deformities.[36] Selenium can decimate fish populations and make the surviving species unsafe to eat.[37] In humans, exposure to selenium can cause hair and fingernail loss, numbness in extremities, and problems with circulation.[38] EPA has documented widespread ecosystem damage in water bodies by selenium contamination from coal ash dumps, including the killing of nearly all species of fish from one impacted lake, the deformity or death of fish and amphibians in numerous streams and rivers, and the restriction of fishing due to high selenium levels in fish in several reservoirs.[39]

B. Air Pollution from Improper Disposal of Coal Ash

In addition to the health risks associated with exposure to coal ash constituents that contaminate water supplies, EPA has also determined that the disposal of coal ash in landfills presents a risk of inhalation of particulate matter and that the National Ambient Air Quality Standards ("NAAQS") for particulate matter can be violated at such landfills.[40] EPA has concluded that there is a "strong likelihood that dry-handling [of coal ash] would lead to the NAAQS being exceeded absent fugitive dust controls."[41] Particle pollution, especially fine particles, contains microscopic solids or liquid droplets

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[36] Lemly, A.D., Wildlife and the Coal Waste Policy Debate: Proposed Rules for Coal Waste Disposal Ignore Lessons from 45 Years of Wildlife Poisoning, Environmental Science and Technology (July 27, 2012), *available at* http://pubs.acs.org/doi/abs/10.1021/es301467q; Lemly A.D., Coal Combustion Waste Is a Deadly Poison to Fish (Dec. 8, 2009) (prepared for United States Office of Management and Budget Washington, D.C.); Lemly A.D., Symptoms and implications of selenium toxicity in fish: the Belews Lake case example, Aquatic Toxicology 57 (2002) (attached to Lee Decl., Ex. 8).

[37] *Id.*

[38] U.S. EPA, Integrated Risk Information System: Selenium and compounds (CASRN 7782-49-2); Agency for Toxic Substances & Disease Registry, Toxicological Profile for Selenium (CAS ID #: 7782-49-2), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp.asp?id=153&tid=28.

[39] *See* 75 Fed. Reg. at 35,234–39 (Table of EPA's Proven Damage Cases); U.S. EPA, Office of Solid Waste, Coal Combustion Waste Damage Case Assessments (July 9, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/07sludge_EPA.pdf.

[40] U.S. EPA, Inhalation of Fugitive Dust: A Screening Assessment of the Risks Posed by Coal Combustion Waste Landfills (draft) 11 (Sept. 2009), ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-0142 (filed May 13, 2010).

[41] *Id.* 11–12.

that can lodge deep into the lungs and cause serious health problems.[42] Numerous scientific studies have linked particle pollution exposure to a variety of problems, including decreased lung function, asthma, bronchitis, irregular heartbeat, and premature death in people with heart or lung disease.[43]

In short, a wealth of data, much of which EPA itself compiled, demonstrates the serious and increasing risks posed by coal ash to air and water quality and consequently to human health and ecosystems that depend on a clean environment. Such data include extensive documentation of damage that has already occurred to water quality near coal ash dump sites across the country.[44] *See* 75 Fed. Reg. at 35,234–39 (Table of EPA's Proven Damage Cases).

C. Threats Posed by the Failure of Coal Ash Impoundments

Structural failure of the earthen impoundments that hold back millions of tons of coal ash around the country poses another catastrophic risk to human health and the environment. Data are available for nearly 700 of the nation's more than 1,000 coal ash impoundments.[45] Most of these documented ash impoundments are very large (over twenty-five feet high), and over eighty percent of the ponds are more than twenty-six

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[42] U.S. EPA, Fine Particle ($PM_{2.5}$) Designations, www.epa.gov./pmdesignations/basicinfo.htm (last visited Aug. 8, 2012).
[43] *Id.*
[44] Earthjustice Comments, ORCR Docket ID No. EPA-HQ-RCRA-2009-0640-6315 (filed Nov. 19, 2010) (citing Environmental Integrity Project, Earthjustice, Out of Control: Mounting Damages from Coal Ash Waste Sites (Feb. 24, 2010), *available at* earthjustice.org/library/reports/ej-eipreportout-of-control-final.pdf; Environmental Integrity Project, Earthjustice, Sierra Club, In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment (Aug. 26, 2010), *available at* http://www.earthjustice.org/sites/default/files/files/report-in-harms-way.pdf); Environmental Integrity Project, Risky Business: Coal Ash Threatens America's Groundwater Resources at 19 More Sites (Dec. 12, 2011), *available at* http://www.environmentalintegrity.org/documents/121311EIPThirdDamageReport.pdf (attached to Lee Decl., Ex. 6).
[45] U.S. EPA, Information Request Responses from Electric Utilities, Database of Survey Responses, Database Results (Apr. 12, 2012), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm.

years old, with nearly 150 ponds built over forty years ago.[46] Many of the impoundments were not designed or constructed, much less currently maintained, by professional engineers.[47] About fifty coal ash impoundments in the U.S. are rated "high hazard" according to the National Inventory of Dams criteria.[48] Dams assigned the high hazard classification are those where failure or mis-operation is likely to cause loss of human life.[49] Another 181 coal ash impoundments are rated "significant hazard," which means that a dam failure or mis-operation is likely to cause economic loss, environmental damage, disruption of lifeline facilities, or other adverse impacts.[50]

Leading up to a catastrophic coal ash spill in Tennessee, between 2002 and 2008, there were four major spills of coal ash from surface impoundments at three plants, including a two million gallon spill at Plant Bowen in Euharlee, Georgia,[51] a release of over 100 million gallons from the Martin's Creek Power Plant in Martins Creek, Pennsylvania,[52] and two spills of thirty million gallons each at the Eagle Valley Generating Station in Martinsville, Indiana.[53]

On December 22, 2008, a six-story high earthen dam impounding approximately nine million tons of coal ash collapsed at the Tennessee Valley Authority ("TVA")

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[46] *Id.*
[47] *Id.*
[48] U.S. EPA, Coal Combustion Residuals Impoundment Assessment Reports, Summary Table for Impoundment Reports (June 27, 2012), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/index.htm. However, if state rating criteria are taken into account, the number of high hazard impoundments is much greater. The North Carolina Department of Environment and Natural Resources documents 29 high hazard coal ash impoundments in North Carolina alone.
[49] 75 Fed. Reg. at 35,130.
[50] *Id.*; U.S. EPA, Information Request Responses from Electric Utilities, Database of Survey Responses, Database Results (Apr. 12, 2012), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm.
[51] *See* 75 Fed. Reg. at 35,237; U.S. EPA, Information Request Responses from Electric Utilities, Database of Survey Responses, Database Results (Apr. 12, 2012), http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm.
[52] *See* 75 Fed. Reg. at 35,232, 35,238.
[53] *Id.*

Kingston Fossil Plant, flooding 300 acres of river and adjacent properties with one billion gallons of toxic sludge.[54] The torrent of waste damaged numerous houses, carrying one house forty feet downhill with a man trapped inside.[55] The volume of waste released by the disaster was five times larger than the BP oil spill of 2010 and constitutes the largest waste spill in U.S. history. The disaster destroyed the local community, permanently displaced dozens of families, and required a multi-year cleanup, which is still not complete and is currently estimated to cost more than $1.2 billion.[56]

Less than two weeks after the Kingston disaster, another major coal ash spill occurred in Stevenson, Alabama at another TVA coal-burning power plant, the Widows Creek Fossil Plant. On January 9, 2009, a discharge pipe dislodged from a holding pond and released approximately 5,000 cubic yards of flue gas desulfurization sludge into Widows Creek, which flows into the Tennessee River.[57]

Yet another major coal ash spill occurred on October 31, 2011, when 25,000 cubic yards of coal ash from a decades-old landfill on a bluff above Lake Michigan collapsed at a We Energies' power plant in Oak Creek, Wisconsin.[58] The collapse left a debris field 120 yards long and eighty yards wide at the foot of the bluff and resulted in thousands of tons of coal ash fouling Lake Michigan and its shoreline.[59]

Inspections by EPA between 2009 and 2011 of the nation's coal ash ponds confirmed that many more ponds pose a similar danger to human health and the

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[54] 75 Fed. Reg. at 35,232–33.
[55] Shaila Dewan, *Tennessee Ash Flood Larger Than Initial Estimate*, N.Y. TIMES, Dec. 27, 2008, at A10, *available at* http://www.nytimes.com/2008/12/27/us/27sludge.html?_r=2 (attached to Lee Decl., Ex. 9).
[56] Shaila Dewan, *E.P.A. 's Plan to Regulate Coal Ash Draws Criticism*," N.Y. TIMES, May 5, 2010, A13, *available at* http://www.nytimes.com/2010/05/05/us/05coal.html (attached to Lee Decl., Ex. 10).
[57] *See* 75 Fed. Reg. at 35,233.
[58] Wisconsin Dep't of Natural Resources, Summary of Bluff Failure: We Energies Oak Creek Power Plant (Dec. 14, 2011), http://dnr.wi.gov/topic/Spills/documents/oakcreek/nrbpresentation.pdf.
[59] *Id.*

environment.[60] EPA gave 106 impoundments (approximately twenty-five percent of the 425 ponds inspected) a "poor" rating, indicating that repairs were needed and/or documentation was not available to confirm the structural stability of the impoundments.[61] Almost two-thirds of the poor-rated ponds (sixty-five) were high-hazard or significant-hazard impoundments.[62]

As all of this information makes clear, overdue regulation of coal ash is needed as soon as possible to address widespread water and air pollution problems as well as the catastrophic risks of ash impoundment failures.

Conclusion

This Congress should not take the extreme step of amending RCRA, which has not been amended in 29 years, to undercut a single court case in which both conservation and industry plaintiffs are seeking regulatory certainty. We oppose this bill as a grossly inappropriate exercise of legislative power that would harm thousands of American communities by delaying regulation of the second largest toxic waste stream in the nation.

This bill is one of several bills that have been proposed to prevent EPA from regulating coal ash. Just a few weeks ago, this subcommittee held a hearing on the "Coal Ash Recycling and Oversight Act of 2013," a legislative proposal that would prevent EPA from completing its coal ash rulemaking. We vehemently oppose both of these efforts to stop a long overdue rule that is essential to protecting public health and the environment and preventing loss of life and devastation from coal ash dam failures.

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[60] U.S. EPA, Coal Combustion Residuals Impoundment Assessment Reports, Summary Table for Impoundment Reports (June 27, 2012), http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/index.htm.
[61] *Id.*
[62] *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPALACHIAN VOICES 191 Howard Street Boone, NC 28607	
CHESAPEAKE CLIMATE ACTION NETWORK 1108 E Main Street, Suite 603 Richmond, VA 23219	No. _____
ENVIRONMENTAL INTEGRITY PROJECT 1 Thomas Circle, Suite 900 Washington, D.C. 20005	
KENTUCKIANS FOR THE COMMONWEALTH 140 Mini Mall Drive Berea, KY 40403	
MONTANA ENVIRONMENTAL INFORMATION CENTER 107 W Lawrence St. #N-6 Helena, MT 59601	
MOAPA BAND OF PAIUTES Moapa Tribal Office 1 Lincoln Street Moapa, NV 89025	
PRAIRIE RIVERS NETWORK 1902 Fox Drive, Suite G Champaign, IL 61820	
PHYSICIANS FOR SOCIAL RESPONSIBILITY 1875 Connecticut Ave. NW, Suite 1012 Washington, DC 20009	
SOUTHERN ALLIANCE FOR CLEAN ENERGY 3804 Middlebrook Pike Knoxville Tennessee 37921	
SIERRA CLUB 85 Second Street, 2nd Floor San Francisco, CA 94105	

WESTERN NORTH CAROLINA ALLIANCE)
29 North Market Street, Suite 610)
Asheville, NC 28801)
)
Plaintiffs,)
)
v.)
)
LISA P. JACKSON, in her official capacity as)
Administrator, United States Environmental)
Protection Agency,)
United States Environmental Protection Agency)
Ariel Rios Building)
1200 Pennsylvania Avenue, NW)
Washington, DC 20460)
)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. With this action, Plaintiffs Appalachian Voices, Chesapeake Climate Action Network, Environmental Integrity Project, Kentuckians For The Commonwealth, Moapa Band of Paiutes, Montana Environmental Information Center, Physicians for Social Responsibility, Prairie Rivers Network, Sierra Club, Southern Alliance for Clean Energy, and Western North Carolina Alliance (hereinafter "Plaintiffs") seek to compel the U.S. Environmental Protection Agency ("EPA" or "the Agency") to undertake long overdue action to address the serious and widespread risks that unsafe disposal of coal combustion waste or "coal ash" poses to human health and the environment.

2. Coal-fired power plants in the U.S. generate one of the largest and most toxic solid waste streams in the nation. In this voluminous waste stream are large quantities of heavy metals and metal compounds such as arsenic, boron, cadmium, chromium, lead, mercury,

selenium and thallium. These toxic chemicals can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental problems.

3. In the absence of national standards requiring safe disposal, coal ash has been dumped in thousands of unlined and unmonitored ponds, landfills, pits and mines. The result has been the widespread release of hazardous pollutants from coal ash to water, air and soil, endangering human health and the environment.

4. A solution to this pressing national problem must begin with effective regulations that require safe disposal of coal ash. Although the EPA has acknowledged repeatedly over the past three decades that revisions to existing federal regulations are needed, the Agency has failed to undertake these revisions. The EPA's longstanding failure to act in the face of well-documented risks associated with irresponsible disposal of coal ash violates the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k. Pursuant to section 2002(b) of RCRA, each regulation promulgated under the Act shall be reviewed by the EPA Administrator and revised, where necessary, no less frequently than every three years. See 42 U.S.C. § 6912(b).

5. The EPA has not reviewed and revised the regulations that are applicable to coal ash since 1981 and has thus lost pace with developments in the industry. The outdated regulations are inadequate to deal with the rising volumes and increasing toxicity of waste and the resulting threats to health and the environment. It defies the most fundamental purpose of RCRA to leave this voluminous and dangerous waste stream without adequate regulation for over thirty years. With this action, Plaintiffs seek to compel the expeditious review and revision of regulations governing coal ash, open dumping, and the Toxicity Characteristic Leaching Procedure, as required under the Resource Conservation and Recovery Act.

JURISDICTION

6. This action arises under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2).

7. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 6972(a), as well as 28 U.S.C. §§ 1331 and 1361, and may issue a declaratory judgment and grant further relief pursuant to 42 U.S.C. § 6972(a) and 28 U.S.C. §§ 2201 and 2202.

8. Plaintiffs have a right to bring this action pursuant to 42 U.S.C. § 6972(a)(2) and the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706.

9. By registered letter posted January 18, 2012, as well as via email, Plaintiffs gave notice to Defendant of the violations alleged herein and have thereby complied with the sixty-day notice requirement of the Resource Conservation and Recovery Act's citizen suit provision. *See* 42 U.S.C. § 6972(c).

PARTIES

10. Plaintiff Appalachian Voices is a nonprofit organization committed to protecting the land, air, and water of the central and southern Appalachian region, focusing on reducing coal's impact on the region and advancing a cleaner energy future. Appalachian Voices has more than 900 members in the Appalachian region, including North Carolina, Virginia and Tennessee. Appalachian Voices was one of the first conservation groups in the country to assess the extensive damage resulting from the Tennessee Valley Authority ("TVA") coal ash disaster in December 2008. Eliminating pollution from coal ash is one of the group's top priorities, and its staff and members are actively engaged in pressuring the EPA to finalize strong rules on coal ash disposal. Appalachian Voices is also working with communities living near coal ash ponds

to ensure that their voices are heard by state and federal agencies, as well as members of Congress.

11. Plaintiff Chesapeake Climate Action Network ("CCAN") was founded to transition the mid-Atlantic region towards clean energy solutions to climate change, specifically in Maryland, Virginia, and Washington, D.C. Its mission is to educate and mobilize citizens in a way that fosters a rapid societal switch to clean energy. This mission includes ensuring that facilities that contribute to global warming, such as coal-fired power plants, do not impact the health of their members or the environment through unsafe management and disposal of waste products such as coal ash. CCAN has over 90,000 members in Maryland, Virginia and Washington, D.C. Many of CCAN's members live or recreate on or near waters that receive effluent discharges and other pollution from coal ash landfills, prompting CCAN to bring Clean Water Act citizen suits on behalf of their members to address these illegal discharges into local water bodies. CCAN is dedicated to preventing and remediating the contamination of these waters from coal ash on behalf of its members.

12. Plaintiff Environmental Integrity Project ("EIP") is a nonpartisan, nonprofit organization founded in 2002 by former EPA enforcement attorneys to advocate for more effective enforcement of environmental laws. The Environmental Integrity Project's three objectives are: to provide analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health; to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and to help local communities in key states obtain the protection of environmental laws. EIP has a longstanding interest in securing effective federal regulation of coal ash and curtailing ongoing pollution that results from existing regulatory failures.

13. Plaintiff Western North Carolina Alliance ("WNCA") was founded in 1982, and for 30 years, WNCA has been a trusted community partner, marshaling grassroots support to keep forests healthy, air and water clean, and communities vibrant. Utilizing a combination of policy advocacy, scientific research, and community collaboration, WNCA and its chapters throughout Western North Carolina unleash the power of citizens' voices to protect the natural heritage of the region so that people and the environment can thrive. WNCA has over 700 members and is home to the French Broad Riverkeeper, which serves as the primary protector and defender of the French Broad River watershed in western North Carolina. The Riverkeeper works for healthy and safe waterways in the French Broad River watershed by partnering with citizens and communities to identify pollution sources, enforce environmental laws, advocate for stronger environmental laws, engage in restoration, and educate and empower the public. The French Broad Riverkeeper has done extensive work to ensure that coal ash is properly regulated and that environmental damage from coal ash around the French Broad River Watershed has been documented and publicized.

14. Plaintiff Kentuckians For The Commonwealth ("KFTC") is a statewide, grassroots, citizens social justice organization working to ensure clean air, water and land for every Kentuckian. The organization works to protect and preserve a clean environment and biodiversity by pushing for stronger regulations and better enforcement of existing regulations. KFTC has over 7,500 members in Kentucky and across the nation. The Jefferson County chapter of KFTC has established a Coal Ash Strategy Team that is organizing around the problems of water and air pollution caused by coal ash ponds and landfills. The county is home to two high hazard coal ash ponds that have been coating neighborhoods with dust, leaching heavy metals into the Ohio River, and causing serious health issues for nearby citizens.

15. Plaintiff Moapa Band of Paiutes is a federally recognized Indian tribe, organized under a Constitution approved by the Secretary of the Interior in 1942. The tribe resides on the 71,954-acre Moapa River Reservation, which is located within the borders of the state of Nevada. Coal ash, which blows onto the Moapa River Reservation from the landfills and waste ponds of the Reid Gardner Generating Station, presents a significant health threat to the Moapa Paiute tribe by degrading air quality. In addition, leaking coal ash ponds at the Reid Gardner Generating Plant have contaminated the underlying aquifer with arsenic, boron, chromium, molybdenum and other toxic substances. Wastewater ponds at the power plant also provide a pathway of contamination for birds and mammals previously hunted by the Moapa Band of Paiutes. Soil contaminated by coal ash prevents the traditional harvesting of plants for medicinal use. The population of the Moapa Band of Paiutes is approximately 700.

16. Plaintiff Montana Environmental Information Center ("MEIC") is a member-supported advocacy and public education organization based in Helena, Montana. MEIC works to protect and restore Montana's natural environment. Since its founding in 1973, MEIC has lobbied and litigated at the local, state and federal levels to prevent degradation of air, water quality and natural resources. MEIC's advocacy work has included the protection of water resources from surface and groundwater contamination, misuse, and over-appropriation by coal-fired power plants. MEIC has worked with local citizens to identify water quantity and quality problems associated with PPL Montana's operation of the Colstrip power complex. MEIC also submitted comments to the Montana Department of Environmental Quality ("DEQ") on the proposed Administrative Order on Consent related to DEQ's enforcement action concerning water contamination from PPL's coal ash ponds.

17. Plaintiff Physicians for Social Responsibility ("PSR") is the largest physician-led nonprofit organization in the U.S. working to slow, stop and reverse global warming and toxic degradation of the environment. PSR has a national network of 50,000 health professionals and concerned citizen members and e-activists, twenty-five PSR chapters in nineteen states, roughly thirty student PSR chapters at medical and public health schools, and national and chapter staff. PSR works to reduce toxic contamination, and to that end has worked for several years to educate health professionals about the toxic constituents found in coal ash, the nature of coal ash disposal, the pathways by which coal ash toxicants may escape from disposal sites, and the health consequences that may result from exposure. PSR has prepared educational materials on coal ash and has engaged its members in states across the nation in educating their communities, speaking to the mass media, and testifying publicly about the health imperatives of secure coal ash disposal.

18. Plaintiff Prairie Rivers Network ("PRN"), a nonprofit organization and a state affiliate of the National Wildlife Federation, is Illinois' statewide leader in river protection, conservation, and restoration. With over 700 members and 1,200 supporters in Illinois, PRN has been a leader in fighting water pollution from coal mining and coal ash in Illinois. PRN, in collaboration with its partners, has researched coal ash disposal practices in the state and revealed the alarming lack of oversight of Illinois' eighty-three power plant coal ash impoundments and numerous other disposal and reuse operations. PRN has shared this information, in concert with affected communities, with state and national regulators and elected officials in order to advocate for solutions.

19. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. The Sierra Club is a nonprofit, membership organization

incorporated in California with more than 700,000 members in all fifty states and the District of Columbia. The Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. For over ten years, the Sierra Club has worked at both the local and national levels to address the ongoing problem of water and air quality impairment from coal ash landfills and impoundments. The Club's advocacy has involved efforts to close and clean up existing impoundments as well as litigation involving discharges from coal ash waste sites into ground or surface water.

20. Plaintiff Southern Alliance for Clean Energy ("SACE") has over 100 members in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee, as well as members outside of the Southeast. SACE engages on the state, federal and utility levels to advocate for better coal ash management and to reduce the region's dependence on coal-fired power. SACE responded immediately to the Kingston ash disaster in Roane County, Tennessee in 2008. Since that time SACE brought impacted citizens to Washington, D.C. to tell Congress about their first-hand experience with coal ash. SACE staff developed comprehensive comments on EPA's proposed coal ash rule, organized a citizen's public hearing on the proposed federal rule in Roane County, was instrumental in bringing a formal public hearing to Knoxville, and organized press and public events around both hearings. SACE staff are also engaged in a number of administrative permitting challenges within the service area of TVA and are closely monitoring the TVA's transition from wet to dry coal ash handling. Through the development of a website to catalogue and provide detailed information on all of the coal ash surface impoundments in the Southeast, SACE hopes to stimulate action among local

citizens, Riverkeepers and others in response to the serious risk that improper coal ash waste management poses to public health and the environment.

21. Plaintiffs and their members have been and, unless the relief prayed for herein is granted, will continue to be adversely affected by the failure of the EPA to comply with RCRA, the purpose of which is to promote the protection of human health and the environment by assuring that both solid and hazardous waste management is conducted responsibly. The EPA's failure to review and revise regulations pertaining to coal ash, open dumping and proper characterization of waste according to statutorily mandated timeframes increases the likelihood that Plaintiffs' members and their environment will be injured by unsafe waste management practices that lead to contamination from wastes and hazardous pollutants.

22. Members of Plaintiffs' groups live near coal ash disposal sites that operate without safeguards to prevent the release of hazardous substances and other pollutants, because such safeguards are not required by EPA regulations. Consequently, Plaintiffs' members are exposed to hazardous constituents in coal ash that contaminate soil, air and/or water. The EPA's failure to review and revise existing regulations that fail to address the recognized risks posed by coal ash, increases the exposure of Plaintiffs' members to highly toxic pollutants that endanger their health.

23. Plaintiffs' members have an interest in protecting their own health, the health of their children, and the health of their communities. The Defendant's failure to timely review and revise regulations governing the management of coal ash, as required by section 2002(b) of RCRA, increases the risk to Plaintiffs' members of exposure to contaminants in solid waste and/or increases and prolongs Plaintiffs' members' ongoing exposure to such contaminants and their associated risk of adverse health effects accordingly.

24. The health effects from exposure to the contaminants in coal ash and other solid wastes released by facilities that generate, transport, store, or dispose of solid waste include cancer, birth defects, reproductive disorders, damage to the brain and nervous system, damage to the respiratory system, and other illnesses.

25. Plaintiffs' members use the rivers, landscapes, and watersheds near facilities that generate, transport, store, or dispose of coal ash or other solid waste for recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual purposes. Plaintiffs' members derive—or, but for the presence of coal ash and other solid wastes, would derive—recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual benefits from their use of such places. The past, present, and future enjoyment of these benefits by Plaintiffs and their members has been, is being, and will continue to be irreparably harmed by the Defendant's disregard of her statutory duties.

26. Defendant Lisa P. Jackson is the Administrator of the EPA and in that role is charged with the duty to review regulations and revise such regulations, as necessary, according to the schedules set forth in RCRA.

FACTUAL BACKGROUND

A. The Threat Posed by Unsafe Disposal of Coal Ash

27. Each year, more than 650 power plants in the U.S. burn over one billion tons of coal and, as a result, generate approximately 141 million tons of coal combustion waste or "coal ash." Most of the coal ash, comprised of fly ash, bottom ash, boiler slag and flue gas desulfurization sludge, is disposed of in unlined or inadequately lined surface impoundments (ponds), landfills, structural fills and mines.

28. The EPA has identified forty-one heavy metals and other polluting substances in this waste stream. According to the EPA, the contaminants of most concern in coal ash are

antimony, arsenic, barium, boron, beryllium, cadmium, chromium, lead, mercury, molybdenum, nickel, selenium, silver, and thallium. *See* 75 Fed. Reg. 35,128, 35,153 (June 21, 2010). As EPA's Toxic Release Inventory reveals, electric utilities, through land disposal, release the second largest volume of toxic chemicals of all industry sectors tracked. In 2010 alone, the total releases to land of toxic chemicals from fossil fuel electric generating facilities exceeded 304 million pounds. U.S. EPA, TRI Explorer--Facility Report, http://iaspub.epa.gov/triexplorer/tri_release.facility (2010).

29. Approximately 39 percent of the coal ash disposed annually is placed in surface impoundments, the majority of which (about three-quarters) are unlined or inadequately lined. *See* 75 Fed. Reg. at 35,151. The EPA has determined that there are at least 676 coal ash surface impoundments currently operating in the U.S., and the Agency estimates that there are at least 337 operating landfills, of which a significant portion also are unlined. *See* U.S. EPA, Information Request Response from Electric Utilities, Database of Survey Responses, Database Results, http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm; U.S. EPA, Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry, 63 (Apr. 2010). The exact number of structural fills (often unlined gravel quarries) and fills in active and abandoned coal mines (always unlined) is not known, but there are at least many hundreds of fill sites. According to the U.S. Department of Energy in 1993, there are also over 750 "retired" coal ash impoundments and landfills. *See* U.S. Dept. of Energy, Coal Combustion Waste Management Study, ES-1 (Feb. 1993).

30. Toxic metals pollution from coal ash commonly occurs when leaks, seeps, and other failures in surface impoundments, landfills and fill projects allow coal ash-contaminated

water to drain into groundwater and lakes, rivers and streams, either directly or when these surface water bodies are hydrologically connected to surface water. Toxic pollution also occurs when coal ash is placed directly in contact with groundwater. The EPA and environmental groups have identified 156 sites in thirty-four states where coal ash has polluted groundwater and/or surface water. In addition, at twenty-nine more facilities in sixteen states, electric generating utilities have admitted finding coal ash contaminants in groundwater at levels that exceed federal drinking water standards or state groundwater criteria. In fact, levels of toxic metals such as arsenic in groundwater near coal ash disposal sites can exceed the EPA's threshold for hazardous waste. Due to the large volume of coal ash disposed and the frequent absence of liners, it is likely that many more sites are contaminated by coal ash, but since the majority of coal ash disposal sites are not adequately monitored, the release of contaminants is not readily detected.

31. The EPA has listed four contaminated coal ash disposal sites on the Superfund National Priorities List ("NPL"). *See* 75 Fed. Reg. at 35,172. The NPL is the list of the most dangerous hazardous waste sites that the EPA has identified for long-term remedial action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 42 U.S.C. §§ 9601 et seq.

32. The release of toxic contaminants from coal ash disposal sites is common because federal regulations do not require the use of specific controls such as liners, caps, groundwater monitoring systems, and leachate collection systems. A number of states require some controls, but basic safety requirements are often missing. For example, according to the EPA, 36 percent of the states do not have minimum liner requirements for coal ash landfills, and 67 percent do not have liner requirements for coal ash surface impoundments. 75 Fed. Reg. at 35,133. In addition,

a substantial number of coal ash-generating states do not require all landfills and ponds to monitor groundwater to detect toxic releases, install leachate collection systems to control contaminant migration, take timely corrective action to remediate contamination, maintain financial assurance to pay for cleanup and closure, and regularly inspect coal ash ponds for leaks and stability.

33. Many of the toxic chemicals in coal ash pose serious health risks when released into the environment, some in very low concentrations. Arsenic is a known human carcinogen that causes cancer of the skin, bladder, and lungs. Boron exposure can cause stomach, intestinal, kidney, liver, and brain damage, negative effects on male reproduction, and even death. Cadmium exposure can result in diarrhea, stomach pains, severe vomiting, bone fracture, adverse reproductive effects, nerve damage, and immune system damage. Chromium is a known carcinogen and may also cause irritation and ulcers of the stomach and small intestine, sperm damage, and skin ulcers. Lead is a very potent neurotoxicant that can cause developmental delays, hypertension, reduced hearing acuity, impaired hemoglobin synthesis, and male reproductive impairment. Mercury is also a neurotoxicant, and exposure can result in developmental abnormalities, reduced IQ, mental retardation, and behavioral problems. Methylmercury can accumulate to high concentrations in fish and become a major pathway for human exposure to mercury. Molybdenum exposure can result in excess fatigue, headaches and joint pains, and chronic ingestion can cause diarrhea, slowed growth, low birth weight, infertility, and lung, kidney, and liver damage in animals. Exposure to high levels of thallium can result in adverse nervous system effects such as numbness of extremities, and ingestion can lead to vomiting, diarrhea, and temporary hair loss, along with adverse effects on the lungs, heart, liver, kidneys, and reproductive system.

34. Other metals present in coal ash pose additional risks to humans and aquatic organisms. Selenium, for example, is a bioaccumulative pollutant that is harmful to freshwater fish and other aquatic life at very low levels. Selenium at more elevated levels impedes the growth and survival of juvenile fish, and offspring of adult fish that were exposed to excessive selenium suffer skeletal deformities. Selenium can decimate fish populations and make the surviving species unsafe to eat. In humans, exposure to selenium can cause hair and fingernail loss, numbness in extremities, and problems with circulation. The EPA has documented widespread ecosystem damage in water bodies by selenium contamination from coal ash dumps, including the killing of nearly all species of fish from one impacted lake, the deformity or death of fish and amphibians in streams and rivers, and the restriction of fishing due to high selenium levels in fish in several reservoirs. *See* 75 Fed. Reg. at 35,234-9.

35. In 2007, the EPA completed a draft risk assessment on the management of coal ash in landfills and surface impoundments. The EPA found that people living near unlined coal ash surface impoundments have as much as a nine in 1000 chance of getting cancer from drinking water contaminated by arsenic. This risk is 900 times greater than the EPA's regulatory goal of reducing cancer risk to one in 100,000. *See* U.S. EPA, Human Health and Ecological Risk Assessment of Coal Combustion Wastes (draft), ES-1 (Aug. 2007). In 2010, after peer review of the 2007 assessment, the EPA released a second draft of the risk assessment finding an even higher cancer risk from arsenic. U.S. EPA, Human Health and Ecological Risk Assessment of Coal Combustion Wastes (draft) (Apr. 2010). In this risk assessment, the EPA determined that people living near some unlined coal ash impoundments have a one in fifty risk of cancer from drinking water contaminated by arsenic. This risk is 2,000 times the EPA's regulatory goal. *Id.* at ES-5, ES-8. The 2010 risk assessment also identified significant risks to human

health and ecological receptors from disposal of coal ash in unlined and clay-lined landfills and surface impoundments, including substantial risks of injury from antimony, boron, cadmium, lead, molybdenum, selenium and thallium. *Id.* at ES-4 to ES-10.

36. From 2006 to 2009, the EPA's Office of Research and Development ("ORD") published three reports concerning the increased toxicity of coal ash as a result of the use of emission control equipment at coal-fired power plants in a "holistic approach to account for the fate of mercury and other metals in coal throughout the life-cycle stages of [coal ash] management." U.S. EPA, Characterization of Coal Combustion Residues from Electric Utilities Using Wet Scrubbers for Multi-Pollutant Control, EPA-600/R-08/077, xii (July 2008). In its third report in 2009, the ORD's leaching data indicated multiple chemicals of concern where contaminant levels in coal ash leachate greatly exceeded federal drinking water levels and, in the case of arsenic, barium, cadmium, chromium and selenium, the coal ash leachate exceeded the toxicity characteristic levels for hazardous waste. *See* U.S. EPA, Characterization of Coal Combustion Residues from Electric Utilities—Leaching and Characterization Data, EPA/600/R-09/151, viii-xiv (Dec. 2009).

37. In 2009, the EPA completed a screening assessment of the inhalation risks posed by disposal of coal ash in landfills to determine whether the National Ambient Air Quality Standards ("NAAQS") for particulate matter could be violated at such landfills. The EPA concluded that there was a "strong likelihood that dry-handling would lead to the NAAQS being exceeded absent fugitive dust controls." U.S. EPA, Inhalation of Fugitive Dust: A Screening Assessment of the Risks Posed by Coal Combustion Waste Landfills (draft), 11 (Sept. 2009). The report found that daily dust controls, which EPA regulations do not currently require, are necessary to control the "excess levels of particulates" resulting from coal ash landfill operations.

Id. at 12. According to the EPA, particle pollution, especially fine particles, contains microscopic solids or liquid droplets that can lodge deep into the lungs and cause serious health problems. Numerous scientific studies have linked particle pollution exposure to a variety of problems, including decreased lung function, asthma, bronchitis, irregular heartbeat, and premature death in people with heart or lung disease.

38. In short, a wealth of data, much of which the EPA has itself compiled, demonstrates the serious and increasing risks posed by coal ash to air and water quality and consequently to human health and aquatic ecosystems. Such data include extensive documentation of damage that has already occurred to water quality near coal ash dump sites across the country. *See* 75 Fed. Reg. 35,234-9.

B. Threats Posed by Catastrophic Failure of Ash Ponds

39. Failure of the earthen impoundments that hold back millions of tons of coal ash around the country poses another catastrophic risk. Most of the nation's nearly 700 coal ash impoundments are very large (over twenty-five feet high), and over 80 percent of the ponds are over twenty-six years old, with nearly 150 ponds built over forty years ago. *See* U.S. EPA, Information Request Response from Electric Utilities, Database of Survey Responses, Database Results (May 2011) http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm. Many of the impoundments were not designed, constructed or maintained by professional engineers. *Id.* About fifty coal ash impoundments in the U.S. are rated "high hazard" according to the National Inventory of Dams ("NID") criteria. *Id.* Dams assigned the high hazard classification are those where failure or mis-operation is likely to cause loss of human life. Another 181 coal ash impoundments are rated "significant hazard," which means that a dam

failure or mis-operation is likely to cause economic loss, environmental damage, disruption of lifeline facilities, or other significant adverse impacts. *Id.*

40. Between 2002 and 2008, there were four major spills of coal ash from surface impoundments at three plants, including a two million gallon spill at Plant Bowen in Euharlee, Georgia; a release of over 100 million gallons from the Martin's Creek Power Plant in Martins Creek, Pennsylvania; and two spills of thirty million gallons each at the Eagle Valley Generating Station in Martinsville, Indiana. *Id.*

41. On December 22, 2008, a six-story high earthen dam impounding approximately nine million tons of coal ash collapsed at the TVA's Kingston Fossil Plant, flooding 300 acres of river and adjacent properties with one billion gallons of toxic sludge. The torrent of waste damaged twenty-six houses, carrying one house forty feet downhill with a man inside. The volume of waste released by the disaster was five times larger than the BP oil spill of 2010 and constitutes the largest waste spill in U.S. history. The disaster destroyed the local community, permanently displaced dozens of families, and required a multi-year cleanup, which is still not complete and is currently estimated to cost more than $1.2 billion.

42. A second major coal ash spill occurred on November 1, 2011, when 25,000 tons of coal ash from a decades-old landfill on a bluff above Lake Michigan collapsed at a We Energies power plant in Oak Creek, Wisconsin. The collapse left a debris field 120 yards long and eighty yards wide at the foot of the bluff and resulted in thousands of tons of coal ash fouling Lake Michigan. Inspections by the EPA between 2009-2011 of the nation's coal ash ponds confirmed that many of the ponds might pose a danger to human health and the environment. The EPA gave approximately 25 percent of the 410 ponds inspected (103 impoundments) a "poor" rating, indicating that repairs were needed and/or documentation was not available to

confirm the structural stability of the impoundments. Almost two-thirds of the poor-rated ponds (sixty-five) were high-hazard or significant-hazard impoundments. *See* U.S. EPA, Coal Combustion Residuals Impoundment Reports, Summary Table for Impoundment Reports (Oct. 2011), http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/index.htm.

C. The EPA's Failure to Regulate Coal Ash

43. Three weeks after the billion gallon-coal ash spill in Tennessee in 2008, Lisa Jackson, President Obama's choice to head the EPA, stated her intention to review immediately coal ash disposal sites across the country at her Senate confirmation hearing on January 14, 2009.

44. On March 9, 2009, in her new capacity as EPA Administrator, Ms. Jackson issued a statement assuring the public that the Agency was "moving forward quickly to develop regulations to address the management of coal combustion residuals." The statement declared that the EPA anticipated "having a proposed rule ready for public comment by the end of the year." At the end of 2009, however, the EPA had yet to publish a proposed coal ash rule.

45. On June 21, 2010, the EPA published a "bi-proposal" for coal ash, consisting of two sets of proposed rules, one under subtitle C of RCRA, which governs hazardous waste, and a second under subtitle D of the Act, which governs solid waste. *See* Hazardous and Solid Waste Management System; Identification and Listing of Special Waste; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128.

46. Approximately eighteen months later, in lieu of issuing a final rule, the EPA published a Notice of Data Availability that solicited additional public comment on the proposed rule. *See* 76 Fed. Reg. 197 (Oct. 11, 2011). To date, the EPA has issued no final coal ash rule.

STATUTORY BACKGROUND

47. Congress passed the Resource Conservation and Recovery Act in 1976, amending the Solid Waste Disposal Act (P.L. 89-272, 79 Stat. 992) to establish a comprehensive federal program to regulate the handling and disposal of solid waste. *See* 42 U.S.C. § 6901. Congress recognized that, as a result of regulation under the Clean Air Act, the Clean Water Act, and other laws, industry was generating more toxic sludge and other pollution treatment residues that required proper disposal. *See id.* § 6901(b)(3). Further, Congress recognized that inadequate and environmentally unsound practices for the disposal of such solid wastes were responsible for air and water pollution that posed an unacceptable threat to human health and the environment. *See id.* The Act was to ensure that such solid wastes were handled responsibly and did not re-enter the environment.

48. The goal of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by ensuring the safe treatment, storage and disposal of solid waste. *See* 42 U.S.C. § 6902. To achieve this goal, the Act requires that the EPA, among other things: prohibit "open dumping" on the land and close existing open dumps; provide for the management and disposal of hazardous waste in a manner that protects human health and the environment; and promulgate guidelines for responsible solid waste collection and disposal practices. *Id.* §§ 6902(b)(a)(3)- (5), (8).

49. To achieve these objectives, the Act authorizes the EPA Administrator to prescribe regulations as necessary to accomplish the goals of the Act. *See id.* § 6912(a)(1).

50. To ensure that regulations reflect emerging risks to human health and the environment as well as advances in technology and waste management practices, section 2002(b)

of RCRA requires that each regulation promulgated under the Act "shall be reviewed and, where necessary, revised not less frequently than every three years." *Id.* § 2002(b) (emphasis added).

51. Section 2002(b) imposes a mandatory obligation on the EPA to take action in accordance with the three-year statutory deadline. The EPA cannot skirt its statutory responsibilities and must either: (1) complete its review and make a determination that revision is not necessary, or (2) complete its review, make a determination that revision is necessary, and issue revised regulations within the statutory deadline. Under section 2002(b), the EPA must perform this duty every three years. *Id.* § 2002(b).

REGULATORY BACKGROUND

52. In 1980 and 1979, the EPA promulgated regulations addressing coal ash under subtitle C and subtitle D of RCRA, respectively. *See* 40 C.F.R. § 261.4(d) and 40 C.F.R. Part 257, subpart A.

53. The EPA promulgated the regulation governing coal ash under subtitle C of RCRA following Congress' passage of the Solid Waste Disposal Act Amendments of 1980, Public Law 96-482, which amended RCRA. Section 3001(b)(3)(A)(i) of that Act, commonly referred to as the Bevill Amendment, temporarily exempted coal ash from hazardous waste regulation until further study was completed. 42 U.S.C. § 6921(b)(3)(A)(i). At the same time, section 8002(n) of the Act required the EPA to study coal ash and submit a report to Congress evaluating the adverse effects on human health and the environment from the disposal and utilization of these wastes by October 1982. 42 U.S.C. § 6982(n). Lastly, section 3001(b)(3)(C) required the EPA to make a regulatory determination within six months of completing the report

to Congress as to whether coal ash warranted regulation under RCRA subtitle C or some other set of regulations. 42 U.S.C. § 6921(b)(3)(C).

54. The EPA codified the Bevill exemption in 1980 at 40 C.F.R. § 261.4(b)(4). 45 Fed. Reg. 33,084, 33,089 (May 19, 1980). Section 261.4(b)(4) states that "fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste, generated primarily from the combustion of coal or other fossil fuels" are "not hazardous waste." *Id.* This regulation was intended to remain in effect pending the EPA's determination whether subtitle C regulation was warranted.

55. Although the EPA missed by many years the deadlines set out in the statute, the EPA undertook the required consideration of coal ash in response to lawsuits and published its first report to Congress on coal ash in 1988 and a second report to Congress in 1999. *See* U.S. EPA, Report to Congress on Wastes from the Combustion of Coal by Electric Utility Power Plants (EPA530-SW-88-002) (1988); U.S. EPA, Report to Congress: Wastes from the Combustion of Fossil Fuels (EPA530-SW-99-010) (1999).

56. Following its 1999 Report to Congress, the EPA published its final determination regarding the need for coal ash regulation in May 2000. *See* U.S. EPA, Final Regulatory Determination on Wastes from the Combustion of Fossil Fuels, 65 Fed. Reg. 32,214 (May 22, 2000). The EPA's May 2000 Final Determination concluded that while regulation under subtitle C of RCRA was not warranted "at this time," it was nevertheless "appropriate to establish national regulation under non-hazardous waste authorities for coal combustion wastes disposed in landfills and surface impoundments." *Id.* at 32,221. In other words, the EPA's Final Determination in 2000 concluded: (1) subtitle C (hazardous waste) regulation of coal ash was not warranted in 2000, but under certain conditions specified in the determination, it could become

necessary; and (2) revision of subtitle D regulations was in any case immediately required with regard to disposal of coal ash in landfills and surface impoundments.

57. In light of this determination, the EPA officially reported its intent to issue a Notice of Proposed Rulemaking ("NPRM") on "standards for the management of coal combustion wastes generated by electric power producers" in September 2001 and further stated that a "Final Action" would be completed in August 2002. Statement of Regulatory and Deregulatory Priorities, 65 Fed. Reg. 73,453, 73,474 (Nov. 30, 2000). According to the EPA's regulatory agenda, such action would constitute the "development of proposed and final RCRA subtitle D regulations for the management of coal combustion wastes in landfills and surface impoundments." *Id.* The EPA, however, did not publish a NPRM in September 2001, nor did the Agency publish a final rule in August 2002.

58. Instead, the EPA continued to publish semiannual regulatory agendas from 2000-2011 wherein the Agency repeatedly acknowledged that revision of regulations addressing coal ash was needed. However, in each regulatory agenda, the EPA extended the projected dates for promulgation of the NPRM year after year. The following table displays the EPA's regulatory agendas and the projected dates of publication of a NPRM and "Final Action" addressing coal ash in landfills and surface impoundments.

Regulatory Agenda	**Agenda Stage**	**NPRM**	**Final Action**
Fall 2000	Proposed Rule Stage	9/2001	8/2002
Spring 2001	Proposed Rule Stage	12/2001	
Fall 2001	Long-term Actions	3/2003	
Spring 2002	Proposed Rule Stage	3/2003	
Fall 2002	Long-term Actions	1/2004	
Spring 2003	Long-term Actions	8/2004	
Fall 2003	Proposed Rule Stage	8/2004	
Spring 2004	Long-term Actions	3/2007	
Fall 2004	Long-term Actions	4/2006	
Spring 2005	Long-term Actions	7/2006	

Fall 2005	Proposed Rule Stage	8/2006	
Spring 2006	Long-term Actions	5/2007	
Fall 2006	Prerule Stage	12/2006	
Spring 2007	Prerule Stage	5/2007	To be determined
Fall 2007	Long-term Actions	To be determined	
Spring 2008	Long-term Actions	To be determined	
Fall 2008	Long-term Actions	To be determined	
Spring 2009	Proposed Rule Stage	12/2009	
Fall 2010	Long-term Actions	6/21/2010	To be determined
Spring 2011	Proposed Rule Stage	6/21/2010	To be determined
Fall 2011	Long-term Actions	6/21/2010	To be determined

59. After the fall of 2000, the EPA refrained from establishing a target date for "Final Action," and, to date, there has been none. Coal ash continues to be exempted from regulation as a hazardous waste pursuant to 40 C.F.R. § 261.4(d), as promulgated in May 1980, and the subtitle D regulations have not been revised.

A. Subtitle D Regulations and the EPA's Determination of the Need for Revision

60. The subtitle D regulations that are currently applicable to coal ash disposal, and, according to the EPA, in need of revision, are contained in the Criteria for Classification of Solid Waste Disposal Facilities, promulgated in 1979. *See* 40 C.F.R. Part 257, Subpart A. *See* 44 Fed. Reg. 53,438 (Sept. 13, 1979). These criteria broadly define the practices that distinguish "open dumps" from sanitary landfills. *See id.* Coal ash disposal sites not meeting the standards set forth in 40 C.F.R. Part 257 are classified as open dumps and are prohibited under RCRA section 4005(a). 42 U.S.C. § 6945(a).

61. The Part 257 subpart A criteria, however, include only general environmental performance standards. The criteria include regulations broadly addressing surface water (§ 257.3–3), groundwater (§ 257.3–4) and air (§257.3-7). On September 23, 1981, the EPA amended sections 257-3-3, 257.3-4 and 257.3-7. *See* 46 Fed. Reg. 47,048 (Sept. 23, 1981). The

EPA also amended Appendix I of 40 C.F.R. Part 257 in 1991. *See* 56 Fed. Reg. 50,978, 50,998-9 (Oct. 9, 1991). The EPA amended section 257-3-4 with regard to the disposal of sewage sludge on February 19, 1993. *See* 58 Fed. Reg. 9248, 9386. The EPA has not published any further revisions to these subpart A regulations since 1993, and the Agency has never revised these provisions to address the regulatory gaps it has identified with respect to coal ash.

62. Instead, the Agency has acknowledged, in its final determination and each year semiannually since 2000, the need to establish national regulations requiring specific "adequate controls" for coal ash disposal. 66 Fed. Reg. 62,358, 62,361 (Dec. 3, 2001). For example, EPA has acknowledged that the existing subtitle D regulations are inadequate as follows:

a. Section 257.3-4 (Protection of Groundwater). Although the regulation prohibits groundwater contamination beyond the solid waste boundary for particular listed contaminants, section 257.3-4 fails to (1) establish contaminant limits for common coal ash constituents; (2) require liners or specify any design standards to prevent hazardous releases; (3) mandate monitoring to detect groundwater contamination; and (4) require corrective action to address pollution once detected.

b. Section 257.3-3 (Protection of Surface Water). Although Section 257.3-3 prohibits the release of pollutants directly to surface water, it does not address pollution of surface water from hydrologically connected groundwater.

c. Section 257.3-7 (Protection of Air). Section 257.3-7 does not require daily cover at coal ash disposal sites or require any other means to control fugitive dust, nor does it require a final cover to be installed at coal ash disposal sites after disposal ceases.

63. As long ago as 1988, the EPA acknowledged significant deficiencies in section 257.3-4 (protection of groundwater) for all solid wastes. Specifically, the EPA acknowledged that "existing federal and state subtitle D regulations are inadequate" because they lack "essential requirements," including the total absence of groundwater monitoring requirements. *See* U.S.EPA, Report to Congress: Solid Waste Disposal in the United States, Volume 1, ES-2 (1988). In addition to the absence of monitoring requirements, the Agency's 1988 Report to Congress also noted the absence of corrective action requirements in the criteria, as well as any provisions addressing closure, post-closure care and financial responsibility. *Id.* at 43. Despite the deficiencies noted in the 1988 Report to Congress, the EPA has not revised section 257.3-4 to include these requirements.

64. In 1991, the EPA further acknowledged that section 257.3-4 contained a reference to an outdated primary drinking water standard. *See* 56 Fed. Reg. at 50,998-99. Specifically, section 257.3-4 defines contamination as exceedance of the primary drinking water contaminants listed in Appendix I of the regulation. Yet, pursuant to section 257.3-4, the federal maximum contaminant levels ("MCLs") set forth in Appendix I for metals and metal compounds are frozen in time at the levels established by the EPA in 1979. *See* 44 Fed. Reg. at 53,460. Notably, in a 1991 Federal Register notice, the EPA acknowledged that Appendix I did not incorporate changes to the MCL for lead established by the Agency in a drinking water regulation promulgated in 1991. *See* 56 Fed. Reg. 26,460 (June 7, 1991). The EPA explicitly stated that it would "propose necessary changes" to Appendix I after completing an evaluation of how to incorporate the MCL revision. 56 Fed. Reg. at 50,999. The EPA, however, has never revised the regulation, nor has it incorporated additional changes to the MCLs in Appendix I for arsenic and cadmium, which were revised in 2001 and 1991, respectively.

65. Since 1979, the EPA also has acknowledged a substantial deficiency in section 257.3-3, the regulation protecting surface waters from nonhazardous waste disposal. Section 257.3-3(c) prohibits non-point source pollution that violates applicable legal requirements implementing an area-wide or statewide water quality management plan under section 208 of the Clean Water Act. *See* 40 C.F.R. § 257.3-3(c). In 1979, in the preamble to the Part 257 criteria, the EPA noted that some state plans do not address releases from land disposal units, and the EPA promised to revisit the standard if necessary. The Agency wrote, "EPA is also aware that not all 208 plans will have addressed the nonpoint source pollution problems presented by solid waste disposal. EPA intends to explore this problem further to determine whether uniform national guidance is needed..." 44 Fed. Reg. at 53,445. The EPA, however, has never reviewed section 257.3-3(c) to assess the impact of these "leachate seeps" to surface water, which were identified over thirty years ago as a source of surface water contamination from solid waste disposal units.

66. Since 2000, in lieu of revising the exemption for coal ash set forth at 40 C.F.R. §261.4(d) or revising the groundwater, surface water or air regulations applying to coal ash in 40 C.F.R. Part 257, subpart A, the EPA continued to consider several issues identified in its May 2000 Final Determination. In the Determination, the Agency acknowledged that new information might compel a new determination that hazardous waste classification of coal ash is warranted. *See* 65 Fed. Reg. at 32,220-1, 32,221-2. In fact, the EPA's research, undertaken from 2006 to 2009, further demonstrated the need for revisions to current regulations and provided support for hazardous waste regulation of coal ash. Such studies included a report on the gaps remaining in state programs (2006), a documentation of 67 proven and potential "damage cases" from coal ash disposal (2007), health and ecological risk assessments (2007 and

2010), and analyses of the increasing toxicity of coal ash by the EPA's Office of Research and Development (2006, 2008 and 2009).

67. Yet even as EPA acknowledged, year after year, the risks and damage from coal ash, and in spite of two catastrophic failures at coal ash impoundments since 2008, the Agency has never completed its mandatory regulatory review under RCRA § 2002(b), much less taken action, as necessary, to revise its regulations within the timeframe mandated by the statute.

B. The EPA's Failure to Review and Revise the Toxicity Characteristic Leaching Procedure

68. Just as EPA has failed to revisit its regulation exempting coal ash from hazardous waste regulation in the face of mounting evidence that coal ash is hazardous, the Agency also has resisted revising its test for characterizing wastes as hazardous in the face of incontrovertible evidence that its current test is not credible.

69. Pursuant to the directive of Congress to "promulgate regulations identifying the characteristics of hazardous waste," the EPA in 1991 established the Toxicity Characteristic Leaching Procedure ("TCLP") to determine whether a solid waste is "toxic." 40 C.F.R. § 261.24, 42 U.S.C. § 6921(b)(1). A solid waste not specifically listed as "hazardous" by the EPA is nonetheless deemed "hazardous" if it exhibits the characteristic of toxicity. 40 C.F.R. § 261.24.

70. The EPA, other federal agencies, and state regulatory agencies have used the TCLP since 1990 to determine the degree to which toxic metals and other contaminants will leach from solid wastes pursuant to 40 C.F.R. § 261.24. For wastes such as coal ash, the TCLP has provided a basis for the EPA's final regulatory determinations to provide sweeping exemptions from regulation under subtitle C.

71. Because Congress defined hazardous waste to include any solid waste that may "pose a substantial present or potential hazard to human health or the environment *when improperly treated, stored, transported, or disposed of, or otherwise managed*," 42 U.S.C. § 6903(5)(B) (emphasis added), the EPA designed the TCLP to simulate a disposal practice that is dangerous to health and the environment and yet still plausible—the co-disposal of toxic waste in an active municipal solid waste landfill overlying a drinking water aquifer. *See* 55 Fed. Reg. 11,798, 11,807 (Mar. 29, 1990). In order to simplify the process of evaluating solid waste, the EPA chose to establish a test using only this single "plausible" disposal scenario. Many industrial wastes, however, are rarely disposed in municipal landfills.

72. The EPA designed the TCLP to determine the mobility of forty organic and inorganic contaminants present in solid waste, but only under the above-described single disposal scenario. Consequently the TCLP mimics the particular conditions (*e.g.*, a specific pH and liquid-to-solid ratio) present in a municipal solid waste landfill. The resulting leachate, the TCLP extract, is analyzed to determine the concentrations of the forty listed chemicals. *See* Office of Solid Waste, EPA, *Method 1311, in Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,* §§ 2.1, 7.3.15, 7.3.16 (3d ed.1998) (EPA Publication SW-846). According to the regulation, if any of the resulting concentrations of chemicals are equal to or greater than the concentrations listed in Table 1 of 40 C.F.R. § 261.24, then the waste is considered toxic and, consequently, hazardous. *See* 40 C.F.R. § 261.24(a). The concentration levels of the chemicals in Table 1 are equal to 100 times the maximum contaminant level (MCL) for each contaminant as it existed in 1990. Table 1 has not been revised to reflect the EPA's lowering of MCLs for numerous contaminants, including arsenic, cadmium and lead, which occurred after 1990.

73. In 1991, a year after the promulgation of the TCLP, the Environmental Engineering Committee of the EPA's Science Advisory Board ("SAB") identified significant problems with the accuracy of the leach test. The SAB released a report recommending that the EPA conduct a review of the TCLP. *See* U.S. EPA Science Advisory Board, Leachability Phenomena - Recommendations and Rationale for Analysis of Contaminant Release by the Environment Engineering Committee, EPA-SAB-EEC-92-003 (October 1991).

74. In 1999, because the EPA had not yet revised the TCLP, the SAB wrote directly to the EPA Administrator "to call [her] attention to the need to review and improve" the test. *See* U.S. EPA Science Advisory Board. Waste Leachability: The Need for Review of Current Agency Procedures, EPA-SAB-EEC-COM-99-002 (Feb. 26, 1999). The 1999 SAB commentary criticized the EPA's continued reliance on the TCLP, stating emphatically "*[t]he Committee's single most important recommendation is that EPA improve leach test procedures, validate them in the field, and then implement them.*" *Id.* at 2. (Emphasis in original.)

75. The 1999 SAB commentary also warned the EPA of the implications of legal challenges to the TCLP in which courts found that the EPA could not show a "rational relationship" of the TCLP to particular wastes. *See Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (finding the EPA's application of the TCLP to spent potliner was arbitrary and capricious); *Edison Electric Inst. v. EPA*, 2 F.3d 438, 447 (D.C. Cir. 1993) (finding no evidence "that mineral wastes were exposed to conditions similar to those simulated by the TCLP"); and *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (finding the EPA has not justified its application of the TCLP to manufactured gas plant waste).

76. Notwithstanding these recommendations and adverse rulings, the EPA has not substantively revised the regulation establishing the TCLP since 2002, when the Agency

amended the regulation pursuant to the decision in *Association of Battery Recyclers v. EPA. See id.* at 1064. In 2002, the EPA revised Section 261.24 to exempt manufactured gas plant (MGP) waste, codifying the court's decision that the TCLP may not be used for determining whether MGP waste is hazardous under RCRA. 67 Fed. Reg. 11,251 (Mar. 13, 2002). But the EPA has never revised the regulation to address the many other wastes, including coal ash, for which the test is similarly inadequate.

77. For over a decade, the EPA's Science Advisory Board and federal courts have acknowledged the TCLP's failure to predict with accuracy the level of pollutants leaching from broad categories of solid wastes. In 2006, the National Academy of Sciences ("NAS") explicitly acknowledged the inaccuracy of the TCLP for evaluating coal ash. *See* National Academy of Sciences, Managing Coal Combustion Residues in Mines, 123-24, 127 (2006). Also, since at least 2006, the EPA's own Office of Research and Development has acknowledged that the TCLP is not appropriate for testing coal ash and other solid wastes. *See* U.S. EPA, Characterization of Mercury-Enriched Coal Combustion Residues from Electric Utilities Using Enhanced Sorbents for Mercury Control, EPA-600/R-06/008, 12 (Feb. 2008).

78. Finally, while major revisions of the TCLP are warranted in response to the SAB, NAS and ORD concerns, simple revisions are also necessary for those solid wastes for which the TCLP is appropriate. Table 1 of section 261.24 provides maximum concentrations of contaminants for TCLP leachate that were established according to the MCLs in existence in 1990, when the regulation was promulgated. 40 C.F.R. § 261.24, Table 1. For several toxic metals, such as arsenic, cadmium and lead, the MCLs have been substantially lowered since 1990. Since 1990, the EPA, however, has failed to review and revise, as necessary, Table 1 in Section 261.24.

79. The EPA's failure to timely review the TCLP and revise, as necessary, has allowed all of these significant deficiencies to remain unaddressed.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. § 261.4(b))

80. Plaintiffs reallege and incorporate paragraphs 1 through 59.

81. The EPA violated section 2002(b) of RCRA by failing to review 40 C.F.R. § 261.4(b) and revise, as necessary, not less frequently than every three years. 42 U.S.C. § 6912(b).

82. As a result, the EPA failed to fulfill its rule-making obligation under section 2002(b) of RCRA with respect to coal ash. The EPA's longstanding failure to complete a review of this regulation and revise the regulation accordingly pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

SECOND CLAIM FOR RELIEF

VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. §§ 257.3-3, 257.3-4 and 257.3-7)

83. Plaintiffs reallege and incorporate paragraphs 1 through 67.

84. The EPA violated section 2002(b) of RCRA by failing to review 40 C.F.R. §§ 257.3-3, 257.3-4 and 257.3-7 for adequacy concerning coal ash and revise, as necessary, not less frequently than every three years. 42 U.S.C. § 6912(b).

85. As a result, the EPA failed to fulfill its rule-making obligation under section 2002(b) of RCRA. The EPA's longstanding failure to complete a review of these regulations as they apply to coal ash and revise the regulations accordingly pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

THIRD CLAIM FOR RELIEF

VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. § 261.24)

86. Plaintiffs reallege and incorporate paragraphs 1 through 79.

87. The EPA violated section 2002(b) of RCRA by failing to review 40 C.F.R. § 261.24 and revise, as necessary, not less frequently than every three years. 42 U.S.C. § 6912(b).

88. As a result, EPA failed to fulfill its rule-making obligation under section 2002(b) of RCRA. The EPA's longstanding failure to complete a review of this regulation and revise the regulation accordingly pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Declare that Defendant has violated the Resource Conservation and Recovery Act in repeatedly failing to meet the statutory deadlines for completing the requisite review of regulations and revising such regulations where necessary to address risks posed by coal ash;

2. Order Defendant to complete a review of the regulations applying to coal ash and the Toxicity Characteristic Leaching Procedure as soon as possible;

3. Order Defendant to issue necessary revisions of regulations in accordance with section 2002(b) of RCRA as soon as possible.

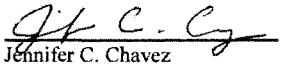
4. Retain jurisdiction of this action to ensure compliance with its decree;

5. Award plaintiffs the costs of this action, including attorney's fees; and

6. Grant such other relief as the Court deems just and proper.

DATED: April 5, 2012

Respectfully submitted,



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Counsel for Plaintiffs

Mr. SHIMKUS. The chair now recognizes Mr. Thomas Duch, City Manager, city of Garfield, New Jersey. Sir, you are recognized for 5 minutes.

STATEMENT OF THOMAS DUCH

Mr. DUCH. Mr. Chairman, committee members, I appear before you today on behalf of the people of the City of Garfield, a community of approximately 31,000 people located in south Bergen County in the State of New Jersey. We are multi-ethnic, multi-cultural and a multi-religious community. We are a microcosm of America itself.

Our city is an old industrial city filled with tired factory buildings, many of which are beyond their useful life. Many of these former industrial sites have contamination problems which are beyond the grasp of local government to handle.

Back in 1983 at the EC electroplating factory in our community, there was a spill of hexavalent chromium. 3,640 gallons of chromium were released into the Earth. Of that, 1,056 gallons were recovered, with the rest remaining in our soil.

Over the last 25 years, the NJ DEP handled this site. They made a determination in the late 1980s that no further action was required and that there were no health concerns.

In early 1993, Fire Company Number 3, located in the downstream plume of the underground water table had to be closed due to the detection of hexavalent chromium in the basement of that firehouse facility.

As we have learned, once hexavalent chromium enters a building and crystallizes, it can be dispersed into the air. Scientific evidence tells us that if you breathe that dust into your lungs, it will likely cause cancer.

Approximately 5 years ago, in the fall of 2008, I was contacted by the U.S. EPA. I was told that they were taking on the responsibility for the chromium spill in our city. My initial meeting was productive and I was impressed with the competence and the genuine interest of the EPA in helping our people. We provided them with lists of residents, property owners and tenants in an effort to get notice out to the community that the EPA would investigate and examine homes and properties in the affected area.

The EC electroplating facility is located in a densely populated section of Garfield. Within the spill area, there are approximately 600 separate parcels of property. These include one and two-family homes, multi-family dwellings, an elementary school, a daycare facility, houses of worship and industrial and commercial properties. We have approximately 6,300 separate parcels of property in our city, therefore, almost 10 percent of our community has been affected.

Notification has been made to residents in multiple languages: English, Spanish, Polish and Macedonian. We have conducted many public hearings with the EPA to provide information to our people and to answer their questions.

The EPA's team on the ground in Garfield has been exceptional. They have answered our concerns professionally, knowledgeably and competently. They have given reassurance to a scared popu-

lace, but despite that reassurance, property values in the area have declined significantly.

With the assistance of the EPA, 400 homes and properties have been examined. Contaminated properties detected to date have been cleaned up and monitoring wells have been installed throughout the affected area in order to fingerprint exactly where the contamination lies below the surface.

To get into the ground below the EC electroplating facility, demolition of the building on the surface was required. Due to safety concerns expressed by residents that chromium-tainted dust could be released from the property during demolition, an additional public hearing was held with the staff and administration of a kindergarten through fifth grade elementary school one half block from the site. That hearing included residents throughout the affected area.

The factory itself has now been demolished. The site is fenced and ready for the next phase of study to plan for the removal of the chromium that sits below ground in the water table of this neighborhood.

This phase, the analysis and cleanup phase, will absolutely require continued funding of the U.S. EPA initiative in the City of Garfield. We are a Superfund site. We are a Superfund cleanup priority. We are a community living in fear that this chromium in our water table may be impacting the health, safety and welfare of our residents. Our cleanup need is immediate.

I urge your committee to continue with the necessary funding to address Superfund sites, not only in the City of Garfield, but throughout the Nation. It is incumbent upon all of us as public officials to prioritize and to fund those budgetary requests that provide the greatest good for the people that we answer to. I respectfully request your support for all of the cleanup funding that is necessary in the City of Garfield and all other sites which present immediate health hazards to the people who live in or near them.

Thank you, Mr. Chairman, members of the committee, for giving me the opportunity to appear before this prestigious committee.

Mr. SHIMKUS. Thank you.

[The prepared statement of Mr. Duch follows:]

Statement of Thomas Duch
City Manager, Garfield, NJ
May 17, 2013

I appear before you today on behalf of the people of the City of Garfield, a community of approximately 31,000 people, located in southern Bergen County, in the State of New Jersey. We are a multi- ethnic, multi-cultural, and multi-religious community. We are a microcosm of America itself.

Our City is an old industrial City filled with tired factory buildings, many of which are beyond their useful life. Many of these former industrial sites have contamination problems which are beyond the grasp of local government to handle.

Back in 1983, at the EC Electroplating Factory located in our community, there was a spill of hexavalent chromium. Approximately 3,640 gallons of chromium were released into the earth. 1,056 gallons were recovered with the rest remaining in our soil. Over the last 25 years the NJ DEP handled this site. They made a determination in the late 1980's that no further action was required and that there were no health concerns.

In early 1993, Fire Company #3 located in the downstream plume of the underground water table had to be closed due to the detection of hexavalent chromium in the basement of that firehouse facility. As we have learned, once hexavalent chromium enters a building and crystalizes, it can be dispersed into the air. Scientific evidence tells us that, if you breathe that dust into your lungs, it will likely cause cancer.

Approximately five years ago (in the fall of 2008) I was contacted by the US EPA. I was told that they were taking on the responsibility for the chromium spill in our City. My initial meeting was productive and I was impressed with the competence and genuine interest of the EPA in helping our people. We provided them with lists of residents, property owners and tenants in an effort to get notice out to the community that the USEPA would investigate and examine homes and properties in the affected area.

The EC Electroplating facility is located in a densely populated section of Garfield. Within the spill area, there are approximately 600 separate parcels of property. These include one and two family homes, multi-family dwellings, an elementary school, a daycare facility, houses of worship, and industrial and commercial properties. We have approximately 6,300 separate parcels of property in our City. Therefore, almost 10% of our community has been affected. Notification has been made to residents in multiple languages: English, Spanish, Polish and Macedonian. We have conducted many public hearings with the EPA to provide information to our people and to answer their questions. The EPA's team on the ground in the City of Garfield has been exceptional. They have answered our concerns professionally, knowledgeably and competently. They have given reassurance to a scared populace. Despite that reassurance, property values in the area have declined significantly.

With the assistance of the EPA, 400 homes and properties have been examined. Contaminated properties, detected to date, have been cleaned up and monitoring wells have been installed throughout the affected areas (between 8 feet and 400 feet deep) in order to fingerprint exactly where the contamination lies below the surface.

To get into the ground below the EC Electroplating factory, demolition of the building on the surface was required. Due to safety concerns from residents that chromium tainted dust could be released from the property during demolition, an additional public hearing was held with the staff and administration of a K – 5 elementary school one-half block from the site, which included residents throughout the affected area. The factory itself has now been demolished. The site is fenced and ready for the next phase of study to plan for the removal of the chromium that sits below ground in the water table of this neighborhood. This phase, the analysis and clean-up phase, will absolutely require continued funding of the USEPA initiative in the City of Garfield. We are a Superfund site. We are a superfund clean-up priority. We are a community living in fear that this chromium in our water table may be impacting the health, safety and welfare of our residents.

Our clean-up need is immediate. I urge your committee to continue with the necessary funding to address Superfund sites, not only in the City of Garfield but throughout the nation. It is incumbent upon all of us, as public officials, to prioritize and to fund those budgetary requests that provide the greatest good for the people we answer to.

I respectfully request your support for all of the clean-up funding that is necessary in the City of Garfield and other sites which present immediate health hazards to the people who live in or near them.

Thank you for giving me the opportunity to appear before this prestigious committee.

[The prepared statement of Mr. Stanislaus follows:]

Testimony for the Record
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Before the Subcommittee on Environment and Economy
Committee on Energy and Commerce
United States House of Representatives

May 17, 2013

Mr. Chairman and members of the Subcommittee, we are pleased to provide testimony for today's hearing record from the U.S. Environmental Protection Agency regarding the Committee's draft legislative proposals that would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and a legislative proposal to amend the Solid Waste Disposal Act.

CERCLA SUPERFUND PROGRAM

Under CERCLA, EPA implements the Superfund Program's Remedial and federal Facilities Program that addresses risks to human health and the environment resulting from the release or threatened release of hazardous substances and pollutants and contaminants at the nation's most contaminated sites. The Superfund Remedial Program, working with our state and tribal partners, generally conducts responses to clean up non-federally owned/operated sites and oversees cleanups conducted by potentially responsible parties (PRPs). EPA's Federal Facilities Program works with federal entities to provide oversight and help ensure cleanup and long-term stewardship is carried out at federally owned/operated sites.

By listing sites on the Superfund National Priorities List (NPL), EPA identifies contaminated sites which represent the highest priority. Since 1983, EPA has listed 1,685 sites on the NPL. Of those sites, 1,361 NPL sites are considered to have current human exposure to contamination under control or falling within the levels specified as safe by EPA. In addition,

1,069 NPL sites have contaminated ground water migration under control to prevent further spread of contaminants, prevent human exposures, and prevent unacceptable discharge levels to surface water, sediments, or ecosystems. Further, at 1,145 or 68 percent of NPL sites, all cleanup remedies are in place.

The Superfund Emergency Response and Removal Program serves as the principal federal responder to many emergency events; provides response support to state, local, tribal and potentially responsible parties when their response capabilities are exceeded; and manages risks to human health and the environment. This program includes shorter-term responses intended to protect people from imminent threats posed by hazardous waste releases and sites. In addition, EPA, through its Superfund Enforcement program, supports cleanup by finding the companies or other parties responsible for contamination at a site, and requiring them to do the cleanup themselves, or reimburse the agency for cleanups funded by EPA.

LEGISLATIVE PROPOSALS

In general, the Committee's draft legislative proposals may not be necessary and could require developing a revised or new process for program operations that have proved successful over the years. The Superfund cleanup process governed by CERCLA and the National Contingency Plan (NCP) currently includes requirements for state consultation and involvement. Since the inception of the Superfund program, EPA has continually evaluated program implementation and sought ways to improve the effectiveness of the cleanup program. Working with our state and tribal partners, we have instituted a variety of program changes and reforms over the years. The agency is committed to continuing these efforts working closely with our state and tribal partners.

Federal and State Partnership for Environmental Protection Act of 2013

Consultation with States

The Federal and State Partnership for Environmental Protection Act of 2013 proposal amends Section 104 of CERCLA to add a statutory requirement that EPA consult with affected states when undertaking a removal action. As required by the NCP, EPA's current policy and practice is to consult with states prior to undertaking removal actions. During EPA and state consultation and work-planning, it is not unusual for states to request that the agency conduct a removal action. However, if enacted, we are concerned that this provision, which would be required under all circumstances, could potentially have an adverse impact on our emergency removal program by introducing potential delays when EPA needs to conduct time-critical emergency removal actions.

The proposal also amends the current CERCLA statutory requirement that EPA consult with affected states *before* determining an appropriate remedial action by shifting the consultation requirement to be initiated during the process of selecting and when selecting an appropriate remedial action. Shifting the statutory timeframe for EPA-state consultation could potentially generate uncertainty and delays into an effectively functioning process that has been in place for many years. EPA is committed to continue working closely with our state and tribal partners regarding the selection of cleanup remedies and will continue to engage in active consultation throughout the Superfund cleanup process.

State Credit for Other Contributions

Under CERCLA, a state shall receive credit for remedial action expenditures against its required share of costs (10 percent) associated with EPA funded remedial actions. The legislative proposal amends Section 104 of CERCLA to add a new provision to allow states a credit for expenditures and in-kind contributions associated with removal actions. It should be noted that there is currently no state cost-share requirement under CERCLA for EPA funded removal actions, so there is no cost share against which to apply such a credit. In addition, the proposal would also significantly broaden the state services eligible for this credit and would place an additional burden on EPA appropriated remedial cleanup funding by potentially diminishing state cost-share funding and increasing EPA's administrative costs. To help address remedial cleanup funding challenges, the FY 2014 President's budget request once again supports reinstatement of lapsed Superfund taxes to provide a stable, dedicated revenue source for the Superfund program.

State Concurrence with Listing on the National Priorities List

The proposal amends CERCLA Section 105 by adding a statutory requirement that EPA cannot list a site on the NPL if a state objects to listing. EPA's current policy and practice[1] is to not list a site without state concurrence, therefore, this legislative proposal is unnecessary. In addition, there are important policy caveats to EPA's policy that are not addressed in the legislative proposal. Under current policy, EPA reserves its right to exercise its statutory listing authority when a state is a liable party under CERCLA, when a release of hazardous substances or pollutants and contaminants have crossed state lines, or where the Agency for Toxic Substances and Disease Registry has issued a public health advisory.

[1] EPA's NPL listing policy can be found at: http://www.epa.gov/superfund/sites/npl/hrsres/policy/stcorr96.pdf

Review of Remedy Selection

The proposal amends Section 113 of CERCLA and would appear to allow states to litigate the selection of a remedial or removal action prior to the completion of cleanup. Section 113(h) of CERCLA was enacted by Congress to provide EPA and communities threatened by hazardous waste sites and spills certainty that cleanups could not be endlessly delayed by costly litigation prior to completion of the cleanup. We are concerned that federal courts would be an ill-fitting forum to decide the technical merits of a proposed hazardous waste site cleanup remedy. EPA is committed to continue working closely with our state and tribal partners regarding the selection of cleanup remedies and will continue to engage in active consultation throughout the Superfund cleanup process.

FEDERAL FACILITY ACCOUNTABILITY ACT of 2013

Federal Facilities

CERCLA Section 120 provides that federal Departments and Agencies must comply with the requirements of the Act, and are already subject to actions under CERCLA for the costs of response relating to their contribution to releases of hazardous substances at sites. In addition, CERCLA Section 120 provides that state laws concerning removal and remedial actions at non-NPL sites shall apply at facilities owned or operated by federal Departments and Agencies in the same manner and extent as any non-governmental entity. The legislative proposal amends Section 120 of CERCLA to add additional statutory requirements on federal Departments and Agencies to comply with state cleanup procedural and substantive response, containment, and remediation requirements at all facilities that are or ever have been owned by any federal entity. While these amendments to Section 120 will have a more significant impact on other federal

agencies such as the Department of Defense and the land management agencies, we note that the extension of Section 120 to facilities that were owned by federal entities at any time in the past could present a significant unfunded burden on federal agencies. In addition, there is no definition currently in CERCLA or in the legislative proposal that defines the meaning of state "containment" requirements.

The amendments to Section 120 could create the potential for competing federal-state authorities as to appropriate response actions at a site. The amendment would allow a State to issue a federal agency an administrative order under state law, and require the federal agency to comply with the State's order, even if the State's response action conflicts with a response action selected by the federal agency in accordance with other provisions of CERCLA.

In addition, the legislative proposal would make federal Departments and Agencies subject to state injunctive actions, federal employees subject to state civil penalties, and make federal employees subject to state criminal actions for any act or omission related to state procedural or substantive requirements. Further, the proposal provides for states to charge federal Departments and Agencies service fees and oversight costs for permitting, document review, inspections and monitoring, or any other assessed charges related to state response, containment, or hazardous substance activities. We believe that it is important that other federal departments and agencies be given an opportunity to express their views on these amendments because of the significant impact that it may have on their programs and their personnel.

REDUCING EXCESSIVE DEADLINE OBLIGATIONS ACT of 2013FINANCIAL Responsibility for Classes of Facilities Under CERCLA

The legislative proposal amends Section 108 of CERCLA to delete the requirement for the President (authority delegated to EPA) to identify, within 3 years of enactment of CERCLA, classes of facilities for which financial responsibility shall first be developed. EPA has complied with the identification and notice requirements which would be amended by this provision in a federal Register Notices published in July 2009[2] and December 2009. The legislative proposal also amends Section 108 by stating that financial responsibility requirements promulgated by the President (authority delegated to EPA), shall not preempt any state financial responsibility requirements existing at the time of EPA promulgated requirements. EPA has been evaluating the state preemption issue under CERCLA Section 108(b) and is committed to working with the states as we evaluate approaches for addressing financial responsibility.

Review of Regulations Under the Solid Waste Disposal Act

The legislative proposal amends Section 2002 of the Solid Waste Disposal Act to remove the requirement that EPA review solid and hazardous waste regulations no less than every three years and could potentially reduce a regulatory burden on EPA. The current statutory provision requiring review every three years can pose a significant resource burden on EPA given the complexity and volume of EPA's RCRA regulations. This issue is currently being litigated and EPA has not had the opportunity to consult with the Department of Justice on the potential impacts of this legislative proposal.

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[2] *Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements*, July 2009. See: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-SFUND-2009-0265-0001 and *Advanced notice of proposed rulemaking (ANPRM) that identified additional classes of facilities for development of CERCLA Section 108(b) financial responsibility requirement: Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements under CERCLA Section 108(b); Advanced Notice of Proposed Rulemaking, December 2009*. See: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-SFUND-2009-0834-0001

CONCLUSION

EPA remains committed to working with Congress and our federal, state and tribal partners in the Superfund program as we cleanup hazardous waste sites to protect human health and the environment. EPA is concerned that several of the draft legislative proposals could create program delays and the potential for litigation by introducing statutory uncertainty into a program that over the years has developed into an effective cleanup and response program that has produced significant human health, environmental, and economic benefits. EPA and other federal agencies would be happy to provide technical assistance upon request as the Committee continues its deliberations on the legislative proposals.

Mr. SHIMKUS. Now the chair recognizes himself for 5 minutes for 5 minutes of questioning.

Let me start with Ms. Dillen. When Earthjustice has engaged in litigation with the EPA, does Earthjustice receive compensation from the Federal Government for attorney fees and court costs?

Ms. DILLEN. Only if we prevail in a lawsuit. The Federal Government is like any other party, and if it is——

Mr. SHIMKUS. So the answer is yes. And can you give us how much you received in 2012?

Ms. DILLEN. No. I don't have that figure.

Mr. SHIMKUS. Well, can you submit that to the committee for the record?

Ms. DILLEN. Yes, I certainly can.

Mr. SHIMKUS. Great. Thank you.

Let me follow up with you. Do you have a position on any other legislation we are discussing today?

Ms. DILLEN. Not that I am prepared to discuss.

Mr. SHIMKUS. So a hearing on three pieces of legislation, so you decided just to testify on one?

Ms. DILLEN. Chairman, I was asked to address the 2002(b) issue, which I have particular knowledge about. I am not an expert on CERCLA, and wouldn't care to——

Mr. SHIMKUS. Let me ask a question as a citizen. If there is a state and has a Federal facility that has major contamination, do you think that the Federal Government should comply with the same laws that states, local communities and businesses have to abide by?

Ms. DILLEN. Chairman, I am here to testify about 2002(b), and I would prefer not to wade in to CERCLA, which is an area that requires, I think——

Mr. SHIMKUS. Thank you.

Ms. DILLEN [continuing]. Tremendous sensitivity——

Mr. SHIMKUS. Thank you.

Ms. DILLEN [continuing]. And expertise.

Mr. SHIMKUS. Mr. Duch, let me ask you that same question on just Federal facilities. If a Federal facility is in your community and it has the same type of problem as you just outlined by a private sector business, should that Federal facility have to comply with the Federal laws in your community?

Mr. DUCH. Mr. Chairman, in my opinion, a Federal facility should apply just like every other facility.

Mr. SHIMKUS. All right. Thank you very much.

Let me now go to Ms. Hanson. ECOS has adopted a resolution that it advocates clarification of the CERCLA waiver of sovereign immunity to ensure that Federal facilities are subject to appropriate state regulations. Does the Federal Facilities Accountability Act accomplish the purposes of the ECOS resolution?

Ms. HANSON. According to our understanding of the bills, we do believe that it addresses concerns expressed by the states in that resolution.

Mr. SHIMKUS. Does ECOS support the Federal and state Environment Partnership for Environmental Protection Act?

Ms. HANSON. I will have to double-check on that.

Mr. SHIMKUS. Well, that is——

Ms. HANSON. I am—yes.

Mr. SHIMKUS. The name, we have the REDO Act, the state Partnership Act and we have the Federal Accountability Act, three pieces of legislation in this oversight hearing today.

Ms. HANSON. And which one were you asking about? I am sorry.

Mr. SHIMKUS. In essence, the state Partnership Act, giving states more of a role in the whole process as——

Ms. HANSON. I am sorry. I got my pages out of order.

We addressed certain part—we agree with certain parts of the bill: the consultation with the states and the credit for state contributions.

Mr. SHIMKUS. Mr. Steers, can you describe the role states currently have in administering the CERCLA cleanup program?

Mr. STEERS. Yes. Many of the states work with the EPA on oversight and also assist the U.S. Government through cooperative agreements on doing site assessments and preliminary investigations at the very front end of the CERCLA process where we identify sites.

So the states have a role in working with U.S. EPA in identifying sites that may be at risk. We also have a role in using state Superfund contracts for the process of state input and oversight, at least to be able to offer that; not always used, but we do get that opportunity.

Mr. SHIMKUS. Do you have any decision-making authority under CERCLA?

Mr. STEERS. I will say it is very limited. And typically what—and what we would hope by these bills is that we have more authority, especially when it comes to determining whether to even put a site on the NPL, or with the remedy; especially with the selection of a remedy.

Mr. SHIMKUS. Yes. And I think you followed—that was my follow-up question. Why would that—why is it important that the states at least have some role? So it is really the NPL issue, too. You may want to more rapidly identify a location on the NPL. And correct me if I am wrong, by empowering you all, you may be able to leverage that and get a site on the NPL sooner?

Mr. STEERS. We may be able to do that. We have—states understand their sites the most and have the greatest boots on the ground with being able to identify what our priority sites are. So having the ability to suggest sites for the NPL is also something that I think we all as states would support where it is appropriate.

Mr. SHIMKUS. Great. My time has expired. The chair now yields to Mr. Tonko for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair. And, again, good morning to our witnesses. I would like to examine one legislative provision in the bills before us that may be particularly controversial.

Section 113 of CERCLA includes a statutory bar on pre-enforcement review of cleanup remedies. My understanding is that when this committee crafted the law decades ago, this was considered a very important key provision.

Mr. Miller, your testimony refers to this bar on pre-enforcement judicial review as, and I quote, one of the key provisions of the statute. Can you explain why that provision is so important?

Mr. MILLER. Certainly. The concern was that without the bar on the pre-enforcement review, anyone would be allowed to challenge an EPA decision on a remedy and thereby delay the implementation of the remedy potentially for years while the litigation runs its course. And so obviously there was a concern that responsible parties at these sites might seek to delay their obligation to clean up the site, but it could go the other way. Everybody is precluded pretty much from challenging remedies prior to their implementation, environmental groups, industry, states.

Mr. TONKO. And so is the result, then, of that perhaps added or extended hazardous and human health concerns?

Mr. MILLER. Well, because the statute bars that type of litigation, it allows the remedies to be implemented in a timely fashion, and then people can sue after the remedy has been implemented to challenge whether it was a correct decision or not, but in the meantime you have addressed the human health concerns by implementing the remedy.

Mr. TONKO. So then what problems would arise if Congress did indeed lift this bar and allowed judicial review of cleanup remedies?

Mr. MILLER. As I read the provision, any time a state has expressed an objection to a remedy, it would allow any entity to sue to block implementation of the remedy, and so at sites where that occurred cleanup could be delayed for years.

Mr. TONKO. And an increased litigation that would result?

Mr. MILLER. It would—I mean, yes.

Mr. TONKO. So, Mr. Miller, it appears that the way the proposal is drafted, even a responsible party would be able to go to court to challenge a remedy before its implementation.

Mr. MILLER. That is how I read the provision.

Mr. TONKO. And the responsible party could have a financial incentive to go to court, delay a cleanup and argue for a less protective cleanup remedy? Is that correct?

Mr. MILLER. Yes, that is correct.

Mr. TONKO. I guess someone could argue that despite those drawbacks, this provision might still be worth it if it resulted in better cleanups, but this provision would result in judges deciding the best way to clean up Superfund sites.

Does anyone on the panel think that judges would make the best technical cleanup decisions? Anyone?

Mr. MILLER. I guess it depends on the standards they are applying. Typically judges give some deference to agency decisions within the area of their expertise, but the main concern here is with the timing of the litigation and the timing of when the cleanups would happen.

Mr. TONKO. Anyone else that might have an opinion on having it fall to a judicial interpretation? Anyone?

If not, Mr. Duch, you are a city manager trying to get a site cleaned up in your community. What would be your advice to the committee when you hear that we are considering a legislative proposal that could increase litigation and in fact delay cleanups?

Mr. DUCH. My primary concern as a city manager is really the health, safety and welfare of the people who live in that area. Any litigation that would slow up the process is certainly not desired.

Anything that allows the filing of more litigation could present a problem in my community. Right now there is no litigation. We are proceeding. Litigation would slow us down.

Mr. TONKO. And, Mr. Chair, the basic policy behind Superfund is that polluters should pay for their pollution. May I respectfully share that I think we should be very careful about potentially creating new avenues for litigation that can allow polluters to delay cleanups and argue for weaker protections. They have a financial incentive to do so, but that does not align with the public interest.

With that, I yield back.

Mr. SHIMKUS. The gentleman yields back. I think we have time for one more round of—not round, but one more question before there is votes. There are 11 minutes left on the floor. So the chair now will turn to Mr. Murphy for 5 minutes.

Mr. MURPHY. Thank you, Mr. Chairman. I was assuming I wasn't going to get to, so I will pass, go to somebody else. I am still preparing my questions.

Mr. SHIMKUS. Well, for the majority time, does anyone want to seek time for the 5 minutes? Mr. Latta.

Mr. LATTA. Well, thank you, Mr. Chairman. And thanks very much for our witnesses for being here today. I really appreciate it.

And if I could start with Ms. Hanson, if I may. Kind of following along the chairman's lines, the question is, has ECOS, has it adopted a resolution regarding the fact that states are co-regulators with the Federal Government and that there should be a meaningful and substantial involvement of the state environmental agencies as partners?

Ms. HANSON. We have.

Mr. LATTA. OK. And does the Federal and state Environmental Partnership for Environmental Protection Act accomplish the purpose of the ECOS resolution?

Ms. HANSON. In that it addresses consultation with the states, it does.

Mr. LATTA. OK. And let me just ask to follow up with that, is that consultation very—you know, I came from state government. I was in the legislature for 11 years. And I was also on the receiving end. I was a county commissioner for 6 years. So I was getting it from the Federal and the state.

So does the ECOS support the Federal and state Environmental Partnership for the Environmental Protection Act? Does that——

Ms. HANSON. I didn't follow your question. I am sorry.

Mr. LATTA. OK. Does the ECOS support the Federal and state Environmental Partnership for the Environmental Protection Act?

Ms. HANSON. We support parts of the bill: the consultation, the state credit for their contributions, and placing the sites on the National Priorities List.

Mr. LATTA. OK. And following along those lines, in your testimony it notes that the EPA is not obligated to listen to state input about the remedy selection for sites on the National Priority List. And to what extent does the EPA include the states in selecting a response action?

Ms. HANSON. I believe that would vary state to state. If you wanted specific numbers or responses, I would have to get back to you.

Mr. LATTA. OK. Well, when you say it varies from state to state, is there a wide variance? Or how would you rank that?

Ms. HANSON. Again, I would have to check on exactly what that would be.

Mr. LATTA. OK. And if I could turn to Mr. Steers, if I could ask you. Do Federal agencies, including the EPA, implementing the CERCLA routinely comply with all applicable state requirements, and if not, why not?

Mr. STEERS. Well, we often identify and actually we always do identify the ARARs in the state requirements. Typically, though, the Federal agencies, especially on former use defense sites, for example, the agencies tend to use sovereign immunity as a get-out-of-jail card, if you will, trying to circumvent state requirements that may be more stringent, and especially considering them and other media such as the NPDS water programs and the Clean Air Act. So states have authorized programs and have regulatory requirements that we end up having delayed Federal actions because of debates on sovereign immunity.

Mr. LATTA. OK. But in those, who typically determines what state requirements are applicable?

Mr. STEERS. Can you repeat your question again?

Mr. LATTA. Yes. Who typically determines what state requirements are applicable?

Mr. STEERS. You know, the states are only in a position to offer these up. And at the end of the day EPA and the Federal agencies determine which ARARs that are going to be used.

Mr. LATTA. Thank you, Mr. Chairman.

Mr. SHIMKUS. Will the gentleman yield?

Mr. LATTA. I yield to the chairman.

Mr. SHIMKUS. Thank you. I had a follow-up question for Mr. Duch. I come out of local government, too. So I appreciate folks in municipalities, counties, and townships. If you were required under state statute—I assume cities in New Jersey are empowered by the state constitution, which allow you to incorporate as a city—I mean, is that correct?

Mr. DUCH. Our city is incorporated. I don't understand, Mr. Chairman.

Mr. SHIMKUS. Well, the state gives that you authority to incorporate to become a city by the state constitution.

Mr. DUCH. Correct.

Mr. SHIMKUS. So let say the state passed a law and said, City, you have to review all of ordinances every 3 years. Would that be helpful?

Mr. DUCH. It probably would be helpful. New Jersey is known for having many old, old laws——

Mr. SHIMKUS. So I can, then, call the State of New Jersey and say, I have got a city manager who says it is going to be helpful to him to review all his local ordinances every 3 years. And, if not, then people who are adverse to that would be able to take the city to court because you haven't reviewed those laws in 3 years. Is that what you are asking for?

Mr. DUCH. I am not asking for that, Mr. Chairman.

Mr. SHIMKUS. But the point of the question is one of the pieces of legislation says that the Federal Government, the EPA has to re-

view every regulation within 3 years. And if they don't, whether it is a good regulation or not, they have to review it. And, if not, then outside parties can sue them. Would you like the same type of venue for your local community?

Mr. DUCH. It would slow down our ability to run the government if there was a review process.

Mr. SHIMKUS. Yes, sir. And very costly.

Mr. DUCH. Absolutely.

Mr. SHIMKUS. And possibly litigious.

Mr. DUCH. If I had to make a choice between doing that and spending the money on the cleanup, I would spend the money on the cleanup.

Mr. SHIMKUS. Amen, brother. Thank you. I am going to recess the committee till after votes. We will reconvene about 15 minutes after the last vote. The hearing is recessed.

[recess.]

Mr. LATTA [presiding]. I would like to call the subcommittee back to order. I believe I was the last to ask questions before the recess for votes. And the next questioner on the Democratic side is the gentleman from Michigan, the chairman emeritus, Mr. Dingell is recognized.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy. These questions go to Mr. Miller of Colorado Department of Law.

Mr. Miller, relating to the amendments in Section 108 of CERCLA, how many states have promulgated the financial responsibility requirements?

Mr. MILLER. I don't know the answer to that question.

Mr. DINGELL. We will submit it for the record.

Mr. MILLER. But certainly, any state that has a RCRA program or state equivalent to RCRA, would have financial assurance for——

Mr. DINGELL. But the answer is very few, if any. Is that right?

Mr. MILLER. I am not sure.

Mr. DINGELL. OK. Let's go to the next one. I don't want to be unfair to you.

Relating to the amendment to Section 2002(b) of CERCLA, which eliminates the requirements of current law that require the Administrator to review regulations every 3 years, this requirement has been a part of the Federal law for over 30 years. Do you believe that the efforts to change this longstanding provision have anything to do with litigation relating to coal ash regulations? Yes or no.

Mr. MILLER. It is my understanding that it does.

Mr. DINGELL. Thank you. Now, sir, does anything prevent a state from obtaining funding for its activities on Superfunds and things of that sort from fees, taxes, or other revenues to clean up toxic waste sites in their state?

Mr. MILLER. They would just have to do it in compliance with whatever their state laws are.

Mr. DINGELL. So there is no obstacle in any Federal law to prevent them from doing so?

Mr. MILLER. Not that I am aware of.

Mr. DINGELL. OK. Now, if states then choose to exercise this, they have total control over the remedy selected or the removal action taken. Is that not so?

Mr. MILLER. It depends on whether the Federal Government is also acting. If the EPA——

Mr. DINGELL. No, but if the state initiates its own program, using its own funding, it can then proceed to function under its own law; right?

Mr. MILLER. That is correct.

Mr. DINGELL. Now let us draw our attention to Section 113(h). This provides new opportunity for lawsuits where a state simply writes a letter objecting to a remedy selected by the President. After such letter is posted by the state, it would allow this new—under this provision, it would allow the responsible party who polluted the site to litigate the challenge and to challenge the remedy. Is that not so?

Mr. MILLER. That is correct.

Mr. DINGELL. I believe that Ms. Dillen—I have trouble seeing—I believe you were of the same view. Is that correct?

Ms. DILLEN. Yes.

Mr. DINGELL. Thank you. Now, the next question is, would it allow an environmental group also to challenge the remedy if they could get a state to write such a letter? Yes or no.

Mr. MILLER. Yes.

Mr. DINGELL. OK. Who would, in fact, be barred from such an effort; in other words, getting the Governor to write a letter? Anybody could do it; right?

Mr. MILLER. Anybody could try to do that, yes.

Mr. DINGELL. Good. Now, in a situation where the state wants the most gold-plated remedy which might require the excavation and disposal of hundreds of tons of contaminated soil so its future operation and maintenance costs for which the state is responsible are less, could this new lawsuit provision be used to leverage the Federal cleanup decision up or down?

Mr. MILLER. It would provide the states more leverage in their discussions with EPA as to what their——

Mr. DINGELL. I am not trying to trap you, but the answer is yes, right?

Mr. MILLER. Clearly, it is trying to give the states more leverage in their negotiations with EPA.

Mr. DINGELL. Now, this also affords opportunity for the process to be delayed, does it not?

Mr. MILLER. The way that provision is drafted, because it affects the 113(h) bar on judicial review, it does——

Mr. DINGELL. So again the answer is yes?

Mr. MILLER. Yes.

Mr. DINGELL. Now, what happens to the citizens surrounding the community? Here we have a lot of folks living around the site and they are daily being exposed to these hazardous substances. And they want the site redeveloped to create jobs and to make their lives and that of their families and children more safe. So now we have a process where the decision is going to be litigated, and this can take years in the Federal court under this new lawsuit provision. Am I correct?

Mr. MILLER. Yes, it could lead to lengthy delays in cleaning up sites.

Mr. DINGELL. And one of the problems I believe with Superfund is that these things are litigated till hell freezes over; isn't that right?

Mr. MILLER. CERCLA litigation can go on for a long time.

Mr. DINGELL. And it is having a prodigious delaying effect on the cleanup of all of these poison sites and it is creating huge difficulty in terms of seeing to it that we make the progress that people desperately want in disposing of these sites, and it is costing more money. Am I right or wrong?

Mr. MILLER. Well, with the pre-enforcement judicial—the bar on pre-enforcement judicial review in place, that limits litigation that would delay cleanups. Most of the——

Mr. DINGELL. So the answer is it permits a splendid opportunity to obfuscate the process, delay the cleanup, and cost a lot more money in litigation, which is a prodigiously expensive undertaking. Right?

Mr. MILLER. Right. It would open the door to a lot more litigation.

Mr. DINGELL. Now, Ms.Hanson——

Mr. SHIMKUS [presiding]. If the gentleman would suspend. The clock got started late, and you are already 30 seconds over.

Mr. DINGELL. Am I incorrect that I have got 26 seconds?

Mr. SHIMKUS. And the clock got started late, so it is really a minute and 26. But if the gentleman wants to ask unanimous consent for an additional 30 seconds for——

Mr. DINGELL. I will accede to the wishes of the chair. I thank you.

Mr. SHIMKUS. Thank you. The chair now recognizes the gentleman from West Virginia, Mr. McKinley, for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman. Just a matter of housekeeping, Mr. Chairman, and for the panel, I think we have worked under the idea in this committee, in my time, we were to have all testimony submitted within 48 hours or prior to 48 hours before testimony. And, Ms. Dillen, were you aware of that requirement from Earthjustice, that there is a 48-hour restriction?

Ms. DILLEN. Mr. McKinley, my understanding is there was only an agreement reached late yesterday on what witnesses would be here, and I only received my invitation to testify yesterday afternoon.

Mr. MCKINLEY. So there is some reason. Because we only got your last night testimony around 7:30.

Ms. DILLEN. Yes, there is a reason.

Mr. MCKINLEY. So I didn't have a lot of chance. But I think it was interesting because quite frankly, I thought, after reading your testimony, I thought you were going to testify at a different hearing. Because it really has little to do with this hearing when 10 of the 15 pages had to do with fly ash when—and then when they quizzed you, they were—someone earlier, you didn't have expertise in all 3, but you did have about the fly ash. So I hope you come back when we talk with fly ash so we can have a meaningful, adult conversation with that.

Ms. DILLEN. I would be delighted to.

Mr. MCKINLEY. But, in the meantime, I am trying to reconcile your testimony. On page 4, you say that, "In any deadline enforcement case, the agency has ample time—" on and on—"and there is no reason to the courts will impose unworkable deadlines." But yet then in your own brief you said you think they should be forced to do it within 6 months. Can you explain that a little bit better why there is this contradiction in your testimony and in your legal brief?

Ms. DILLEN. Certainly. There isn't a contradiction. In our briefing, we take the position that EPA has had decades to come forward with revisions of the regulations that should address coal ash and has failed to do that. It has proposed a rule in 2009. We think that the agency could expeditiously wrap up this rulemaking process that has created uncertainty for everyone. Whether——

Mr. MCKINLEY. There seems to be a bit of a moving target. I am curious, I think some testimony—maybe, Mr. Duch, you mentioned it, about some of the pollutants. But the legislation that we passed four times out of here last year would have resolved a lot of the issues that you are referring to about groundwater contamination. Because under the legislation we passed, it called for new liners underneath all new impoundments that would take care of this, and called for strict requirements over dam safety and water monitoring. All the things—but yet your group opposed that. So I am just curious about that, because you seem to be wanting it both ways. When the legislation was addressing it. But I think the real sticking point, if I am correct, is over primacy. You want the EPA to control the landfills versus the House's position, and with quite a few from the other side of the aisle, we are looking for resolution by allowing the states. And the states themselves have said they are prepared to do that. So you worked against a resolution to the very problem you are addressing.

Ms. DILLEN. We want environmental protection in whatever form it comes in. The House bill would not provide it.

Mr. MCKINLEY. We gave it with putting liners underneath it and dam impoundments so we wouldn't have another Kingston. Because it wasn't what they were containing was the problem, it was a failure of a dam that collapsed that caused that.

Ms. DILLEN. Respectfully, we disagree. But that is a bill that is not before the committee today.

Mr. MCKINLEY. Thank you. So I was just curious because you came and that is all your testimony has been, about fly ash. So I am just curious to see what you know about it other than just you want it your way and not in a way the committee—because we had an earlier discussion with Administrator Stanislaus. And he showed a very positive attitude about getting this thing resolved this year. And I am very encouraged with the possibility. We may very well through bipartisan get some kind of resolution. But you seem to be stuck outside the table. I would suggest that perhaps instead of looking for perfect, if you are willing to compromise with us, we will all come to some resolution and resolve this matter and remove the stigmas associated with the recyclable materials.

My time—apparently, I have got a couple seconds. You want to respond?

Ms. DILLEN. We would certainly be interested in any action by Congress that would resolve the longstanding water pollution problems and fly ash air pollution problems and dam safety issues. So far, that has not materialized.

Mr. MCKINLEY. You understand Mr. Stanislaus already said he is trying to work with us and try to get that resolved.

Ms. DILLEN. I am sorry. I——

Mr. MCKINLEY. You are not aware that the Administrator said he is willing to work with us on a bipartisan——

Ms. DILLEN. If the Administrator is willing to work with Congress and Congress is willing to come to a solution that actually works to address coal ash, we would be the first people to endorse such a solution. So far, that solution has not materialized.

Mr. MCKINLEY. Thank you very much. Yield back.

Mr. SHIMKUS. Gentleman's time expired. Chair now recognizes the gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman.

Ms. Hanson, could you tell me how many times a site has been added to the National Priority List without the concurrence of the state of location?

Ms. HANSON. I don't have a number right off. We would have to look into that to get an actual number of times.

Mr. MCNERNEY. My understanding is there haven't been any. And I was wondering if that was because there was a tacit agreement in place or was it because of financial constraints at the EPA that states are not adding sites or not wanting to add sites to the National Priority List?

Ms. HANSON. I don't know specifically why that would be.

Mr. MCNERNEY. Well, my district has two Superfund sites. And I was going to ask your opinion on what it would take to get action on those sites. Would it take additional EPA budget money? Would it take legislation here in Congress?

Ms. HANSON. Not knowing anything about those sites and where they have fallen and looking at risk and things like that, it would be hard to make any statement on how you get those.

Mr. SHIMKUS. Would the gentleman yield? Are those on the National Priority List right now, do you know? I am just curious.

Mr. MCNERNEY. Yes, they are. In fact, I can tell you what they are, if you want.

Mr. SHIMKUS. No. I just—because part of this debate is if states have bad sites, they are trying to use this venue to get on the National Priorities List. It is not the flip side.

Mr. MCNERNEY. Reclaiming my time.

Ms. Dillen, some have claimed that the deadline set out in Section 2002(b) of the Solid Waste Disposal Act has proven impracticable and it results in an avalanche of lawsuits. As you mentioned in your testimony there has only been 3 lawsuits under that provision in the last 29 years since the law has been on the books. Do you believe that the EPA has been under excessive burdens because of this review requirement?

Ms. DILLEN. No. There is no evidence to suggest that it has been. These 3 lawsuits all relate to a single issue, and that is regulation of coal ash. And that is something that has been an issue that EPA has recognized needs to be addressed for the last two decades. And

even in that court case, EPA has said, we recognize we need to revise these regulations. And so now it is just a question of getting it done. And I would submit that without a deadline we won't see regulations to address this problem in the foreseeable future.

Mr. MCNERNEY. Thank you. Mr. Miller, you mentioned the issue of Federal financial responsibility requirements, potentially preempting state requirements. Do you believe the EPA has the discretion to address that issue under current authority?

Mr. MILLER. My understanding of the existing law is that EPA does have discretion to write rules that would meet the intent of Section 108 to provide financial assurance for releases of hazardous substances without preempting state laws that address related but separate issues, such as RCRA closure of hazardous waste impoundments, and the like, or mining bonds under state mining laws to require reclamation. But they also have the discretion to preempt.

Mr. MCNERNEY. Thank you.

Ms. Hanson, again, you have expressed support for protecting state financial responsibility requirements for hard rock mining. How many states have adopted financial responsibility requirements for hard rock mining?

Ms. HANSON. I do not have that number with me today.

Mr. MCNERNEY. You will need to get that to us, then.

Ms. HANSON. OK.

Mr. MCNERNEY. Has ECOS conducted a comparative analysis of those state requirements to know how the requirements are similar and how they are different?

Ms. HANSON. We have not.

Mr. MCNERNEY. All right. I understand that we may be marking these bills up in June. Will you commit to provide the committee that information for the record before the markup occurs?

Ms. HANSON. We will do our best to get that information as rapidly as we can.

Mr. MCNERNEY. Thank you. I yield back.

Mr. SHIMKUS. Gentleman yields back the time. Chair now recognizes the gentleman from Florida, Mr. Bilirakis, for 5 minutes.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I appreciate it very much. Thank you for holding this hearing.

There are 16 Superfund sites in or near my Florida congressional district, some of which have had the status for several years. The length of time it takes for EPA and the Florida Department of Environmental Protection to coordinate is one of the reasons the process takes so long.

This question is for Ms. Hanson and Mr. Steers. You have mentioned that EPA's coordination practices are not consistent across regions or state to state. What legislative recommendations do you suggest to ensure every state receives equitable treatment? Whoever would like to go first.

Mr. STEERS. Yes. I think in order to solve the—especially with remedy selection and being able to get some more consistency across the country by EPA regions, I think having EPA have more skin in the game, if you will, may help that concurrence be taken a little more seriously. It is not to say that they are never concurring with or they are never taking the information and the rec-

ommendations the states have, but it is not done consistently. And the results when it is not done on either poor design or performance of some of these long-term systems are saddling the states with a lot of cost, my pipe example being one. But there is many out there. And I believe if EPA had more skin in the game by—you know, if they want to minimize or marginalize a state's recommendations, then they should be on the hook for some of the long-term O&M that goes on with these sites. It is a way to ensure that the state's voices are heard for the long course of O&M that can result from not taking our comments into account during the remedy selection.

Mr. BILIRAKIS. Thank you.

Ms. Hanson.

Ms. HANSON. Yes. ECOS always advocates for a stronger state role in working on environmental issues with the Federal Government. And under the current setup, the Federal Government is only required to—is not required, actually, it is just a policy that EPA consult with the states. And we have said in our testimony that we would like it to be—we approve of it being required.

Mr. BILIRAKIS. Thank you. Ms. Hanson, you note in your testimony that providing a mechanism for states to list sites that meet the listing criteria would make certain parties more willing to negotiate with the states and resolve cleanup issues without having to use Superfund money. Can you please explain that or elaborate if you will?

Ms. HANSON. I think if sites knew that they could have a state come to them in addition to just the Federal Government, there is not just one mechanism but more than one mechanism or more than one group, that they would be more willing to talk to states. If they think it is only the Federal Government that is going to come in on a site, on a complex Superfund-type site, they are not going to talk to the states, they are going to wait for the Federal Government to come in.

Mr. BILIRAKIS. Again for Ms. Hanson. EPA has indicated that the agency has a policy of not listing its sites on the National Priorities List over the objection of the states. Is that policy applied consistently across the regions? And shouldn't it be a requirement that EPA not list a site over the objection of the state?

Ms. HANSON. We find that there are regularly variations state to state, region to region, on all sorts of work with the EPA. So having something a requirement ensures that it does occur consistently.

Mr. BILIRAKIS. Anyone else wish to comment on that?

Mr. STEERS. And I would agree. I think a lot of our states, we feel like we are being pressured through the governance concurrence process into putting sites on the NPL when, quite frankly, there are other solutions out there that could facilitate a cleanup much faster than just being in on the CERCLA process. I understand there are some EPA regions where they are actually going through looking at newspaper articles for sites that potentially could be on the NPL as a way to try to keep the ball rolling with getting sites enrolled in the program. That is why I feel, and our association feels, that having a process where you go through prioritizing the states sites and what the state knows about the

economic and environmental conditions in a community— in a previous testimony I gave in front of this committee, I mentioned that we have some success stories of watershed approaches that are used sometimes to clean up several sites without having to go through the long process on the NPL. And we had one in my former State of Ohio that I worked for, which was a very big success story, where a lot of contaminated property along the Ottawa River was actually restored and cleaned up without the Superfund stigma attached to it because all the responsible parties came together, worked together, and facilitated a cleanup on their own with the state using a voluntary cleanup program as a way to restore that watershed.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I yield back.

Mr. SHIMKUS. The gentleman's time has expired. The chair now recognizes the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman, for holding the hearing. I am glad to hear that this will be the first of at least two hearings looking at the successes and possible shortcomings of RCRA and Superfund sites. Our district in East Houston, on Harris County, Texas, has a number of Superfund sites close in proximity, including the San Jacinto Waste Pits and the U.S. Oil Recovery. With my colleague, Congress Ted Poe's support, the EPA has been conducting studies and we are in the early stages of cleaning up the San Jacinto River site. U.S. Oil Recovery site was listed as a proposed addition to the NPL in 2011. From what I have witnessed at the San Jacinto Waste Pits, I believe the EPA is making great strides in the Superfund program. However, as a form state legislator, I am sensitive to the cost Federal decisions have placed on state and local governments and hope this hearing will highlight the importance of the EPA to work with the states as closely as possible and weigh the long-term cost of remediated Superfund sites on state governments.

Mr. Miller, the national contingency plan sets out how cleanups are to be conducted. It includes an expectation that institutional controls will be used to supplement engineering controls as appropriate. In your experience, has that expectation been borne out in the Superfund cleanups?

Mr. MILLER. No. That is actually an area where there has been quite a bit of difficulty. EPA has paid increasing amounts of attention to institutional controls in recent years and has developed some policy guidance on it. But it is an issue that we struggle with, particularly at sites that are cleaned up under removal authority. And it is an issue that is always difficult at Federal facilities. Federal agencies routinely resist imposition of these institutional controls at their sites. And it is kind of a puzzling position to me because the institutional controls really don't cost very much at all. It is just creating a legally binding document and monitoring it, compliance with it. But the Federal agencies have resisted our efforts to impose it at a number of sites. We have recently had some luck with the Department of Defense, has come around. And they are happy to use a mechanism that we have in Colorado that a lot of other states don't have at DOD facilities. But we are continuing to get resistance from the land management agencies.

Mr. GREEN. The CERCLA as currently written prioritizes treatment that significantly reduces the volume, toxicity, and mobility of the contaminants over response actions that do not have that effect. It also requires a cost-effectiveness analysis of response actions, including the costs of operation and maintenance for the entire period during which such activities are required. Mr. Miller, in your experience, are these statutory requirements consistently met?

Mr. MILLER. It is a balancing act at every site.

Mr. GREEN. My experience with two sites in our area, the U.S. Oil Recovery site has been frustrating because of the—it is in Pasadena, Texas, in our district—because of the responsible party has been very unwilling, in fact has disappeared on us. So that has caused other problems.

Are these areas where we might want to conduct more oversight? And do you think that sometimes just asking the right question can result in improved performance?

Mr. MILLER. It is an issue that varies from site to site. I do think that, particularly with respect to the long-term maintenance costs—in Colorado, we are looking at paying roughly $8 million a year to operate water treatment plants at two of our larger mining sites. And over time, that O&M cost is going to eventually exceed the cost of the original remedy. So this is an issue that the states actually sued EPA over when the National Contingency Plan was promulgate in 1990 over the cost-sharing provisions. EPA wrote a rule that interpreted the statute to require the states to pay 100 percent of the operation and maintenance. And it was the states' position that the statute actually required a 90/10 cost split—90 percent Federal, 10 percent state—for both the initial cost of the cleanup as well as continued operation and maintenance. So earlier today when I referred to changing the cost share provisions, changing the allocation of O&M costs I think could encourage EPA to pay more attention to remedies that would minimize, really, the long-term costs of these sites.

Mr. GREEN. Thank you. I know I am almost out of time.

Mr. Chairman, I agree with Mr. Miller. There are existing concerns over EPA's enforcement of Superfund, particularly in light of our hearing yesterday in our Energy Committee on the President's budget cuts to the Superfund. And I think it is our subcommittee's responsibility to oversee the EPA actions. Hopefully, the EPA must work with state and local governments as closely as possible to weigh the long-term costs of the remediated sites. But taking a heavy, heavy-handed approach will only make the problem worse and open up Superfund to more litigation, which obviously doesn't help us clean up the sites.

So I appreciate the time this morning.

Mr. SHIMKUS. The gentleman yields back the time. The chair now recognizes chairman emeritus, Mr. Barton, for 5 minutes.

Mr. BARTON. Mr. Chairman, I don't have any questions. I will just make a general comment. These 3 bills to me look like common-sense efforts to reform and improve CERCLA. And I know that former Chairman Dingell seemed to have some pretty serious reservations. But hopefully we can work through those and have a good, open process in the markup and move the bills. I mean, no

Federal law was set in stone, and certainly the times have changed and some of the imperfections in CERCLA need to be changed. And I think this is good faith effort, these 3 bills, to do that. So I hope that the committee, the subcommittee can move forward in a bipartisan, open way to move these bills.

With that, I yield back or yield to you.

Mr. SHIMKUS. Gentleman yields back. Chair recognizes the gentlelady from the State of Illinois, Ms. Schakowsky, for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. Mr. Tonko asked if I would sit here.

Mr. SHIMKUS. That is great.

Ms. SCHAKOWSKY. Mr. Duch, I want to thank you for being here today. Your testimony really provided a picture of how Superfund works in the real world to protect people and communities from the risks and costs of contamination. It is so important that any changes this committee considers to Superfund builds on its success helping communities like yours instead of undermining it. That is why I really am concerned that the bills before us today actually undermine our ability to help communities like yours. Although the EPA couldn't be here, they did review the bills. And they tell us that the bills will increase litigation, divert funds, and generally delay needed cleanups.

So, Mr. Duch, how long has your town been fighting to clean up the contamination at the Superfund site?

Mr. DUCH. The spill that I spoke about earlier took place in 1983. It was managed by the New Jersey Department of Environmental Protection for the next 25 years. There was a determination made by them in the late '80s that there was really no further problem and no further concern. We were very fortunate in 2008 that the U.S. EPA was handed the case by the NJDEP. They came in. They have begun the cleanup. But my concern is, we have now fingerprinted where our problem is, but we need to clean up. And the only way we can clean up is if there is continued funding for the EPA to do that. Right now, they are doing the analysis phase to determine what is the best way to clean up. They are monitoring wells, forty-six of them, that have been drilled throughout this 600-parcel area. Those monitoring wells are between 8 feet and 400 feet deep. So the analysis is being done. But a determination needs to be made as to the best way to clean up. There are a number of alternatives that the EPA has discussed with us. They are all expensive. And every other community in the country that has a Superfund site, in particular, a site like this that is under residential properties, is threatened. So we do need help.

Ms. SCHAKOWSKY. So this is your water supply for your town?

Mr. DUCH. Our water supply is not impacted. The problem is that there is a fairly high water table in this particular area. So when the water table rises, the hexavalent chromium can seep into basements. When it seeps into basements and it dries, it crystallizes. And in that crystallized form, when it becomes airborne dust, it becomes dangerous. So the sooner we can get it out of the water table or treat it in the water table, the sooner our people will be safe.

Ms. SCHAKOWSKY. So if the money for the cleanup were just not available from the EPA, does your town have any other way to get the site cleaned up?

Mr. DUCH. Our community is—we are one of 70 towns in Bergen County. We are a—on the socioeconomic scale, our people are working class people. The city does not have that kind of a budget, nor do we have the technical expertise that would allow us to address this problem properly.

Ms. SCHAKOWSKY. So would you oppose changes to the Superfund that have the potential to limit the funds available for cleanups like yours or have the potential to significantly delay any cleanup?

Mr. DUCH. We certainly would oppose that. The sooner the cleanup can take place the better. The less obstacles that are placed in front of the EPA, the sooner we can move forward.

Ms. SCHAKOWSKY. Thank you very much.

Mr. DUCH. Thank you.

Ms. SCHAKOWSKY. I wanted to ask Ms. Dillen, we have a local issue—I don't know, we may disagree on that, Mr. Chairman. But you probably know about the Badger Ferry that was recently granted a 2-year permit to continue operating on Lake Michigan in a settlement with the Environmental Protection Agency. This has to do with coal ash being dumped right into the lake. And every time it sails between Wisconsin and Michigan, the Badger Ferry dumps 4 tons of coal ash into the lake. And each year more than 500 tons of coal ash is dumped right from the ferry into the lake. I wondered what—if you could share your thoughts on the Badger Ferry settlement that would allow another season for them to continue dumping.

Ms. DILLEN. Well, I am not familiar with the details of the settlement. But I certainly know about the issue. And it is one of the notorious examples of what can happen when there isn't proper regulation of coal ash. And I think it underscores what my message has been to the subcommittee today, which is, please don't take away the one backstop that we have to ensure that EPA is forced to address this. And I think the settlement that you point up suggests that the agency is not going to take the action that is needed to address even the most notorious problems like the Badger Ferry if it doesn't have a deadline.

Mr. SHIMKUS. Gentlelady's time expired. We appreciate the first panel for being here and for your testimony. The subcommittee stands in recess until Wednesday, May 22, at 10:15 a.m.

[The bills follow:]

[DISCUSSION DRAFT]

113TH CONGRESS
1ST SESSION

H. R. _____

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to State consultation on removal and remedial actions, State concurrence with listing on the National Priorities List, and State credit for contributions to the removal or remedial action, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to State consultation on removal and remedial actions, State concurrence with listing on the National Priorities List, and State credit for contributions to the removal or remedial action, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal and State Partnership for Environmental Protection Act of 2013".

1 **SEC. 2. CONSULTATION WITH STATES.**

2 (a) REMOVAL.—Section 104(a)(2) of the Comprehen-
3 sive Environmental Response, Compensation, and Liabil-
4 ity Act of 1980 (42 U.S.C. 9604(a)(2)) is amended by
5 striking "Any removal action undertaken by the President
6 under this subsection (or by any other person referred to
7 in section 122) should" and inserting "In undertaking a
8 removal action under this subsection, the President (or
9 any other person undertaking a removal action pursuant
10 to section 122) shall consult with the affected State or
11 States. Such removal action should".

12 (b) REMEDIAL ACTION.—Section 104(c)(2) of the
13 Comprehensive Environmental Response, Compensation,
14 and Liability Act of 1980 (42 U.S.C. 9604(c)(2)) is
15 amended by striking "before determining any appropriate
16 remedial action" and inserting "during the process of se-
17 lecting, and in selecting, any appropriate remedial action".

18 (c) SELECTION OF REMEDIAL ACTION.—Section
19 104(c)(4) of the Comprehensive Environmental Response,
20 Compensation, and Liability Act of 1980 (42 U.S.C.
21 9604(c)(4)) is amended by striking "shall select remedial
22 actions" and inserting "shall, in consultation with the af-
23 fected State or States, select remedial actions".

24 (d) CONSULTATION WITH STATE AND LOCAL OFFI-
25 CIALS.—Section 120(f) of the Comprehensive Environ-

1 mental Response, Compensation, and Liability Act of
2 1980 (42 U.S.C. 9620(f)) is amended—
3 (1) by striking "shall afford to" and inserting
4 "shall consult with"; and
5 (2) by inserting "and shall provide such State
6 and local officials" before "the opportunity to par-
7 ticipate".

8 **SEC. 3. STATE CREDIT FOR OTHER CONTRIBUTIONS.**

9 Section 104(c)(5) of the Comprehensive Environ-
10 mental Response, Compensation, and Liability Act of
11 1980 (42 U.S.C. 9604(c)(5)) is amended—
12 (1) in subparagraph (A)—
13 (A) by inserting "removal at such facility,
14 or for" before "remedial action"; and
15 (B) by striking "non-Federal funds." and
16 inserting "non-Federal funds, including over-
17 sight costs and in-kind expenditures. For pur-
18 poses of this paragraph, in-kind expenditures
19 shall include expenditures for, or contributions
20 of, real property, equipment, goods, and serv-
21 ices, valued at a fair market value, that are
22 provided for the removal or remedial action at
23 the facility, and amounts derived from mate-
24 rials recycled, recovered, or reclaimed from the
25 facility, valued at a fair market value, that are

1 used to fund or offset all or a portion of the
2 cost of the removal or remedial action."; and
3 (2) in subparagraph (B), by inserting "removal
4 or" after "under this paragraph shall include ex-
5 penses for".

6 **SEC. 4. STATE CONCURRENCE WITH LISTING ON THE NA-**
7 **TIONAL PRIORITIES LIST.**

8 (a) BASIS FOR RECOMMENDATION.—Section
9 105(a)(8)(B) of the Comprehensive Environmental Re-
10 sponse, Compensation, and Liability Act of 1980 (42
11 U.S.C. 9605(a)(8)(B)) is amended—
12 (1) by inserting "Not later than 90 days after
13 any revision of the national list, with respect to a
14 priority not included on the revised national list,
15 upon request of the State that submitted the priority
16 for consideration under this subparagraph, the
17 President shall provide to such State, in writing, the
18 basis for not including such priority on such revised
19 national list. The President may not add a facility
20 to the national list over the written objection of the
21 State." after "the President shall consider any prior-
22 ities established by the States."; and
23 (2) by striking "To the extent practicable, the
24 highest priority facilities shall be designated individ-
25 ually and shall be referred to as" and all that follows

1 through the semicolon at the end, and inserting
2 "Not more frequently than once every 5 years, a
3 State may designate a facility that meets the criteria
4 set forth in subparagraph (A) of this paragraph,
5 which shall be included on the national list;".
6 (b) STATE INVOLVEMENT.—Section 121(f)(1)(C) of
7 the Comprehensive Environmental Response, Compensa-
8 tion, and Liability Act of 1980 (42 U.S.C. 9621(f)(1)(C))
9 is amended by striking "deleting sites from" and inserting
10 "adding sites to, and deleting sites from,".

11 **SEC. 5. REVIEW OF REMEDY SELECTION.**

12 Section 113(h) of the Comprehensive Environmental
13 Response, Compensation, and Liability Act of 1980 (42
14 U.S.C. 9613(h)) is amended by adding at the end the fol-
15 lowing:
16 "(6) An action by the President under section
17 104(c)(4) (relating to selection of remedial action),
18 if the President selects a remedial action under such
19 section over the written objection of the affected
20 State or States.".

[DISCUSSION DRAFT]

113TH CONGRESS
1ST SESSION

H. R. _____

To amend the Solid Waste Disposal Act relating to review of regulations under such Act and to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to financial responsibility for classes of facilities.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Solid Waste Disposal Act relating to review of regulations under such Act and to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to financial responsibility for classes of facilities.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Reducing Excessive
5 Deadline Obligations Act of 2013".

1 **SEC. 2. REVIEW OF REGULATIONS UNDER THE SOLID**
2 **WASTE DISPOSAL ACT.**

3 Section 2002(b) of the Solid Waste Disposal Act (42
4 U.S.C. 6912(b)) is amended to read as follows:

5 "(b) REVIEW OF REGULATIONS.—The Administrator
6 shall review, and revise, as the Administrator determines
7 appropriate, regulations promulgated under this Act.".

8 **SEC. 3. FINANCIAL RESPONSIBILITY FOR CLASSES OF FA-**
9 **CILITIES UNDER CERCLA.**

10 Section 108(b)(1) of the Comprehensive Environ-
11 mental Response, Compensation, and Liability Act of
12 1980 (42 U.S.C. 9608(b)(1)) is amended—

13 (1) by striking "Not later than three years
14 after the date of enactment of the Act, the President
15 shall" and inserting "The President shall, as appro-
16 priate,";

17 (2) by striking "first" after "for which require-
18 ments will be"; and

19 (3) by adding at the end the following: "The re-
20 quirements promulgated by the President under this
21 paragraph shall not preempt any State financial re-
22 sponsibility requirements in existence on the effec-
23 tive date of the requirements promulgated by the
24 President.".

[DISCUSSION DRAFT]

113TH CONGRESS
1ST SESSION

H. R. _____

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 with respect to the applicability of the Act to Federal facilities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 with respect to the applicability of the Act to Federal facilities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Federal Facility Ac-
5 countability Act of 2013".

1 **SEC. 2. FEDERAL FACILITIES.**

2 (a) APPLICATION TO FEDERAL GOVERNMENT.—Sec-
3 tion 120(a) of the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of 1980 (42
5 U.S.C. 9620(a)) is amended in the heading by striking
6 "OF ACT".

7 (b) APPLICATION OF REQUIREMENTS TO FEDERAL
8 FACILITIES.—Section 120(a)(2) of the Comprehensive
9 Environmental Response, Compensation, and Liability Act
10 of 1980 (42 U.S.C. 9620(a)(2)) is amended—

11 (1) by striking "preliminary assessments" and
12 inserting "response actions";

13 (2) by inserting "or" after "National Contin-
14 gency Plan,";

15 (3) by striking ", or applicable to remedial ac-
16 tions at such facilities"; and

17 (4) by inserting "or have been" before "owned
18 or operated".

19 (c) APPLICABILITY OF LAWS.—Section 120(a)(4) of
20 the Comprehensive Environmental Response, Compensa-
21 tion, and Liability Act of 1980 (42 U.S.C. 9620(a)(4))
22 is amended to read as follows:

23 "(4) APPLICABILITY OF LAWS.—

24 "(A) IN GENERAL.—Each department,
25 agency, and instrumentality of the United
26 States shall be subject to, and comply with, at

1 facilities that are or have been owned or oper-
2 ated by any such department, agency, or instru-
3 mentality, State substantive and procedural re-
4 quirements regarding response, containment,
5 and remediation relating to hazardous sub-
6 stances in the same manner and to the same
7 extent as any nongovernmental entity.
8 "(B) COMPLIANCE.—
9 "(i) IN GENERAL.—The United States
10 hereby expressly waives any immunity oth-
11 erwise applicable to the United States with
12 respect to any State substantive or proce-
13 dural requirement referred to in subpara-
14 graph (A).
15 "(ii) INJUNCTIVE RELIEF.—Neither
16 the United States, nor any agent, em-
17 ployee, nor officer thereof, shall be immune
18 or exempt from any process or sanction of
19 any State or Federal Court with respect to
20 the enforcement of any injunctive relief
21 under subparagraph (C)(ii).
22 "(iii) CIVIL PENALTIES.—No agent,
23 employee, or officer of the United States
24 shall be personally liable for any civil pen-
25 alty under any State substantive or proce-

1 dural requirement referred to in subpara-
2 graph (A), or this Act, with respect to any
3 act or omission within the scope of the of-
4 ficial duties of the agent, employee, or offi-
5 cer.
6 "(iv) CRIMINAL SANCTIONS.—An
7 agent, employee, or officer of the United
8 States shall be subject to any criminal
9 sanction (including any fine or imprison-
10 ment) under any State substantive or pro-
11 cedural requirement referred to in sub-
12 paragraph (A), or this Act, but no depart-
13 ment, agency, or instrumentality of the ex-
14 ecutive, legislative, or judicial branch of
15 the Federal Government shall be subject to
16 any such sanction.
17 "(C) SUBSTANTIVE AND PROCEDURAL RE-
18 QUIREMENTS.—The State substantive and pro-
19 cedural requirements referred to in subpara-
20 graph (A) include—
21 "(i) administrative orders;
22 "(ii) injunctive relief;
23 "(iii) civil and administrative penalties
24 and fines, regardless of whether such pen-
25 alties or fines are punitive or coercive in

1 nature or are imposed for isolated, inter-
2 mittent, or continuing violations; and
3 "(iv) reasonable service charges or
4 oversight costs.
5 "(D) REASONABLE SERVICE CHARGES OR
6 OVERSIGHT COSTS.—The reasonable service
7 charges or oversight costs referred to in sub-
8 paragraph (C) include fees or charges assessed
9 in connection with—
10 "(i) the processing, issuance, renewal,
11 or modification of permits;
12 "(ii) the review of plans, reports,
13 studies, and other documents;
14 "(iii) attorney's fees;
15 "(iv) inspection and monitoring of fa-
16 cilities or vessels; and
17 "(v) any other nondiscriminatory
18 charges that are assessed in connection
19 with a State requirement regarding re-
20 sponse, containment, and remediation re-
21 lating to hazardous substances.".
22 **SEC. 3. AUTHORITY TO DELEGATE, ISSUE REGULATIONS.**
23 Section 115 of the Comprehensive Environmental Re-
24 sponse, Compensation, and Liability Act of 1980 (42
25 U.S.C. 9615) is amended by adding at the end the fol-

1 lowing new sentence: "If the President delegates or as-
2 signs any duties or powers under this section to a depart-
3 ment, agency, or instrumentality of the United States
4 other than the Administrator, the Administrator may re-
5 view actions taken, or regulations promulgated, pursuant
6 to such delegation or assignment, or a State may request
7 such a review, for purposes of ensuring consistency with
8 the guidelines, rules, regulations, or criteria established by
9 the Administrator under this title.".

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]
[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. HENRY A. WAXMAN

Today we begin to examine three legislative proposals involving the Superfund program and hazardous and solid waste. These bills cover an expansive number of topics—from how sites are cleaned up, to who pays for what, to when citizens can go to court over the decisions.

These are complex issues and changing the law could have serious consequences. Legislating in this area is no small undertaking.

That's why I want to thank the Chairman for agreeing to hear from additional witnesses next Wednesday. We won't be able to cover every issue, but it will be very helpful to hear testimony from the Government Accountability Office and the Congressional Research Service on Superfund and these legislative proposals.

One bill we will consider today is couched as legislation designed to repeal so-called "excessive deadlines." Although some may claim that the targeted review requirement will require extensive resources and lead to a flurry of lawsuits, the requirement has been in place for decades with no issue. EPA has never found the review burden excessive, and only three suits have ever been brought to enforce the deadline—all three relate to the long overdue rulemaking on coal ash. The delays in finalizing that rulemaking are bad for the environment and are harming the beneficial reuse industry.

These cases do not suggest that the deadline is excessive—instead, they suggest that it is necessary.

This is just one example of how the provisions before us today may seem innocuous, or even helpful, on paper. But when we examine EPA's experience implementing RCRA and Superfund over the last 30–40 years, it becomes clear that they are unnecessary at best, and at worst, a threat to the continued success of this essential program.

Another small provision in the Federal and state Partnership for Environmental Protect Act would allow litigation over selected cleanup methods before the cleanup occurs—adding significant costs and delays to the process. One expert my staff spoke with called that change "a hole so big it could swallow all of Superfund." I don't believe any of my colleagues want to see that happen.

These three bills present a lot of ground to cover. I look forward to hearing from the witnesses today and when the hearing reconvenes next week. And I hope that members of the Subcommittee are given a full opportunity to understand these bills before they are brought to markup.

I hope we are able to resist the temptation to take legislative shortcuts, to move legislation before it is adequately vetted and carefully considered. This Subcommittee tried that in the last Congress and it resulted in legislative failure after considerable confusion and wasted effort.

By Email

May 22, 2013

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515

Re: Opposition to the draft bill, the "Reducing Excessive Deadline Obligations Act of 2013".

Dear Mr. Shimkus and Mr. Tonko:

The undersigned public interest groups write to express opposition to the "Reducing Excessive Deadline Obligations Act of 2013," which would protect polluters from liability for the full costs of toxic cleanup. The bill would amend the Resource Conservation and Recovery Act (RCRA) and Superfund (the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)) in a manner that increases the potential for harm to human health and the environment.

The bill would amend RCRA to delay regulation of the second largest toxic waste stream in the nation, harming thousands of communities across the across the country and the Commonwealth of Puerto Rico that are facing water contamination, fugitive dust, and the risk of catastrophic collapse of ash impoundments. The bill would eliminate the basis for a lawsuit where public interest and industry plaintiffs are seeking regulatory certainty and a reasonable timeline for the EPA to establish safeguards for coal ash disposal. Regulation of toxic coal ash is long overdue, and the EPA has acknowledged that "it has an obligation to conclude review, and any necessary revision, of certain regulations within 40 C.F.R. Part 257 pertaining to coal combustion residuals."[1]

Regarding Superfund, the bill would weaken this crucial law by allowing insufficient state requirements to preempt federal rules, thereby leaving communities unprotected and taxpayers at risk of funding expensive cleanups. Failure to ensure full liability for cleanup will endanger the health of communities and their environment, cause significant delays in cleanup, and place great burden on taxpayers to cover the shortfall, which is often substantial, particularly at hardrock mine sites.

Many states don't have the capacity to manage clean-up activities at major mines if the company fails or is unable to complete reclamation and closure. As a result, the federal government often inherits these mines under CERCLA. Of 1,635 sites on the 2007 CERCLA National Priorities List of "Superfund" sites, 7% are mining and/or smelting sites, yet 21% of the Superfund budget ($2.4 billion) was spent on mining.[2]

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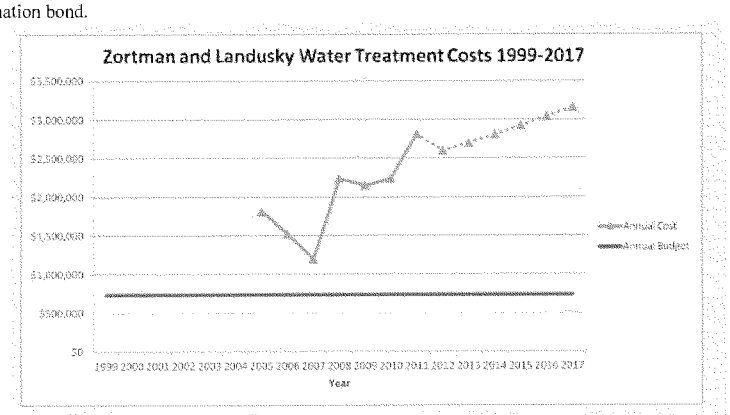
[1] EPA's Combined Opposition to Plaintiffs' Motions for Summary Judgment, and Memorandum in Support of EPA's Cross-Motion for Summary Judgment in Case Nos. 1:12-cv-00585 and 1:12-cv-00629, and for Partial Summary Judgment and Order to Govern Further Proceedings in Case No. 1:12-cv-00523, No. 1:12-cv-00523 (filed October 11, 2012).
[2] U.S. EPA, The CERCLA Financial Responsibility Initiative, power point presentation by Ben Lesser, 2010.

Reports by the non-partisan Government Accountability Office (GAO) in 2006 and 2011 document the inadequacy of financial assurance at hardrock mines in the U.S., and recommend that the federal government do more, not less to protect taxpayers.[3]

Financial assurance requirements for cleanup at mine sites vary considerably from state to state. Exemptions and gaps in state laws put federal taxpayers at significant financial risk because they fail to ensure that sufficient financial assurance is in place to cover mine reclamation and closure costs. Inadequate state financial assurance requirements for hard rock mining are the norm, not the exception. For example, bonding shortfalls and their consequences are briefly described below for three western states:

- **Montana: Inadequate state bonding statute results in inadequate bonds and significant taxpayer liability**

In practice, many federal agencies currently defer to states for financial assurance on hardrock mines via a memorandum of understanding. This has repeatedly resulted in inadequate financial assurance and significant costs to taxpayers. For example, in Montana, the Zortman Landusky mine is located on a mix of federal and private land. The federal agencies deferred to the State of Montana to calculate and hold the reclamation bond.



Federal taxpayers are paying water treatment costs at the Zortman Landusky mine, where the company filed for bankruptcy, and the reclamation bond was grossly insufficient.

The Zortman Landusky Mine in north central Montana has developed severe acid mine drainage, which will require costly water treatment in perpetuity. The reclamation bond was grossly insufficient to cover costs. As of 2009, the U.S. Bureau of Land Management has spent over $10 million for water treatment, while the State of Montana had spent approximately $3 million. The annual cost of water treatment has continued to increase, far beyond the calculated cost in the surety bond (see attached diagram). In 2011, a storm resulted in the release of over 50 million gallons of acid mine drainage downstream, and the failure of a seepage

[3] GAO, "Environmental Liabilities: Hardrock Mining Cleanup Obligations, Testimony before the Committee on Environment and Public Works, U.S. Senate, June 2006. GAO, "Abandoned Mines: Information on the Number of Hardrock Mines, Cost of Cleanup and Value of Financial Assurances, Testimony before the Subcommittee on Energy and Mineral Resources, Committee on Natural Resources, July 2011.

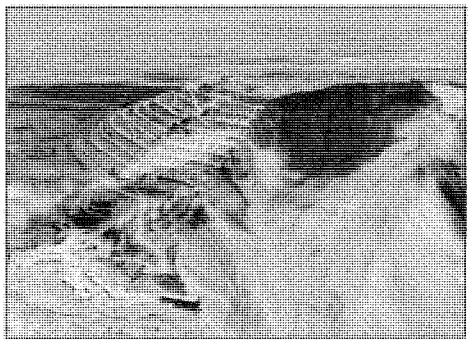
collection system, which has increased impacts to water supplies and the cost of cleanup.[4] Similarly, the State of Montana collected insufficient financial assurance to cover the cost of long-term water treatment at the Beal Mountain Mine, which is located on federal and private land in western Montana. The $6.8 million reclamation bond calculated by the State has been spent. As of 2012, $18 million in state and federal funds have been expended, primarily consisting of federal funding. Yet the Forest Service estimates cleanup and water treatment costs at over $30 million, which will be borne by taxpayers, not the mining company.[5]

- **Idaho: Exemption for underground mines and cap on bonds for all surface mines.**

Underground mines in Idaho are exempt from reclamation and financial assurance requirements under the Idaho Surface Mining Act. Yet, underground mines can cause substantial damage to water quality.

Further, the State of Idaho also puts an artificial cap of $2,500 per affected acre for financial assurance for most surface mines, without Board approval.[6] Yet, mines with acid mine drainage or metals leaching may require water treatment for centuries, or in perpetuity, generating water treatment costs in the $20,000-$100,000 per acre range,[7] resulting in a substantial shortfalls for taxpayers.

- **Utah: Exemption for active mines that predate state bonding regulations**



2013 landslide at Bingham Canyon pit.

The State of Utah contains a broad grandfather clause that exempts "historic" mines from state bonding requirements, if mining at the site pre-dated Utah's financial assurance requirements. This exemption has potentially far-reaching and disastrous results for taxpayers and the environment. For example, the immense pit at the Brigham Canyon Mine is exempt from bonding requirements because of its "historic site" status, even though it is still an active mining operation. Consequently, the largest open pit mine in North America is largely exempt from bonding. The recent pit failure (see photo) at the Brigham Canyon Mine demonstrates the substantial financial liability should the company fail to conduct adequate reclamation.

Thus, in order to protect taxpayers and the environment, any preemption clause would have to include a determination that applicable state requirements are as stringent as the federal requirements.

Further, because scores of unreclaimed and polluting mining sites are continuing to take a high economic and environmental toll, we vigorously support the reinstatement of lapsed Superfund taxes to provide a stable, dedicated revenue source for the Superfund program. Only with the reinstatement of such

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[4] Warren McCullough & Wayne Jepson, Zortman: Dealing with Extreme Storm Events, power point presentation by Montana Department of Environmental Quality, presented at the Montana Tech 2012 mining conference: *www.mtech.edu/mwtp/conference/2012.../Warren%20McCullough.pdf*

[5] http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5183264.pdf

[6] http://www.legislature.idaho.gov/idstat/Title47/T47CH15SECT47-1512.htm

[7] Jim Kuipers, P.E., Putting a Price on Pollution, 2004. Available at http://www.earthworksaction.org/files/publications/PuttingAPriceOnPollution.pdf

taxes, paid for by the industries responsible for toxic pollution, will the protection of health and environment be safeguarded and American taxpayers protected.

Respectfully,

Carl Wassilie
Alaska's Big Village Network
Anchorage, AK

Deborah Shepherd
Executive Director
Altamaha Riverkeeper
Darien, GA

Brian Shields
Director
Amigos Bravos
Taos, New Mexico

Charles Scribner
Executive Director
Black Warrior Riverkeeper
Birmingham, AL

Ann Mesrobian
Conservation Chair
Bastrop County Environmental Network
Bastrop, TX

Myra Crawford PhD, MPH
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Cahaba Riverkeeper
Birmingham, AL

Sam Perkins
Director of Technical Programs
Catawba Riverkeeper Foundation
Charlotte, NC

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Director
Center for Alternative Mining Development
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Juanita Sneeuwjagt, President
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& Environmental Justice
Clintwood, VA

Judy G. Brown
Chair
Concerned Citizens of Giles County
Pearisburg, VA

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State Advocate
Environment Missouri
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Theaux M. Le Gardeur
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Gunpowder Riverkeeper
Monkton, MD

Henry S. Cole, Ph.D.
President, CEO
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Consultants, Inc.
Upper Marlboro, MD

Jessica Hall
Executive Director
Humboldt Baykeeper
Eureka, CA

Justin Hayes
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Idaho Conservation League
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Steven G. Gilbert, PhD, DABT
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Tiernan Sittenfeld
Senior Vice President of Government Affairs
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Washington, DC

Curt Havens
President
Little Blue Regional Action Group (LBRAG)
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Lead Organizer
Little Village Environmental Justice
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Riverkeeper
Lower Mississippi Riverkeeper
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Elisa Young
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Racine, OH

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Northern Alaska Environmental Center
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Tiffany Schauer
Executive Director
Our Children's Earth Foundation
San Francisco, CA

Michael Stabile
President
Patagonia Area Resource Alliance
Patagonia, Arizona

Bob Fulkerson
State Director
Progressive Leadership Alliance of Nevada
(PLAN)
Reno, Nevada

Robin Broder
Vice President
Potomac Riverkeeper
Washington, DC

Traci Barkley
Water Resources Scientist
Prairie Rivers Network
Champaign, IL

William C. Patric
Executive Director
Rivers Without Borders
Port Townsend, WA

Mary Costello
Director
Rock Creek Alliance
Sandpoint, Idaho

Deb Self
Executive Director
San Francisco Baykeeper
San Francisco, CA

Dan Rudolph
Executive Director
San Juan Citizens Alliance
Durango, CO

Jeff Kelble
Riverkeeper
Shenandoah Riverkeeper
Boyce, VA

Don Mottley
Spokesperson
Save Our Rivers
Boonville, IN

Jim Costello
Save Our Cabinets
Heron, Montana

Hilary Cooper
Director
Sheep Mountain Alliance
Telluride, CO

Ed Hopkins
Director, Environmental Quality Program
Sierra Club
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Becky Bartovics
Co-Chair
Sierra Club, Maine
Portland, ME

Brian Paddock
Legal Chair
Sierra Club, Tennessee
Nashville, TN

Barbara Miller
Director
Silver Valley Community Resource Center
Kellogg, ID

Bart Mihailovich, Director
Rick Echstaedt, Attorney
Spokane Riverkeeper
Spokane, WA

Justin Bloom
Executive Director & Waterkeeper
Suncoast Waterkeeper
Sarasota, FL

Mike Peterson
Director
The Lands Council
Spokane, WA

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Riverkeeper
Wabash Riverkeeper
Lafayette, IN

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Waccamaw Riverkeeper
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Political Director
Western Organization of Resource Councils
Washington, DC

Cindy Rank
Chair
Mining and Extractive Industries Committee
West Virginia Highlands Conservancy
Rock Cave, WV

Alaska Community Action on Toxics * California Communities Against Toxics * California Safe Schools * Clean Water Action * Coalition for a Safe Environment * Connecticut Coalition for Environmental Justice * Del Amo Action Committee * Environment America * Earthjustice * Friends of the Earth * Green Door Initiative * Greenpeace * League of Conservation Voters (LCV) * National Association for the Advancement of Colored People (NAACP)* National Hispanic Environmental Council (NHEC) * National Latino Coalition on Climate Change (NLCCC) * Natural Resources Defense Council (NRDC) * Little Village Environmental Justice Organization (LVEJO) * Los Jardines Institute (The Gardens Institute)* Miller-Travis & Associates * Physicians for Social Responsibility (PSR) * Sierra Club * Society for Positive Action * Texas Environmental Advocacy Services (T.E.J.A.S.) * Voces Verdes (Latino Leaders for the Environment)* WE ACT for Environmental Justice * West Oakland Environmental Indicators Project (WOEIP)

By Email

May 22, 2013

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515

Re: Opposition to the draft legislation, the "Federal and State Partnership for Environmental Protection Act of 2013"

Dear Mr. Shimkus and Mr. Tonko:

The undersigned public interest groups write to express our strong opposition to the "Federal and State Partnership for Environmental Protection Act of 2013," which weakens the nation's Superfund law (the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)) and places American communities at risk of increased toxic exposure. The bill will increase litigation that will cause delays in cleanups and establish roadblocks to listing new toxic waste sites. The amendments to CERCLA contained in the bill will place our communities and their environment in danger and increase the cost of hazardous waste cleanup for U.S. taxpayers.

Specifically, the bill amends Section 113(h) of CERCLA by allowing States, and other parties, to litigate the selection of a removal or remedial action prior to the completion of a cleanup. This is a radical and damaging change to the Superfund law, because Section 113(h) of CERCLA currently prohibits federal courts from reviewing "any challenges" to CERCLA cleanups once a

"removal or remedial action" ordered by the U.S. Environmental Protection Agency (EPA) is underway. Congress determined in 1986 that if the courts permitted challenges at ongoing CERCLA sites, cleanup efforts would likely be unacceptably delayed, having the potential effect of increasing contamination and threatening human lives. Section 113(h) was enacted to provide communities threatened by hazardous waste sites and spills with a guarantee that cleanups could not be endlessly delayed by costly litigation prior to completion of the cleanup. This bill totally undermines this fundamental safeguard. The bill opens the door to *any* person – including the polluter responsible for the release– to challenge a cleanup before its implementation whenever a state objects in writing to the proposed remedy.

Secondly, the "Federal and State Partnership for Environmental Protection Act of 2013" amends Section 105 of CERCLA by adding a statutory requirement that the EPA cannot list a site on the National Priority List (NPL) over a state's objection to such listing. The NPL is the list of the most dangerous toxic waste sites in the nation, and the listing of sites has great legal and practical import. Often, the listing of a site is a prerequisite to its cleanup. Yet this bill seeks to change the listing process and weaken public protections. Since 1996, the EPA's formal listing policy has been to determine the position of the States on every site that the EPA is considering for NPL listing, "as early in the site assessment process as practical."[1] Still, the EPA recognizes that under some conditions, it may not be feasible—or protective of public health -- to obtain such concurrence. Examples of these situations include where the State is itself the responsible party, where hazardous substances involve more than one state, and where the public health is determined to be in danger. Furthermore, the EPA's ability to place a site on the NPL provides strong and essential leverage for response actions. The bill ignores these important considerations and would offer an unqualified veto power to any state where a toxic site is located.

Lastly, while we firmly oppose the weakening of the current Superfund law, we strongly support the reinstatement of the Superfund fee that expired nearly 20 years ago. Since the fee lapsed in 1995, federal funding has been negligible and hundreds of dangerous and leaking sites are not being cleaned up. Restoring the Superfund fee would provide the much-needed dedicated source of funding to address the hundreds of toxic waste sites that remain unremediated on the NPL. Renewing the fee would again hold polluters accountable, while accomplishing the essential goals of protecting human health, investing in the restoration of polluted sites, and putting tens of thousands of citizens to work.

Thank you in advance for your consideration of our opposition to the "Federal and State Partnership for Environmental Protection Act of 2013.

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[1] *See* U.S. Environmental Protection Agency, Memorandum, Coordinating with the States on National Priorities List Decisions, November 14, 1996, *available at* http://www.epa.gov/superfund/sites/npl/hrsres/policy/stcorr96.pdf

Respectfully,

Pamela Miller
Executive Director
Alaska Community Action on Toxics
Anchorage, AK

Jane Williams
California Communities Against Toxics
PO Box 845
Rosamond, CA 93560

Robin Suwol
California Safe Schools
Toluca Lake, CA

Lynn Thorp
National Campaigns Director
Clean Water Action
Washington, DC

Jesse Marquez
Coalition for a Safe Environment
Wilmington, CA

Sharon Lewis
Executive Director
Connecticut Coalition for Environmental Justice
Hartford, CT

Cynthia Babich
Del Amo Action Committee
Torrance, CA

Anna Aurilio
Director
Washington DC Office
Environment America
Washington, DC

Martin Hayden
Vice President, Policy and Legislation
Earthjustice
Washington, DC

Marcie Keever
Legal Director
Friends of the Earth
Washington, DC

Ms. Donele Wilkins
President & CEO
Green Door Initiative
Detroit, MI

Rick Hind
Legislative Director
Greenpeace
Washington, DC

Tiernan Sittenfeld
Senior Vice President of Government Affairs
League of Conservation Voters (LCV)
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Rafael Hurtado
Organizer
Little Village Environmental Justice Organization (LVEJO)
Chicago, IL

Richard Moore
Coordinator
Los Jardines Institute (The Gardens Institute)
Albuquerque, New Mexico

Vernice Miller-Travis
Miller-Travis & Associates
Advocating for Environmental Justice & Sustainable Community Development
Bowie, MD

Hilary O. Shelton
Director
Senior Vice President for Advocacy and Policy, NAACP Washington Bureau
National Association for the Advancement of Colored People (NAACP)
Washington, DC

Roger Rivera
President
National Hispanic Environmental Council
(NHEC)
Alexandria, VA

Mark Magana
Executive Director
National Latino Coalition on Climate Change
(NLCCC)
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Scott Slesinger
Legislative Director
Natural Resources Defense Council (NRDC)
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Barbara Gottlieb
Director, Environment & Health
Physicians for Social Responsibility (PSR)
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Martha Dina Argüello
Executive Director
Physicians for Social Responsibility
PSR - Los Angeles
Los Angeles, CA

Ed Hopkins
Director, Environmental Quality Program
Sierra Club
Washington, DC

Shabaka Heru
Society for Positive Action
Athens Park, CA

Juan Parras
Founder
Texas Environmental Advocacy Services
(T.E.J.A.S)
Houston, TX

Roberto Carmona
Board Member
Voces Verdes (Latino Leaders for the
Environment)
Chicago, IL

Ms. Peggy Shepard
Executive Director
WE ACT for Environmental Justice
Harlem, NY/ Washington, DC

Brian Beveridge
Co-Director
West Oakland
Environmental Indicators Project
Oakland, CA

HEADWATERS RESOURCES

Adding Value to Energy™

21 May 2013

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515

Re: Reducing Excessive Deadline Obligations Act of 2013

Dear Chairman Shimkus and Ranking Member Tonko:

We are writing on behalf of Headwaters Resources, Inc. ("Headwaters") and Boral Material Technologies, Inc. ("Boral") regarding the Reducing Excessive Deadline Obligations Act of 2013. We appreciate this opportunity to submit this brief comment on the draft legislation, which, in part, would amend the Resource Conservation and Recovery Act ("RCRA") by deleting Section 2002(b), 42 U.S.C. § 6912(b). Section 2002(b) requires that each regulation EPA has promulgated under RCRA "*shall be reviewed and, where necessary, revised not less frequently than every three years.*"

Headwaters is America's largest manager and marketer of coal combustion residuals ("CCRs"), playing a critical role in finding beneficial use opportunities for utilities that generate CCRs and for customers that beneficially use the CCRs in a variety of products and applications. Boral is also a leading marketer of CCRs and a pioneer in the development of new construction material technologies that use CCRs to produce "green" construction materials. Utilization of CCRs improves performance of concrete and building products while creating significant environmental benefits.

In June 2010, EPA proposed upgraded standards for the management of CCRs that are disposed in impoundments and landfills. Under one proposed option, EPA would designate the disposed CCRs as hazardous waste, and under an alternative option the disposed CCRs would remain a nonhazardous waste. For nearly three years uncertainty has persisted as EPA has neither finalized nor withdrawn its proposed rule. The possibility that disposed CCRs would be regulated as hazardous waste created enormous stigma in the marketplace, causing contractors, architects and engineers to reduce their beneficial use of CCRs in products and applications and causing utilities to limit their interest in supplying CCRs for beneficial use. This led Headwaters and Boral to file so-called deadline suits against EPA to compel it to complete its review of its current rules that regulate CCRs. Headwaters and Boral based their suits on RCRA Section 2002(b).

We understand there was discussion during the May 17, 2003, hearing on the Reducing Excessive Deadline Obligations Act of 2013 suggesting that Headwaters and Boral would be in favor of keeping Section 2002(b) in RCRA to enable such deadline suits to be brought. While

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Headwaters and Boral utilized Section 2002(b) of RCRA in an attempt to end the recent uncertainty, as a matter of overall governance, we think Section 2002(b) of RCRA makes for poor public policy. Specifically with regard to coal ash regulations, we fear that should EPA finalize a subtitle D rulemaking for coal ash as the agency has recently said it intends to do, special interest groups will turn around and sue EPA again every three years in repeated attempts to force revisions of the agency's regulations, indefinitely perpetuating the very uncertainty that has plagued the recycling market. We support the implementation of upgraded federal standards for coal ash disposal that will solve this problem for the long term, and not be subject to repeated attacks through the courts that could revive uncertainty and stigma at the whim of a frivolous plaintiff.

Moreover, as a matter of general public policy, to require EPA every three years to review each of its hundreds, if not thousands, of RCRA regulations, places an unworkable demand on EPA's resources, as the agency noted in its own testimony. It could enable special interest groups, through deadline suits, to set EPA's agenda. It could lead to rearview mirror decision-making. It could ultimately create systemic problems for the agency in addressing regulatory issues of critical importance.

Section 2002(b) was adopted by Congress in 1976 when EPA did not yet have any waste management rules in place. Congress may have then assumed that EPA would promulgate only a few waste rules and, therefore, reviewing them every three years would not be a major administrative burden. But in the ensuing 36 years, in part due to several rounds of major Congressional amendments to RCRA, EPA now has waste management rules that take up more than five inches in the Code of Federal Regulations. What may have been a prudent requirement in 1976 – to review each RCRA rule every three years and revise them as necessary – does not appear appropriate today. Therefore, Headwaters and Boral would not object to Section 2002(b) being deleted entirely from RCRA.

Thank you for this opportunity to clarify the record. As always, Headwaters and Boral are available to respond to questions or provide additional information to the Committee.

Sincerely,

Bill Gehrmann
President, Headwaters Resources, Inc.

Terence Peterson
President, Boral Material Technologies, Inc.

cc: The Honorable Fred Upton, Chairman, Committee on Energy and Commerce
The Honorable Henry Waxman, Ranking Member, Committee on Energy and Commerce

THE
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Director, Arkansas Department of Environmental Quality
PRESIDENT

Dick Pedersen
Director, Oregon Department of Environmental Quality
VICE PRESIDENT

Robert Martineau
Commissioner, Tennessee Department of Environment and Conservation
SECRETARY-TREASURER

Thomas Burack
Commissioner, New Hampshire Department of Environmental Services
PAST PRESIDENT

R. Steven Brown
Executive Director

June 24, 2013

The Honorable John Shimkus
Chair
Subcommittee on Environment and Economy
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Representative Shimkus:

Thank you for seeking additional information from the Environmental Council of the States (ECOS) and your continued interest in the states' opinions. ECOS is always pleased to have the opportunity to share information we have about the work of state environmental agencies with others.

Attached please find our answer to the question for the record which I was asked by Representative Jerry McNerney during the May 17, 2013 hearing on the "Federal and State Partnership for Environmental Protection Act of 2013", the "Reducing Excessive Deadline Obligations Act of 2013" and the "Federal Facility Accountability Act of 2013".

Please let me know if you have additional questions or need further clarification.

Sincerely,

Carolyn Hanson
Deputy Executive Director

Responses to Questions for the Record

The Honorable Jerry McNerney

Ms. Hanson, you have expressed support for protecting State financial responsibility requirements for hard rock mining. How many States have adopted financial responsibility requirements for hard rock mining?

Based on EPA's recent overview of current financial responsibility requirements as part of existing state regulatory programs for the hard rock mining sector, the following 20 states have been identified as having these types of requirements within their programs: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Louisiana, Michigan, Missouri, Minnesota, Montana, Nevada, New Mexico, New York, Tennessee, Texas, Utah, Washington, and Wyoming. In addition, other states, including at least Oregon and South Dakota, are also known to have robust regulatory programs for hard rock mining but to date have not been included in EPA's analysis. Therefore, we have identified at least 22 states that have adopted financial responsibility requirements for hard rock mining.

John W. Suthers
Attorney General
Cynthia H. Coffman
Chief Deputy Attorney General
Daniel D. Domenico
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW
Natural Resources and
Environment Section

Ralph L. Carr
Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, Colorado 80203
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June 13, 2013

Nick Abraham
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington DC 20515

RE: Additional information for the record

Dear Mr. Abraham:

This letter is my response to the request for additional information contained in the June 12, 2013 letter to me from Chairman Shimkus.

The Honorable John D. Dingell

"Relating to the amendments in section 108 of CERCLA, how many States have promulgated the financial responsibility requirements?"

I'm not sure which "financial responsibility requirements" this question refers to. CERCLA § 108(b) directs the Administrator of the Environmental Protection Agency to promulgate regulations requiring "that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." The proposed amendments would add a sentence to CERCLA § 108(b) stating "[t]he requirements promulgated by the President under this paragraph shall not preempt any State financial responsibility requirements in existence on the effective date of the requirements promulgated by the President." At the hearing, I had indicated that a number of states had promulgated financial responsibility regulations that could be preempted by rules that EPA promulgates under CERCLA §108(b).

My understanding is that most states view CERCLA §108(b) as directing EPA to promulgate rules requiring facilities to maintain financial responsibility against the costs of responding to a release of hazardous substances. However, states are concerned that EPA may view its authority more broadly to encompass financial assurance requirements for preventive measures as well as response. For example, the RCRA financial assurance requirements provide funding to cover the

cost of properly closing regulated units at a hazardous waste treatment, storage or disposal facility, and for completing corrective action for existing releases of hazardous wastes or constituents. Any state authorized to implement state hazardous waste programs in lieu of RCRA would have equivalent financial assurance requirements under their own laws. *See, e.g.*, 6 CCR 1007-3, §§ 264.90(a)(2), 264.101(b); Part 266. And some states, including Colorado, have financial assurance requirements to cover the costs of reclaiming mining sites. *See, e.g.*, § 34-32-117, C.R.S. I do not have a complete list of states with mining reclamation financial assurance requirements, but I do know that Alaska, Arizona and New Mexico have such requirements.

Financial assurance mechanisms for RCRA closure and mining reclamation are aimed at prevention of releases of hazardous substances, as opposed to providing funding to address response to a release that has already occurred. States with robust financial assurance requirements for such preventive measures are concerned that EPA may promulgate rules under CERCLA §108(b) that would pre-empt these state requirements, even if the state's requirements were more stringent than what EPA proposes.

Assuming that your question refers only to requirements for financial mechanisms to cover the costs of responding to a release of hazardous substances, and not to state financial assurance requirements addressing preventative measures like RCRA closure or mining reclamation, I can speak definitively only with respect to Colorado. Colorado has not adopted any requirements that would provide funding to cover the costs of responding to a release of hazardous substances for any class of facility. As far as other states go, I am not aware of any that have adopted such requirements, although I have not conducted any sort of survey of state requirements in this area.

Sincerely,

FOR THE ATTORNEY GENERAL

DANIEL S. MILLER
SENIOR ASSISTANT ATTORNEY GENERAL
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June 26, 2013

Mr. Nick Abraham
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Mr. Abraham:

Attached is my response to Chairman Shimkus's June 12, 2013, letter regarding the information he requested at the Subcommittee on Environment and the Economy's May 17, 2013, hearing.

Thank you, again, for the opportunity to testify.

Sincerely,

Abigail Dillen
Managing Attorney

1. Member Making the Request: The Hon. John Shimkus

2. The Request: **How much compensation did Earthjustice receive from the Federal government for attorneys fees and court costs in 2012?**

3. Response: $4,109,578.27

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 31 2013

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable John Shimkus
Chairman, Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your June 12, 2013, letter requesting responses to Questions for the Record following the May 17, 2013, House Energy and Commerce Committee, Subcommittee on Environment and the Economy hearing on legislative proposals entitled the "Federal and State Partnership for Environmental Protection Act of 2013"; the "Reducing Excessive Deadline Obligations Act of 2013"; and the "Federal Facility Accountability Act of 2013".

The responses to the questions are provided as an enclosure to this letter. If you have any further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

Laura Vaught
Associate Administrator

Enclosure

cc: The Honorable Paul Tonko, Ranking Member
Subcommittee on Environment and the Economy

Enclosure

U.S. EPA Responses to Questions for the Record
House Energy and Commerce Committee
Subcommittee on Environment and the Economy
May 17, 2013 Hearing on Legislative Proposals Entitled the "Federal and State Partnership for Environmental Protection Act of 2013"; the "Reducing Excessive Deadline Obligations Act of 2013"; and the "Federal Facility Accountability Act of 2013"

The Honorable John Shimkus

Q1. Does EPA routinely accept State institutional control laws as legally applicable or relevant and appropriate requirements under CERCLA 121? Does that vary from Region to Region?

Answer: All or portions of state institutional control (IC) laws may potentially constitute applicable, or relevant and appropriate requirements (ARARs) on a site-specific basis, depending on the specifics of the state law and site-specific circumstances. All ARARs decisions are made on a site-specific basis and are documented in the appropriate site decision document (e.g., Record of Decision, ROD Amendment).

In 2012, the EPA issued guidance titled: "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites" (OSWER 9355.0-89, Dec. 2012) (2012 IC guidance) that provides overarching direction on the use of ICs. The EPA regions are cognizant of the guidance and are making ARARs decisions given the specifics of the situation. The 2012 IC guidance states the following:

As with other statutory or regulatory provisions, the EPA may evaluate a state IC law or regulation to determine whether all or a portion of the IC law or regulation is a potential ARAR, consistent with CERCLA, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and existing agency guidance and policies. Such ARAR determinations typically are made on a site-specific basis considering the circumstances of the release, an analysis of the specific statutory and regulatory provisions, and a number of other factors [See footnote 13 --For additional guidance on ARARs under CERCLA, see 40 C.F.R. §300.5 and 40 C.F.R. §300.400(g) of the NCP and *CERCLA Compliance with Other Laws Manual*, EPA 540/G-89/006, August 1988, pages 1-10 through 1-12].

In general, any substantive portion of a state IC law or regulation that meets the requirements of CERCLA §121(d) and is consistent with the NCP (e.g., 40 C.F.R. §300.400(g)(4)) may be considered as a potential ARAR. Substantive standards typically establish a level or standard of control, and may include a narrative requirement. In the context of ICs, a substantive requirement could be one that, for example, is designed to protect human health and the environment by requiring land use or activity use restrictions on property with residual contamination where that residual contamination makes the property unsuitable for specific land uses.

As a policy matter, a portion of a state IC law or regulation that requires particular mechanisms or procedures (e.g., state-approved recordation) to implement the IC may be considered part of the substantive requirement if it provides for enforceability of the IC. Procedural requirements tied to discretionary state processes that could result in inconsistent applications of a state IC law or regulation generally would be considered administrative in nature (and not ARARs). For example, a provision in a

state IC law or regulation that allows or requires state approval of a proprietary control, or grants authority to the state to modify or terminate a proprietary control without specified objective factors and meaningful opportunity for public participation generally would not constitute a standard that represents an ARAR.

In some cases, a portion of a state IC law or regulation that is determined not to be an ARAR may be identified by the region in a CERCLA decision document as a to-be-considered (TBC) criteria [See 40 C.F.R. Section 300.400(g)(3)]. In appropriate circumstances, TBCs are used to help ensure the long-term protectiveness of the response action.

Q2. Do other federal agencies routinely accept State institutional control laws as legally applicable or relevant and appropriate requirements under CERCLA? Please provide details responding to this question for each separate federal agency for which you have information.

Answer: All or portions of state institutional control (IC) laws may potentially constitute applicable, or relevant and appropriate requirements (ARARs) on a site-specific basis, depending on the specifics of the law and site-specific circumstances. ARARs decisions are made on a site-specific basis and are documented in the appropriate site decision document (e.g., Record of Decision, ROD Amendment). The Department of Defense, the Department of Energy, and other federal agencies can speak to their particular agency practices.

Q3. Does EPA require compliance with State institutional control laws and regulations when CERCLA remedies do not achieve unrestricted use standards? Does that vary across the Regions?

Answer: If action is determined to be needed at a site under CERCLA, an IC may be appropriate to evaluate as part of the response action to ensure the protectiveness of the remedy, especially in cases where the remedy will not achieve unrestricted site use. Where action is needed and where the state has existing IC laws and regulations, the EPA will consider whether these are "applicable or relevant and appropriate requirements" (ARAR) in selecting a response action. If they are an ARAR, these requirements must be met or waived. The NCP permits six types of ARAR waivers. State IC laws or regulations that are not considered an ARAR, may still be considered by the EPA in developing, proposing, and selecting appropriate response strategies for a site. However, it is not required for the EPA to comply with these laws and regulations in selecting a site remedy. This guidance applies to all regions.

Q4. Please provide documentation regarding EPA's policy of seeking State concurrence before proposing a site to the National Priorities List – including: regulations (if applicable), guidance, memoranda, and any correspondence with or among the Regions.

Answer: In 1996 and 1997, the EPA issued two guidance memoranda describing the process by which the agency would seek state support prior to proposing a site to the National Priorities List (NPL). These two guidance memoranda remain in effect and can be found at http://www.epa.gov/superfund/sites/npl/hrsres/policy/govlet.pdf.

Recently, the EPA initiated a more structured approach for the process by which state and tribal input on NPL listing decisions is solicited. A model letter has been developed for use when requesting state and tribal support for NPL listing. The model letter 1) explains the concerns at the site and the EPA's

rationale for proceeding; 2) requests an explanation of how the state intends to address the site if placement on the NPL is not favored; and 3) emphasizes the transparent nature of the process by informing states that information on their responses will be publicly available. This model letter is available at: http://www.epa.gov/superfund/sites/npl/hrsres/policy/modellet.pdf.

This model letter was prepared after discussions with regions and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). Additional state correspondence with the EPA related to specific site proposal requests can be found at:
http://www.epa.gov/superfund/sites/query/queryhtm/nplstcor.htm

Q5. Please describe in detail EPA's current policy and practice regarding proposing a site to the National Priorities List – including all the steps for listing a site to the NPL and identify the State role, if any, in each step.

Answer: Listing a site on the National Priorities List (NPL) begins, generally, with a site assessment, which is often performed by a state program. The EPA works with the state (or tribe, if the site is located entirely on tribal lands) to assess whether a CERCLA eligible release has occurred. This is the Preliminary Assessment (PA) and Site Inspection (SI) part of the process. Once assessment is complete, the EPA, in consultation with the state, makes a decision regarding the need for further action. Factors that determine whether listing on the NPL is warranted include whether the site scored higher than the 28.5 Hazard Ranking System (HRS) screening threshold; whether site cleanup would be more appropriate under a state cleanup program, or whether the site would be best addressed using a Superfund Alternative Approach. If a decision is made by the EPA and the state to proceed with the NPL listing option, the EPA will seek formal concurrence from the state and will begin preparation of a HRS scoring package.

The EPA is responsible for preparing the HRS documentation record supporting the score. To assist in the preparation of HRS documentation, the EPA may use contractors or states under cooperative agreements. Once a site's HRS package has been prepared, the EPA will include it in the next scheduled NPL proposed rule. The EPA generally issues NPL rules twice a year. If we receive comments, the EPA will address those comments prior to placing the site on the NPL. States often provide additional information to the EPA to support in addressing the comments received.

Under Section 105(h), the EPA generally will defer final listing if a state requests deferral to a state voluntary cleanup and certain conditions related to progress toward cleanup and cleanup agreements are met. The EPA may decline to defer, or elect to discontinue a deferral if the state, as an owner or operator or a significant contributor of hazardous substances is a potentially responsible party; the criteria under the NCP for issuance of health advisory have been met; or conditions related to progress toward cleanup and cleanup agreements are no longer being met.

a. Please also describe EPA's practice, if any, of providing information to a State that proposes a site for listing regarding the decision to list/not list a site.

Answer: If a state recommends a site for listing, the EPA works in close coordination with the state. The EPA and the state will examine various alternatives and jointly determine the best approach. If listing is preferred, the EPA will either develop the HRS package or assist the state in doing so. The EPA will inform the state if more information is needed to support the site score or if the site does not score high enough to be eligible for the NPL. Listing correspondence is placed on the EPA's state

correspondence website. Materials may not be placed on the web site where the site is considered a federal facility and negotiations are occurring between the EPA and another federal agency. Internal correspondence between the agencies or between the EPA and private PRPs is deliberative in nature and may not be made publicly available.

b. Is the documentation regarding the listing decision – including correspondence with the Office of Management and Budget – available to the State that proposed the site for listing?

Answer: NPL listing does not constitute "significant" rulemaking under Executive Order 12866 for purposes of OMB review. Documentation supporting the NPL rulemaking, including all of the Hazard Ranking System scoring material, is available to the state once the site is proposed for NPL addition. The state is an active participant in the listing process as it is the EPA's policy to formally request in writing the position of the states (and tribes where applicable) on sites that the EPA is considering for listing. Please see http://www.epa.gov/superfund/sites/query/queryhtm/nplstcor.htm for more information on the state concurrence policy.

Q6. Is it EPA's policy to automatically list a site that a State proposes to the NPL under Section 105(a)(8)(B)? Why or why not?

Answer: The EPA's practice is to consider for listing any site recommended by a state that meets the listing criteria.

a. What is EPA's policy and practice for deciding whether sites that are proposed by States will be listed on the NPL?

Answer: Other than two exceptions discussed below, the site would have to score 28.5 on the Hazard Ranking System (HRS) or above to be eligible. In addition, the EPA would want to determine whether other policy or statutory constraints (such as deferral to RCRA policy, petroleum exclusion statutory exemption, etc) were applicable. The EPA would need to work with other federal agencies if the site was considered a federal facility site to determine whether particular statutory authorities under which those agencies operate would provide a more appropriate avenue for addressing the contamination at the particular site than NPL listing.

There are two circumstances under which the EPA would list a site regardless of the HRS score. The first is where the state deems the site its "highest priority facility," as provided under CERCLA Section 105(a)(8)(B). This is commonly known as the "silver bullet" or "state pick." The second is when the site meets the Agency for Toxic Substances and Disease Registry (ASTDR) health advisory listing criteria, as provided under 40 CFR 300.425(c)(3).

b. Does the policy and practice for listing sites proposed by States vary from Region to Region?

Answer: While the EPA regions may recommend sites for listing, the authority to list sites resides with the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) in the EPA headquarters (HQ). While the policy applies equally to each state, variation does occur among state programs, as some states more strongly pursue listing of sites, while others may prefer to use state authorities whenever possible, seeking federal assistance as needed.

Q7. Please describe in detail EPA's current policy and practice regarding consultation with States in selecting a remedial action and also respond to the following:

Answer: CERCLA outlines specific requirements with regard to consultation with states through the remedy selection and implementation process. As a general matter, the region (together with the lead agency, if it is a federal facility site) involves the state in discussions related to the site early in the process and continues this relationship throughout. This involvement meets the standards established by CERCLA, but generally provides more frequent involvement and consultation with the state than required. The frequency and nature of the dialogue is determined by the state, the nature of the site and the state's desires for involvement on a site-specific basis.

a. Does interpretation or implementation of the Agency's policy regarding consultation with states in selecting a remedial action vary among Regions?

Answer: All the EPA regions follow the NCP requirements for state involvement in selection of remedy. This includes seeking concurrence from the state on proposed plans. While the degree of consultation may vary among sites, this is based on site-specific circumstances and interest rather than regional differences.

b. Please describe EPA's interpretation of Section 104(c)(2) that requires that the Agency consult with affected States *before* determining an appropriate remedial action. Identify the specific points(s) in the remedy selection process that EPA consults with an affected state and describe, in detail, the consultation process.

Answer: CERCLA 121(f)(1) required the EPA to promulgate regulations for substantial and meaningful involvement by each state in initiation, development, and selection of remedial response actions to be taken in that state. The requirement regarding consultation with states in selecting a remedial action is outlined in the NCP in section 300.500 and 300.515.

One document that provides supporting guidance is titled: "A Guide to Preparing Superfund Proposed Plans, Records, of Decision, and Other Remedy Selection Decisions" (OSWER 9200.1-23.P, July 1999). Section 1.2.2 provides a discussion of lead and support agency roles in the remedial response process.

A state may function as the lead-agency for fund-financed remedial action or as a support-agency. In either case, the requirement for interaction between the EPA and the state must meet the standards set forth in the NCP. Section 300.515(d) relating to the remedial investigation/feasibility study leading up to the decision document includes providing states with the opportunity to provide timely identification of regulations that may constitute applicable, or relevant and appropriate requirements (ARARs). Section 300.515(e) relating to the state involvement in the decision requires the following:

"(e) State involvement in selection of remedy. (1) Both EPA and the state shall be involved in preliminary discussions of the alternatives addressed in the FS prior to preparation of the proposed plan and ROD. At the conclusion of the RI/FS, the lead agency, in conjunction with the support agency, shall develop a proposed plan. The support agency shall have an opportunity to comment on the plan. The lead agency shall publish a notice of availability of the RI/FS report and a brief analysis of the proposed plan pursuant to [Section] 300.430(e) and (f). Included in the proposed plan shall be a statement that the lead and support agencies have reached agreement or, where this is not the case, a statement explaining the concerns of the support agency with the lead agency's proposed plan..."

"(2)(i) EPA and the state shall identify, at least annually, sites for which RODs will be prepared during the next fiscal year, in accordance with [Section] 300.515(h)(1). For all EPA-lead sites, EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy. For Fund-financed state-lead sites, EPA and the state shall designate sites, in a site-specific agreement, for which the state shall prepare the ROD and seek EPA's concurrence and adoption of the remedy specified therein, and sites for which EPA shall prepare the ROD and seek the state's concurrence. EPA and the state may designate sites for which the state shall prepare the ROD for non-Fund-financed state-lead enforcement response actions (i.e., actions taken under state law) at an NPL site. The state may seek EPA's concurrence in the remedy specified therein. Either EPA or the state may choose not to designate a site as state-lead."

Further, Section 300.515(h) relating to remedy selection requires the following:
"(1) Annual consultations. EPA shall conduct consultations with states at least annually to establish priorities and identify and document in writing the lead for remedial and enforcement response for each NPL site within the state for the upcoming fiscal year. States shall be given the opportunity to participate in long-term planning efforts for remedial and enforcement response during these annual consultations.

(2) Identification of ARARs and TBCs. The lead and support agencies shall discuss potential ARARs during the scoping of the RI/FS. The lead agency shall request potential ARARs from the support agency no later than the time that the site characterization data are available. The support agency shall communicate in writing those potential ARARs to the lead agency within 30 working days of receipt of the lead agency request for these ARARs. The lead and support agencies may also discuss and communicate other pertinent advisories, criteria, or guidance to be considered (TBCs). After the initial screening of alternatives has been completed but prior to initiation of the comparative analysis conducted during the detailed analysis phase of the FS, the lead agency shall request that the support agency communicate any additional requirements that are applicable or relevant and appropriate to the alternatives contemplated within 30 working days of receipt of this request. The lead agency shall thereafter consult the support agency to ensure that identified ARARs and TBCs are updated as appropriate.

(3) Support agency review of lead agency documents. The lead agency shall provide the support agency an opportunity to review and comment on the RI/FS, proposed plan, ROD, and remedial design, and any proposed determinations on potential ARARs and TBCs. The support agency shall have a minimum of 10 working days and a maximum of 15 working days to provide comments to the lead agency on the RI/FS, ROD, ARAR/TBC determinations, and remedial design. The support agency shall have a minimum of five working days and a maximum of 10 working days to comment on the proposed plan."

In practice, the EPA meets and exceeds the NCP requirements related to state coordination and consultation. The specifics are determined on a site-specific basis in coordination with the state.

c. Your written testimony states that shifting the statutory timeframe for EPA-State consultation could "potentially generate uncertainty and delays" – please explain what the potential uncertainty and/or delays that may result and explain why it is the Agency's position that uncertainty/delays may result.

Answer: The current statutory and regulatory process affords states meaningful involvement and provides avenues for the states to pursue if they disagree with the resolution of a remedy issue. (See response to Question 7d).

d. Describe the State role in the selection of the remedial action.

Answer: Under CERCLA, the President selects the remedial alternative (See CERCLA 104 (c)(4)). However, the lead agency (for example, the EPA) shall provide the support agency (e.g., the state) an opportunity to review and comment on the RI/FS, proposed plan, ROD, and remedial design, and any proposed determinations on potential ARARs and TBCs. State acceptance is one of nine criteria for the evaluation of remedial alternatives and in the selection of a remedy as described by the NCP in Section 300.430.

In accordance with 40 CFR 300.515(e)(2)(i), "(f)or all EPA-lead sites, the EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy." However, "State concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, i.e., signing a ROD, nor is the EPA's concurrence a prerequisite to a state's selecting a remedy at a non-Fund financed state-lead enforcement site under state law (See the NCP section 300.515(e)(2)(ii))."

For Superfund lead response actions, states have the discretion of not to enter into the state superfund contract or cooperative agreement and thereby preventing implementing of the remedy. Under CERCLA Section 104 (c):
"(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; ..."

e. How are the long-term operation and maintenance costs which will be borne by the States calculated? for what duration of time? and how is this information communicated to the States for their consideration during the remedy selection process? to what extent and how is the long-term financial burden to the State taken into account as a part of the remedy selection? Does the State have the authority to reject a remedial alternative from consideration due to long-term operation and maintenance costs?

Answer: In the Superfund program, the remedial investigation/feasibility study (RI/FS) is used to characterize the nature and extent of the risks at hazardous waste sites and to evaluate remedial alternatives. During the FS, cost estimates for capital (construction), operation and maintenance (O&M) and total present worth for each remedial alternative are developed as noted in EPA guidance titled: "Guidance for Conducting Remedial Investigations and Feasibility Studies (RI/FS) under CERCLA, Interim Final" (OSWER Directive 9355.3-01, 1988). In accordance with CERCLA, see 40 CFR §300.430(e)(9)(iii)(G), costs including annual and net present value of O&M costs are considered as one of the nine criteria used in the FS to evaluate Superfund remedial alternatives.

The EPA's cost estimating guidance titled: "A Guide to Developing and Documenting Cost Estimates" (OSWER Directive 93355.0.75, 2000) provides extensive information on the development of O&M cost estimates. The goal of this guidance is to improve the consistency, completeness and accuracy of Superfund cost estimates during the remedy selection process.

Pursuant to the 2000 EPA guidance cited above, O&M costs are those post-construction costs necessary to ensure or verify the continued effectiveness of a remedial action. O&M costs are typically estimated

on an annual basis and include all labor, equipment, and material costs, including overhead and profit, associated with activities such as monitoring; operating and maintaining extraction, containment, or treatment systems; and disposal.

Remedial actions typically involve construction costs in the early phases of a project and O&M costs in later years to implement and maintain the remedy. Present value analysis is a standard technique often used to compare expenditures which may occur over different time periods and may have varying O&M costs. This allows for comparison of different alternatives on the basis of a single cost figure. The 2000 EPA guidance cited above provides specific information on implementing this process for Superfund sites.

A key aspect of the present value analysis is the discount rate, which is similar to an interest rate and is used to account for the time value of money. Per the 2000 EPA cost estimating guidance: EPA policy on the use of discount rates for RI/FS cost analyses is stated in the preamble to the NCP (55 FR 8722) and in the OSWER Directive 9355.3-20 entitled '*Revisions to OMB Circular A-94 on Guidelines and Discount Rates for Benefit-Cost Analysis*' (OSWER Directive 9355.3-20, 1993). Based on the NCP and this directive, a discount rate of 7% should be used in developing present value cost estimates for remedial alternatives during the FS.

The duration of O&M varies with the specific operating conditions and requirements associated with a given cleanup. In addition, the O&M requirements may vary over the full duration of the cleanup. Communication between the federal and state agencies begins early in the remedial action process and helps lay the foundation for successful remedy implementation. In accordance with CERCLA §121, the state participates "in the long-term planning process for all remedial sites within the State." The lead regional office typically works closely with their counterparts at the state (and tribe, as appropriate) during scoping and development of remedial alternatives. This cooperation typically extends to reviewing drafts of remedy documents for the site, discussing and/or concurring with the site's decision document, and receiving and/or reviewing drafts of remedial design documents, remedial action, monitoring and operations and maintenance documents.

Before the EPA can undertake a fund-financed remedial action, CERCLA Section 104(c)(3) requires the agency to enter into a Superfund State Contract (SSC) or Cooperative Agreement with the state. The SSC is a contract used to document assurances including state payment assurance for its remedial action cost share. In the SSC, the state assures that it will assume all future operation and maintenance of the remedy.

The financial burden to the state is one of many factors considered during the remedy selection process. In accordance with the EPA guidance titled: "A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents" OSWER Directive 9200.1-23P, 1999), the FS uses a nine criteria analysis to evaluate the alternatives and compare them to one another. Cost, including capital, O&M and present worth, is one of the nine criteria. Selection of the preferred alternative is presented in the site's decision document with an explanation of the balance of trade-offs among the remedial alternatives.

The state has the authority to not concur with a selected remedy due to O&M costs or other reasons. In accordance with 40 CFR §300.515(e)(2)(i), "(f)or all EPA-lead sites, EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy." However, "State concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, i.e., signing a ROD, nor is

EPA's concurrence a prerequisite to a state's selecting a remedy at a non-Fund financed state-lead enforcement site under state law (40 CFR § 300.515(e)(2)(ii))."

f. During the hearing, the ASTSWMO witness provided an example of a remedy component (a corroded pipe) that was in poor operational condition at the time the State became responsible for the operation and maintenance, which resulted in the State incurring unanticipated maintenance costs at the outset of the operation and maintenance period. Does EPA ensure that all remedy components are in proper working order and condition before turning the remedy over to the responsibility of the State to prevent such occurrences? If so, please describe in detail how.

Answer: The EPA wants an effective transfer of a Superfund site's remedy to a state, ensuring that all remedy components are in proper working order and in good condition for the state to assume O&M of the site remedy in accordance with the NCP and associated guidance. There are multiple opportunities for the state and the EPA to work together as the site's remedy is determined, through the design and construction of the remedy, and into the operation of the remedy.

The process requires joint inspection of the treatment system at various stages and allows the EPA and the state to determine whether the remedy has been constructed in accordance with the site decision document and remedial design documents, and to develop a list of repairs, replacements, or adjustments that might be necessary before operation and maintenance responsibility is transferred to the state.

The EPA recognizes that, in some cases, treatment system components may need to be repaired or replaced before transfer to the state. During the Remedial Action (RA) and Long Term Response Action (LTRA) stages, major considerations should include updating the O&M Plan and encouraging state officials to visit the site during construction and remedy operation. The EPA guidance entitled "Transfer of Long-Term Response Action Projects to States" (OSWER Directive 9355.0-81FS, July 2003) includes a checklist of considerations that the region and state can follow over the life of a project to minimize issues for O&M transfer.

In certain site-specific circumstances, the EPA may determine that it is appropriate to pay or partially pay for certain repairs or modifications to operating remedies even though a state has assumed responsibility for O&M. The EPA guidance titled: "Directive on Paying for Remedy Repairs or Modifications during the State-Funded Period of Operation and Maintenance" (OSWER Directive 9375.2-12, April 2007) includes considerations for determining whether it is appropriate for the Agency to pay some or all of the costs to repair or modify a remedy after a state has assumed responsibility for O&M. These may include such things as a new, previously not identified contaminant of concern which requires a fundamental remedy change, an Applicable or Relevant and Appropriate Requirement (ARAR) change that requires a more stringent clean up level than that established in the ROD or a construction defect that affects protectiveness.

Q8. Please describe in detail EPA's current policy and practice regarding consultation with States in selecting a removal action.

a. Does interpretation or implementation of the Agency's policy vary among Regions?

Answer: The NCP states that the "basic framework for the response management structure is a system (e.g., a unified command system) that brings together the functions of the Federal Government, the state government, and the responsible party to achieve an effective and efficient response" (NCP 300.105(d)).

The EPA consults with a state on removal actions conducted in that state and also considers state concerns when conducting removal actions. In practice, the EPA region engages the state so that it is a cooperative partner in the removal action. This can be accomplished by using the structure of the Unified Command/Incident Command System (UC/ICS) in emergency situations or for larger incidents, but also occurs through a less formal process such as periodic meetings and consulting with state counterparts via email and phone. As part of the consultation process, the region typically obtains that state's input about cleanup levels, may formally ask the state to identify state applicable, relevant and appropriate standards or requirements, and discusses operational methods to address the site. The state may also be able to provide relevant expertise. The region makes an effort to understand the history of the site and often determines in advance of initiating removal activities whether the state welcomes the EPA involvement. For emergency response situations, when practicable and considering the immediacy of the threat, the EPA notifies the appropriate state agency before beginning a removal action. For time-critical removal actions, states are kept informed of negotiations concerning site assessment activities and early actions.

Non-time critical removal actions generally allow sufficient time for coordination and consultation with the states as well as stakeholders since it is expected that six months will be available before on-site activities must begin when using this authority. Generally, the EPA works with the state throughout the non-time critical removal actions process. The EPA consults with the state prior to issuance of the engineering evaluation/cost analysis and prior to signature of the Removal Action Memorandum.

Specific to effective communication and coordination, the EPA and the state typically exchange lists of appropriate contacts for a particular site or type of response. All parties should be notified of anticipated, initial, and ongoing site activities and the region may wish to suggest that the state designate a person to be the primary coordinator or contact person with the On-Scene-Coordinator (OSC) for federal-lead removal actions. OSCs are encouraged to meet with states on a periodic basis to discuss ongoing site activities. The region may also utilize the Regional Response Team (RRT) as an opportunity to coordinate and consult with states on priority removal actions.
Implementation and interpretation of removal policy regarding consultation with states on removal actions is consistent across states. State response capabilities vary depending on the type and scope of the response action. Communication and coordination between the EPA and the state is documented in the Removal Action Memorandum and other key site documents such as removal response pollution reports and situation reports.

Q9. To what extent do individual Regions consistently apply EPA Headquarters' policies and interpretations regarding: (1) listing sites on the National Priorities List; (2) consulting with affected States in selecting the appropriate remedy; (3) consulting with affected States in selecting a removal action; and (4) providing credit toward 10% cost share under section 104(c)(5) for State in-kind contributions. Please provide detailed examples and explanations for each of the items listed in (1) through (4) for each Region.

Answer: Generally, it is the EPA's policy and practice to consult with states early and often from the time of site discovery throughout the remedial process including any post-construction long-term operation and maintenance of the remedy. While implementation of this policy generally reflects pre-established expectations for relationships between a region and a specific state as defined in the NCP, it is tailored to site-specific circumstances and the urgency of the response, often in a cooperative agreement, a site-specific Superfund state contract, or a Superfund memorandum of agreement.

In accordance with the NCP, the state is given the opportunity to work with the EPA to establish the rules of engagement to ensure that the states are provided a meaningful role in developing removal and remedial response plans. Every effort is made to involve the state during site assessment, removal, the remedial investigation and feasibility study, in selecting and implementing a response plan and in considering reimbursement of cleanup costs. The EPA generally tailors the frequency and scope of consultations with the states at any stage of a cleanup based on the exigency of the situation, the interests of the state and the nature of the site and response operations. Generally, the EPA regions are fully aware of EPA policies, and apply them when developing state-specific MOAs and Cooperative Agreements.

(1) Listing sites on the National Priorities List.

Answer: With respect to listing sites on the NPL, the EPA requests state concurrence prior to listing. This process is consistently applied. If the EPA region recommends proposal to or listing on the NPL when the state is opposed, an issue resolution process is employed per the 1997 EPA policy (http://www.epa.gov/superfund/sites/npl/hrsres/policy/stcorr97.pdf). To ensure national consistency in this process, the EPA has developed a model letter that regions use to request state concurrence.

(2) Consulting with affected States in selecting the appropriate remedy.

Answer: All EPA regions follow the NCP requirements for state involvement in selection of remedy. This includes seeking concurrence from the state on proposed plans.

The following link provides regional examples of remedy selection documents that include state concurrence letters:
http://cumulis.epa.gov/superrods/index.cfm?fuseaction=main.search

(3) Consulting with affected States in selecting a removal action.

Answer: Please see the response to Question 8.

The following link provides regional examples of action memoranda that include state information:
http://www.epaosc.org/site/regionmap.aspx

(4) Providing credit toward 10% cost share under section 104(c)(5) for State in-kind contributions.

Answer: A state may meet its statutory obligation to provide 10% cost share toward the fund-financed remedial action costs incurred by the EPA using one or more of the following methods: 1) cash payment; 2) credit; or 3) in-kind services.[1] The state may choose to satisfy part or all of its 10% cost share for remedial action with in-kind services, provided the State has entered into a cooperative agreement with the EPA. Where the EPA has the lead for the remedial action, but the state would like to provide in-kind services to satisfy part, or all, of its cost share, EPA may enter into a support agency cooperative agreement with the state. In that case, the use of the support agency cooperative agreement as a vehicle for providing cost share must be documented in the state superfund contract.

[1] 40 CFR § 35.6285

"In-kind services" are different from "credits." The granting of "credit" towards a state's cost share is specifically authorized under CERCLA 104(c)(5). Credits are direct, out of pocket expenditures of non-federal funds by states for remedial action. Credits are generally considered items like labor costs (FTE), items purchased by the state, or other tangible items for which the state has documentation of cost (e.g., a bill). "In-kind services" are generally items that are donated by third parties, e.g., services, whereby the value of the item is estimated and in-kind contributions are only provided to satisfy cost shares under the terms of a cooperative agreement. In-kind contributions are authorized under OMB common rules applicable to grants and were adopted by the EPA under the EPA grant regulations at 40 CFR Part 31 and Part 25, Subpart O and may only be applied to satisfy a state's cost share where the in-kind contributions are allowable costs under the terms of a cooperative agreement.

States rarely request the use of "in-kind" services to be applied toward satisfying the state cost share, whereas "credit" is used much more frequently. In EPA Region 8, the state of Colorado requested that the donated use of land be considered an "in-kind" service to be applied as its cost share for the Russell Gulch Sediment Control Dam at the Central City/Clear Creek Superfund site. A third party donated a perpetual easement to allow Colorado to access, construct, operate, and maintain a sediment control dam. In EPA Region 10, the state of Idaho requested that costs borne by developers who install barriers to contamination be considered in-kind services that would be applied to the state's cost share at the Coeur d' Alene Superfund Site.

Applicable Regulations:

40 CFR Part 31 are general grant regulations that apply to grants and cooperative agreements to States, Local Governments, or Federally-recognized Indian tribal governments, and 40 CFR Part 35, Subpart O are the cooperative agreement and state superfund contract requirements that supplement the requirements contained in Part 31. Subpart O also cross references Part 31. (See 40 CFR 35.6005.)

Q10. If a State conducts a removal-type action (at State expense) or provides assistance to EPA in conducting a removal action (when under no obligation to do so) such that EPA either does not need to do a removal action and/or the State action ultimately reduces the long-term remedial cost, following EPA's current policy and practice would it be possible for States to get credit for these actions (under 104(c)(3)) towards the State's *10% cost share for the remedial action*?

Answer: CERCLA permits states to receive credit for "amounts expended for remedial action."[2] CERCLA only permits a state to get credit for removal actions if those actions were taken between January 1, 1978 and December 11, 1980.[3] While CERCLA does allow states to receive credit for work conducted prior to listing, the language limits those credits to "expenses for remedial action." [4] The EPA

[2] CERCLA sec. 104(c)(5)(A) provides that a state shall receive a credit for amounts expended *for remedial action*, provided they are direct, out-of-pocket expenditures of non-federal funds.

[3] Sec. 104(c)(5)(C) provides that a state shall be granted a credit against the share of the costs for which it is responsible provided they are direct out-of-pocket non-federal funds expended for cost-eligible *response action between January 1, 1978 and before the enactment of CERCLA*. Response includes removal, remedial planning, and remedial actions.

[4] For work performed prior to listing, 104(c)(5)(B) provides that a state shall receive credit for *expenses for remedial action* at a facility incurred before the listing of the facility on the National Priorities List or before a contract or cooperative agreement is entered into IF: (i) after such [remedial] expenses are incurred the facility is listed on the NPL and a contract or cooperative agreement is entered into for the facility; and (ii) the President determines that such expenses would have been credited to the state under 104(c)(5)(A) had the expenditures been made after listing of the facility on such list.

only approves credit for expenditures legally eligible for credit.

Q11. Does the Agency anticipate changes to the role of State/State participation in the CERCLA process in FY 14 and beyond due to economic and budgetary pressures?
Answer:

Answer: The EPA does not anticipate changing the role provided for state/state participation in the CERCLA process. CERCLA and the NCP currently provide an important and meaningful role for states.

Q12. Of the three bills –what would EPA anticipate would need to be changed in the National Contingency (NCP) to implement the changes? A. Could EPA implement the changes in the legislation without changing the NCP – please be specific regarding the specific provisions of the Federal –State Partnership for Environmental Protection Act and the Federal Facilities Accountability Act. B. Would EPA implement the changes in the Federal –State Partnership for Environmental Protection Act and the Federal Facilities Accountability Act without changing the NCP?

Answer: The EPA has not identified what, if any, changes to the NCP would be needed. The agency has not reached any conclusions as to whether it could implement the draft legislation without changes to the NCP, nor has it reached any conclusions as to whether it would implement the draft legislation without changes to the NCP.

Q13. In the late 1990's/early 2000's, EPA Office of Solid Waste and Emergency Response and States reformed the RCRA Corrective Action process to address lessons learned, to streamline the administrative process, and to improve the remedy effectiveness and efficiency. What similar reforms to the CERCLA remedial process and the NCP have been made to address these same issues?

Answer: Since the inception of Superfund in 1980, the EPA has sought to improve the program by incorporating lessons learned through its experience cleaning up hazardous waste sites. A significant number of program reforms were undertaken beginning as early as 1989. These early efforts included several broad-based studies and three rounds of "administrative reforms" that focused on concerns such as improving enforcement, expediting cleanup response, encouraging community participation, environmental justice, using innovative technologies, and state and tribal empowerment. For additional information please see the EPA web page at:
http://www.epa.gov/superfund/programs/reforms/index.htm.

More recently, OSWER's three-year (FY 2010- FY 2012) Integrated Cleanup Initiative (ICI) sought to use the EPA's assessment and cleanup authorities in a more integrated, transparent, and accountable fashion, to address a greater number of contaminated sites, to accelerate cleanups where ever possible, and put sites back into productive use. The ICI identified opportunities for improvements across all of EPA's land cleanup programs, including the Superfund, Brownfields, Federal Facilities, Resource Conservation and Recovery Act, and Underground Storage Tanks programs. (See the EPA ICI web page for more information on the ICI at http://www.epa.gov/oswer/integratedcleanup.htm)

For example, the EPA worked with the Department of the Navy to develop the "Toolkit for Preparing CERCLA Record of Decisions" (Sept. 2011). This document is designed to help improve the public transparency and understanding of Superfund Records of Decision (RODs) for remedy decisions

through use of advanced data visualization technology. In another instance, the EPA issued a directive in February 2013, that highlights lessons learned from three project management pilot studies designed to explore non-traditional approaches to remedial design and action (See OSWER Directive 9200.2-129, "Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned").

a. What changes *are needed* to the CERCLA Remedial process and the NCP to modernize and streamline the process to implement the similar efficiencies and process improvements that were made to the RCRA CA [corrective action] processes?

Answer: The EPA has a long-standing commitment to the principle of comparability between the RCRA corrective action and CERCLA programs and to the idea that the programs should yield similar remedies in similar circumstances. To further this goal, many guidance documents apply to both program and lessons learned, and remedy effectiveness information is applicable to both programs.

The EPA is committed to the continuous improvement of its operations by taking greater advantage of its site remediation experience as illustrated in the examples above; therefore, changes to the remedial process in the NCP are not needed to maintain the parity between the two programs.

In November 2012, the Superfund remedial program initiated a comprehensive review of its operations to identify options to maintain its effectiveness in achieving its core mission of protecting human health and the environment in the face of diminishing funding availability. The review builds on previous recommendations from the ICI, incorporates actions from ongoing efforts, and includes unique actions developed under the program review. Several areas are being considered in this Program Review to capture important technical developments in the cleanup process, as well as innovations in remedial project management. The final action plan is expected to be completed by December 2013.

Q14. Your written testimony states that "since the inception of the Superfund program, EPA has continually evaluated program implementation and sought ways to improve the effectiveness of the cleanup program. Working with our state and tribal partners, we have instituted a variety of program changes and reforms over the years." Please list the program changes and reforms referred to in this statement and provide specific years(s) that the changes were made.

Answer: Since the inception of Superfund in 1980, the EPA has sought to improve the program by incorporating lessons learned through its extensive experience cleaning up hazardous waste sites.

The EPA began efforts to address administrative changes to improve the Superfund program in 1989 by publishing a "90-Day Study" that focused on concerns such as enforcement, expediting cleanup response, and encouraging community participation. In June 1991, the EPA convened a 30-day task force whose work culminated in initiatives to:

- Set aggressive cleanup targets;
- Streamline the Superfund process;
- Elevate site specific issues that cause delay;
- Accelerate private party cleanups;
- Refocus the debate on Superfund progress; and
- Review risk assessment/risk management policies.

Both the "90-Day Study" and the "30-Day Study" provided the framework for the first set of Superfund administrative improvements. The EPA announced a first round of administrative reforms in June 1993 that established nine new initiatives to:

- Increase enforcement fairness and reduce transaction costs;
- Improve cleanup effectiveness and consistency;
- Expand meaningful public involvement; and
- Enhance the State role in the Superfund program.

The EPA announced a second round of reforms in February 1995. The second round of reforms sought to administratively test or implement many of the proposal's innovations through both pilot projects and new or revised Agency guidance. This round strengthened and improved the program through initiatives in enforcement, public involvement and environmental justice, innovative technology, and state and tribal empowerment.

The EPA introduced the third and final round of "Superfund Reforms" in October 1995. Through a group of 20 initiatives, this round took a "common sense" approach to reform and targeted the concerns of diverse stakeholders. Several reforms in this final round focused on making cleanup decisions more cost-effective and protective of human health and the environment. Other initiatives aimed to reduce litigation and transaction costs, and to keep states and communities more informed and involved in cleanup decisions. For additional information please see the EPA web page at: http://www.epa.gov/superfund/programs/reforms/index.htm.

More recently, OSWER's three-year (FY 2010- FY 2012) Integrated Cleanup Initiative (ICI) sought to use the EPA's assessment and cleanup authorities in a more integrated, transparent, and accountable fashion, to address a greater number of contaminated sites, to accelerate cleanups where ever possible, and put sites back into productive use. The ICI identified opportunities for improvements across all of the EPA's land cleanup programs, including the Superfund, Brownfields, Federal Facilities, Resource Conservation and Recovery Act, and Underground Storage Tanks programs. (See the EPA ICI web page for more information on the ICI: http://www.epa.gov/oswer/integratedcleanup.htm)

For example, the EPA worked with the Department of the Navy to develop the "Toolkit for Preparing CERCLA Record of Decisions" (Sept. 2011). This document is designed to help improve the public transparency and understanding of remedy decisions through use of advanced data visualization technology. In another instance, the EPA issued a directive in February 2013 that highlights lessons learned from three project management pilot studies designed to explore non-traditional approaches to remedial design and action (See OSWER Directive 9200.2-129, "Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned").

a. Please also indicate whether the changes referred to involved revisions of the NCP and provide details regarding the timeframe (date of the proposed rule, date of the final rule, and any other details regarding timing) for the regulatory change.

Answer: The EPA has made a recent change in the NCP to recognize important technological advances. A final rule was issued in the Federal Register on March 18, 2013 entitled "*National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File* (77 FR 66729)."

This revision to the NCP was done in accordance with the EPA's Action Development Process Guidance for EPA Staff on Developing Quality Actions (ADP), beginning in March, 2012, with submission to the EPA's Rule and Policy Information and Development System. Appropriate reviews were conducted by the Agency and the National Response Team, in accordance with Executive Order 12580, as described in the ADP.

On November 7, 2012, the EPA published in the Federal Register a direct final rule entitled *National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File* (77 FR 66729) (hereafter the Direct Final rule). This direct final rule added language to 40 CFR 300.805(c) of the NCP to make the administrative record file more broadly available to the public with computer telecommunications or other electronic means. Concurrently, the EPA published a parallel proposed rule (77 FR 66783) that requested comment on the same change to the NCP. The EPA stated in that direct final rule that if adverse comment was received on the amendment by December 7, 2012, the affected amendment would not take effect and the EPA would publish a timely withdrawal in the Federal Register of the amendment. The EPA received one comment and as a result withdrew the amendment on January 22, 2013 (78 FR 4333). The EPA published the final rule to address the comment received on the amendment and to finalize the NCP revision.

b. For program changes that did not involve regulatory changes to the NCP, please describe in detail the degree to which individual project managers and Regional Offices have implemented these changes and in accordance with Headquarters' guidance and intent. Where there has been inconsistency in the application of the EPA Headquarters guidance and intent, what steps has EPA Headquarters taken to identify and correct such inconsistencies?

Answer: Generally, site managers apply concepts outlined by CERCLA, the NCP, and associated guidance consistently from site to site. However, this does not mean that remediation strategies and outcomes are expected to be the same from site to site. CERCLA, the NCP and associated guidances build an implementation framework that relies upon site-specific data collection, decision making and response action. As a result, Superfund is a program that is applied on a site-by-site basis. This permits the EPA to address the wide variety of contaminant releases (and site conditions) found throughout the country in a cost-effective manner.

Nevertheless, the EPA HQ provides ongoing support for all ten EPA regional offices as they address these sites to ensure that cleanups are conducted consistent with the statute, regulations and relevant guidance. HQ supports Superfund regional offices in a number of ways. For example, HQ regional coordinators provide day-to-day assistance to regional staff and management in reviewing draft documents and strategies, including draft and final decision documents, Five-Year Reviews, and NPL deletion documents. In addition, HQ technical and policy expertise supports required regional consultations, ensures that program polices are given due consideration and that the best science is used to support decisions. Further, a subset of sediment remediation strategies and high cost proposed remedies are reviewed formally by the Contaminated Sediments Technical Advisory Group (CSTAG) and/or the National Remedy Review Board (NRRB). In certain cases, regional managers must brief HQ managers prior to finalizing key site decisions or response strategies in order to ensure appropriate national consistency.

c. For changes that did not involve regulatory changes to the NCP, please describe in detail the degree to which other federal agencies (by agency) have implemented these changes consistently and in accordance with EPA Headquarters guidance and intent. Where there has been

inconsistency in the application of EPA Headquarters guidance and intent, what steps has EPA Headquarters taken to identify and correct such inconsistencies?

Answer: CERCLA Section 120(a)(2) requires federal agencies to comply with the same guidelines, rules, regulations and criteria as those that apply at non-federal facilities, and prohibits federal agencies from adopting or using guidelines, rules, regulations or criteria that are inconsistent with those established by the EPA. As noted in the answer to question 14b, remediation strategies and outcomes are not expected to be the same from site to site, In those instances where the federal facility is on the NPL, CERCLA Section 120(e)(2), requires the responsible federal agency to enter into an interagency agreement, known as federal facility agreements (FFAs), with the EPA. It is through the FFAs that the EPA can help ensure that CERCLA requirements are met for remedial actions at federal facility NPL sites. See responses to Questions 14 d and e below regarding FFAs. In contrast, FFAs are not required for federal facility non-NPL sites. Federal agencies are responsible for ensuring that CERCLA compliance is met at non-NPL sites.

d. What authority does EPA currently (a) have and (b) utilize, to ensure that other federal agencies (by agency) rules, regulations, policies, interpretations and application to sites concerning the implementation of the CERCLA Removal and Remedial Program are consistent with EPA Headquarters rules, regulations, policies, interpretations, and application to sites including:

i. State involvement in decision-making?
ii. Identification of cleanup standards?
iii. Application of NCP requirements?
iv. Application of EPA Headquarters policies and procedures at NPL Sites?
v. Application of EPA Headquarters policies and procedures at non-NPL Sites?

Answer: CERCLA Section 120(a)(2) requires federal agencies to comply with the same guidelines, rules, regulations and criteria for remedial actions at federal facilities as those that apply at non-federal facilities, and prohibits federal agencies from adopting or using guidelines, rules, regulations or criteria that are inconsistent with those established by the EPA.

The EPA cannot prohibit another federal agency from issuing policy or guidance that is inconsistent with EPA rules, regulations, policy, or guidance. This does not however, alter the statutory requirement that agencies comply with CERCLA section 120(a)(2) requirements. EPA has general authority to enforce the substance of CERCLA requirements in Section 120(e)(2), which requires the responsible federal agency, together with the EPA, to enter into interagency agreements known as Federal Facility Agreements (FFAs), at federal facility sites on the National Priorities List (NPL). FFAs require the federal agency to comply with CERCLA, the National Contingency Plan (NCP), and EPA guidance.

Generally, it the EPA's practice to consult with states frequently during the remedial process and development of an FFA. Most states have chosen to participate in the FFAs. Certain states have chosen not to enter into these agreements, but often participate through other means and help influence cleanup decisions. FFAs provide a formal process for state involvement in decision making, identification of cleanup standards, and the application of NCP requirements.

e. To what extent has EPA utilized the authority described in question 14(d)? What difficulties has EPA encountered in exercising these authorities? Please provide specific examples by federal agency.

Answer: A primary EPA authority, whenever federal facility sites are added to the National Priority List (NPL), is the CERCLA Section 120 interagency agreement, known as a Federal Facility Agreement (FFA). To date, there are 171 Federal Facility Agreements for the 174 federal facility sites on the NPL. Under the direction of an FFA, federal site cleanup is carried out as required consistent with requirements in CERCLA, the National Contingency Plan (NCP), and EPA guidance. There are however, some challenges in exercising the EPA's authority in FFAs. Differences in opinions between agencies or the state may arise in the interpretation and implementation of the regulations and guidance documents with respect to site specific conditions. Both Congressional Research Service (CRS) and General Accountability Office (GAO) testimonies before the House Energy and Commerce Committee on May 22, 2013, identified challenges faced by the EPA.

Q15. In your written testimony regarding the Reducing Excessive Deadline Obligation Act you noted that the current statutory provision in 2002(b) of the Solid Waste Disposal Act could pose a "significant resource burden on EPA given the complexity and volume of EPA's RCRA regulations." Please explain why the current statutory provision would cause a "significant resource burden" on the Agency.

Answer: Section 2002(b) requires the agency to both review all regulations promulgated under the Solid Waste Disposal Act, and to complete any revisions the EPA determines to be necessary within a single three year time frame. Given the various analyses required to support any rulemaking, including for example, the analyses required under Executive Order and the Regulatory Flexibility Act, including convening a small business panel, where required, completing even a single rulemaking in a three-year period can be challenging. When coupled with the requirement to complete a review of all regulations within that same time frame, this represents a significant resource burden. The body of regulations promulgated under the Solid Waste Disposal Act is wide ranging and technically complex; for example, these regulations cover municipal solid waste, hazardous waste identification (including hazardous waste listings and characteristics), requirements for generators, transporters, and treatment, storage and disposal facilities, and requirements for state programs.

Q16. If EPA had to review and, if necessary, revise *each regulation promulgated under the Solid Waste Disposal Act,* would the Agency be able to accomplish such a review? Why or why not?

a. If revision of *each regulation promulgated under the Solid Waste Disposal Act* were necessary, would the Agency be able to accomplish such a revision? Why or why not?

Answer: First, we would note that RCRA section 2002(b) requires that "Each regulation promulgated under this Chapter shall be reviewed and, where necessary, revised not less frequently than every three years." Thus, we would not expect that each regulation would need to be revised every three years. However, for those regulations that the EPA determined would need to be revised, whether the agency would be able accomplish such a revision would likely depend on the technical complexity of the regulation. In certain instances, e.g., for highly complex and technical revisions, the EPA believes it may need a longer time frame to complete the rulemaking.

b. What resources (fiscal and personnel) are or would be required to conduct such a review every three years? Does EPA have such resources at its disposal?

Answer: The EPA has not estimated the resources required to conduct such a review every three years.

The Honorable Henry A. Waxman

Q1. Please describe the review that EPA currently carries out under section 2002(b) of RCRA?

Answer: Again, we would note that RCRA section 2002(b) requires that "Each regulation promulgated under this Chapter shall be reviewed and, where necessary, revised not less frequently than every three years." Thus, we would not expect that each regulation would need to be revised every three years. In implementing the EPA programs, the agency determines which program regulations may need revision. How long it would take to accomplish such a revision would likely depend on the technical complexity of the regulation. The EPA does not currently have a formal process in place to implement the requirement under 2002(b) to review and revise, as necessary, all regulations under section 2002(b) of RCRA.

Q2. How many FTE's are currently used to carry out this requirement?

Answer: The EPA does not have an FTE estimate. The Agency does not have a formal process in place to carry out this requirement.

Q3. How many lawsuits have been filed, since 1976, to enforce the deadline in section 2002(b)?

Answer: Three lawsuits have been filed since 1976, but they all relate to agency decisions whether to modify its current regulation of coal combustion residuals. No other lawsuits have been filed.

Q4. EPA currently has in place a policy on seeking State concurrence before proposing a site to the NPL. Please list all the exceptions included in that policy.

Answer: The EPA policy states that the agency will, with limited exceptions, only list a site on the National Priorities List (NPL) after receiving state concurrence. Examples of exceptions are: 1) sites that meet the listing criteria included in the NCP at 40 CFR Section 300.425(c)(3) (the ATSDR public health advisory listing criteria); 2) sites where the State could be a major responsible party; or 3) sites with community-identified conditions that warrant listing. Since the inception of this policy in 1996, the Agency has proposed adding only one site to the NPL over state objection. This proposal listing took place in 1998. The site remains "proposed" but not final. The EPA and the state, in lieu of final listing, are working collaboratively on the cleanup of this site.

When a site is located on the land of a federally- recognized tribe, the concurrence request would go to the tribe rather than the state.

Q5. What, if any, sites have been added to the NPL since adoption of that policy without State concurrence?

Answer: The EPA has not added any sites to the final National Priorities List (NPL) without state concurrence. Since adoption of the 1996 state concurrence policy, only one site, Fox River NRDA/PCB Releases (Wisconsin), has been proposed to the NPL without the concurrence of the state. The site remains "proposed" but not final. The EPA and the state, in lieu of final listing, are working collaboratively on the cleanup of this site.

Q10. Does section 121 require that analysis to look at the total short- and long-term costs, including operation and maintenance cost for the entire period during which those activities will be required?

Answer: CERCLA Section 121(a) requires that the analysis of alternatives consider both total short-term and long-term cost including O&M for the entire period of operation. The provision requires that in evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

Q11. Under section 121 of Superfund, are response actions which permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substances preferred over other response actions?

Answer: CERCLA 121 (b) establishes a preference for alternatives that permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances. CERCLA 121(b) notes the following:

(b) GENERAL RULES.—(1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment.

EPA primarily focuses consideration of treatment of source materials on those materials that are determined to constitute a principal threat waste. The National Contingency Plan (NCP) preamble further clarified the following:

EPA expects that treatment will be the preferred means by which to address the principal threats posed by a site, wherever practicable. Principal threats are characterized as waste that cannot be reliably controlled in place, such as liquids, highly mobile materials (e.g., solvents), and high concentrations of toxic compounds (e.g., several orders of magnitude above levels that allow for unrestricted use and unlimited exposure). Treatment is less likely to be practicable when sites have large volumes of low concentrations of material, or when the waste is very difficult to handle and treat (e.g., mixed waste of widely varying composition). Specific situations that may limit the use of treatment include sites where: (1) treatment technologies are not technically feasible or are not available within a reasonable timeframe; (2) the extraordinary size or complexity of a site makes implementation of treatment technologies impracticable; (3) implementation of a treatment-based remedy would result in greater overall risk to human health and the environment due to risks posed to workers or the surrounding community during implementation; or (4) severe effects across environmental media resulting from implementation would occur. (See 55 FR 8703, March 8, 1990.)

The remedy decision as to whether treatment is practicable takes into account the NCP nine remedy evaluation criteria plus other EPA Superfund guidance. As noted in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) preamble: CERCLA section 121 states Congress' preference for treatment and permanent remedies, as opposed to simply prevention of exposure through legal controls. The evaluation of the nine criteria (' 300.430(f)(1)(ii)), including cost and other factors, determines the practicability of active measures (i.e., treatment and engineering controls) and the degree to which institutional controls will be included as part of the remedy. (See 55 FR 8707, March 8, 1990).

Q12. What are the least preferred response actions under that section?

Answer: CERCLA 121(b) clarifies that off-site transport and disposal without treatment are the least preferred alternatives. Disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available.

As discussed in the response to question 11 above, consideration of site-specific factors as part of the CERCLA criteria evaluation may result in a decision to not treat hazardous substances and to dispose of the material off-site. This is discussed in the National Contingency Plan (NCP) preamble as follows: EPA agrees with the commenter that off-site disposal without treatment may be selected as the remedy in appropriate circumstances, such as where the site has high volumes of low toxicity waste. However, the statute clearly indicates that this is the least preferred alternative.

Q13. Please describe EPA's track record in meeting the requirements for evaluation of cost-effectiveness and selection of preferred remedies under section 121.

Answer: In accordance with CERCLA and the NCP, all selected remedies must be cost-effective and protective of human health and the environment. In addition, select remedies are required to meet eight other criteria as specified in the NCP. The EPA has consistently met this standard for its decisions under section 121.

CERCLA 121(a) notes the following:

(a) The President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 or secured under section 106 which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective, response.

The NCP preamble notes the following:

Cost-effectiveness is determined in the remedy selection phase, considering the long-term effectiveness and permanence afforded by the alternative, the extent to which the alternative reduces the toxicity, mobility, or volume of the hazardous substances through treatment, the short-term effectiveness of the alternative, and the alternative's cost. (See 55 FR 8722, March 8, 1990.)

CERCLA, at section 121(a), states that "the President shall select appropriate remedial actions ... which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response." Thus, cost-effectiveness is established as a condition for remedy selection, not merely as a consideration during remedial design and implementation. Further in the statute, at section 121(b)(1), Congress again repeats the requirement that only cost-effective remedies are to be selected, as follows: "The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment ... to the maximum extent practicable." Again, cost-effectiveness is cited along with protectiveness as a key factor to consider in selecting the remedy. The EPA believes that the statutory language supports the use of concepts of "cost" and "effectiveness" in this rule's nine evaluation criteria that provide the basis for the remedy selection decision, rather than as factors to be applied after the remedy has been selected. (See 55 FR 8726, March 8, 1990.)

As noted in response to question 11, CERCLA established a preference for use of treatment to the maximum extent practicable. The NCP preamble clarified that treatment for source material is focused on principal threat materials; however, there may be situations where treatment is not practicable. The

determination of the extent to which treatment is practicable takes into account the NCP nine criteria alternatives analysis, plus other EPA Superfund guidance.

Since the inception of the CERCLA program in 1981 through 2011, treatment has been used at 78% of the almost 1,400 NPL sites for which a decision document has been signed for remediation. This statistic does not include sites where a CERCLA response was determined not to be warranted. Based on an analysis of decision documents from FY 2009 through 2011, treatment has been a component of 48% of source control decision documents for those four years. For remedy decision documents that do not involve treatment, the nature of the waste may be such that treatment is not practicable or the waste does not constitute a principal threat. In addition, these three years represent a subset of decision documents for many of these sites; previous decisions or future decisions may address contamination that could warrant consideration of treatment. Generally, the selection of treatment to address source materials has remained relatively constant since FY 1998.

Q14. Can state institutional control laws qualify as legally applicable or relevant and appropriate standards, requirements, criteria, or limitation?

Answer: All or portions of state institutional control (IC) laws may potentially constitute applicable, or relevant and appropriate requirements (ARARs) on a site-specific basis, depending on the specifics of the law and site-specific circumstances. All ARARs decisions are made on a site-specific basis and are documented in the appropriate site decision document (e.g., Record of Decision, ROD Amendment).

In 2012, the EPA issued guidance titled: "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites" (OSWER 9355.0-89, Dec. 2012) (2012 IC guidance) that provides overarching direction on the use of ICs. The EPA Regions are aware of the guidance and are making ARARs decisions based upon site specific situations.

As with other statutory or regulatory provisions, the EPA may evaluate a state IC law or regulation to determine whether all or a portion of the IC law or regulation is a potential ARAR, consistent with CERCLA, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and existing Agency guidance and policies. Such ARAR determinations typically are made on a site-specific basis considering the circumstances of the release, an analysis of the specific statutory and regulatory provisions, and a number of other factors. [See footnote 13 --For additional guidance on ARARs under CERCLA, see 40 C.F.R. §300.5 and 40 C.F.R. §300.400(g) of the NCP and *CERCLA Compliance with Other Laws Manual*, EPA 540/G-89/006, August 1988, pages 1-10 through 1-12]

In general, any substantive portion of a state IC law or regulation that meets the requirements of CERCLA §121(d) and is consistent with the NCP (e.g., 40 C.F.R. §300.400(g)(4)) may be considered as a potential ARAR. Substantive standards typically establish a level or standard of control, and may include a narrative requirement; in the context of ICs, a substantive requirement could be one that, for example, is designed to protect human health and the environment by requiring land use or activity use restrictions on property with residual contamination where that residual contamination makes the property unsuitable for specific land uses.

As a policy matter, a portion of a state IC law or regulation that requires particular mechanisms or procedures (e.g., state-approved recordation) to implement the IC may be considered part of the substantive requirement if it provides for enforceability of the IC. Procedural requirements tied to discretionary state processes that could result in inconsistent applications of a state IC law or regulation

generally would be considered administrative in nature (and not ARARs). For example, a provision in a state IC law or regulation that allows or requires state approval of a proprietary control, or grants authority to the state to modify or terminate a proprietary control without specified objective factors and meaningful opportunity for public participation generally would not constitute a standard that represents an ARAR.

In some cases, a portion of a state IC law or regulation that is determined not to be an ARAR may be identified by the Region in a CERCLA decision document as a to-be-considered (TBC) criteria [See 40 C.F.R. Section 300.400(g)(3)]. In appropriate circumstances, TBCs are used to help ensure the long-term protectiveness of the response action.

Q15. Please describe the rights granted to states under section 121 to require compliance with legally applicable or relevant and appropriate standards, requirements, criteria, and limitations.

Answer: CERCLA section 121 (f) (1) mandates that the state has the opportunity for "substantial and meaningful" involvement in initiation, development and selection of remedial actions. This mandate is codified in the NCP in section 300.500 and 300.515. Section 300.515(d) relating to the remedial investigation/feasibility study leading up to the decision document includes providing states with the opportunity to provide timely identification of regulations that may constitute applicable, or relevant and appropriate requirements.

Section 121(f)(2)((B) grants rights to states to intervene in EPA enforcement actions against potentially responsible parties as follows:
'. . . At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, . . . the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree."

". . . If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action . . . before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree:

Section 121(f)(3) also grants rights to states to intervene in the remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States as follows:

" (A). . . At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation . . . the President shall provide an opportunity

for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.
(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:
(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.
(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.
(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation." For fund lead response actions, states have the discretion of not signing the state superfund contract or cooperative agreement and thereby preventing implementing of the remedy. CERCLA 104 (c):

"(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; ..."

In addition, states may require compliance with state regulation subsequent to the CERCLA cleanup.

Q16. When was the National Contingency Plan (NCP) last revised?

Answer: The EPA published a final rule in the Federal Register on March 18, 2013, that revised the NCP to include computer communications or other electronic means to make the administrative record file available to the public. Prior revisions of the NCP include a September 15, 1994 final rulemaking to implement provisions of the 1990 Oil Pollution Act (OPA), and a March 8, 1990 final rulemaking to implement provisions of the 1986 Superfund Amendments and Reauthorization Act (SARA).

Q17. Please describe the revision process for the NCP, including the duration of the process.

Answer: The EPA revises the NCP through formal rulemaking. A federal regulation is generally an authoritative requirement issued by a federal department or agency that implements a statute and has the force of law. The EPA's rulemaking process generally consists of a proposed rule stage and a final rule stage. In general, the EPA provides notice of a proposed regulation and any person or organization may review the document and submit comments on it in writing. The period during which public comments are accepted varies, but is usually 30, 60, or 90 days.

As part of the EPA rulemaking process, the agency is required to consider the public comments received on the proposed regulation. When the EPA publishes the text of a final regulation in the Federal Register, it generally incorporates a response to the significant issues raised by those who submitted comments and discusses any changes made to the regulation as a result.

Regarding the most recent NCP revision, the EPA revised the NCP to acknowledge advancements in electronic technologies used to manage and convey information to the public. This revision to the NCP was done in accordance with the EPA's Action Development Process Guidance for EPA Staff on Developing Quality Actions (ADP), beginning in March, 2012, with submission to EPA's Rule and Policy Information and Development System (RAPIDS). This action was given a Tier 3 designation. Appropriate reviews were conducted by the Agency and the National Response Team, in accordance with Executive Order 12580, as described in the ADP.
On November 7, 2012, the EPA published in the Federal Register a Direct Final rule entitled *National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File* (77 FR 66729) (hereafter the Direct Final rule). This Direct Final rule added language to 40 CFR 300.805(c) of the NCP to broaden the technology, to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public. Concurrently, the EPA published a parallel Proposed rule (77 FR 66783) that requested comment on the same change to the NCP. The EPA stated in that Direct Final rule that if we received adverse comment on the amendment by December 7, 2012, the affected amendment would not take effect and we would publish a timely withdrawal in the Federal Register of the amendment. The EPA received a comment that identified some questions about the proposed rule change. The Agency withdrew the amendment on January 22, 2013 (78 FR 4333). The EPA published the Final rule on April 17, 2013, which provided additional explanatory language to address the issues raised and finalized this amendment.

Regarding major revisions to the NCP by the EPA in the past, such as rulemakings to implement provisions of the 1990 OPA, and the 1986 Superfund Amendments and Reauthorization Act (SARA), these rulemakings took three or more years to complete.

The Honorable Ralph M. Hall

Q1. I am aware of a very promising initiative involving the Superfund program of EPA and the Civil Works program of the Corps of Engineers that is focused on restoring contaminated urban rivers, which pose some of the most difficult challenges of all Superfund sites across the nation. That initiative, referred to as the Urban Rivers Restoration Initiative, gives States a much greater role in proposing and managing restoration at Superfund sites on urban rivers due to the Federal-State partnership relationship inherent in the Water Resource Development Authorities of the Corps. The proposal has been examined with positive results and recommendations for expansion by the EPA IG.

Might you provide what steps you might take in this Administration to provide greater support and more enthusiastic backing for this proposal?

Answer: The EPA and the Corps of Engineers (USACE) signed a Memoranda of Understanding in 2002, 2005, and 2006 establishing a partnership referred to as the Urban Rivers Restoration Initiative.

USACE receives funding under the Water Resources Development Act (WRDA) to dredge navigational channels in the same rivers where Superfund is responsible for cleanup. As part of these agreements, the EPA and USACE selected pilot projects that would demonstrate how coordinated federal, state and local governments and private sector efforts can not only restore contaminated rivers but also revitalize urban environments. The EPA strongly supports the collaborative and watershed-based concepts piloted in Urban Rivers Restoration Initiative and continues to promote the use of these concepts.

Superfund program guidance, "Integrating Water and Waste Programs to Restore Watersheds: A Guide for Federal and State Project Managers," was developed specifically to enhance coordination across federal, state, and local waste and water programs to streamline requirements, satisfy multiple objectives, tap into a variety of funding sources (including the Water Resource Development Act), and implement restoration activities more efficiently, with a goal of showing measurable results. The guidance provides a road map to conducting cross-programmatic watershed assessments and cleanups in watersheds with both water and waste program issues and presents innovative tools to enhance program integration.

The EPA continues to coordinate environmental studies at sites where there is ongoing CERCLA and WRDA work by promoting the early identification and exchange of information between the EPA, states, and USACE at NPL sites.

FEDERAL AND STATE PARTNERSHIP FOR ENVIRONMENTAL PROTECTION ACT OF 2013; REDUCING EXCESSIVE DEADLINE OBLIGATIONS ACT OF 2013; AND FEDERAL FACILITY ACCOUNTABILITY ACT OF 2013

TUESDAY, MAY 22, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:17 a.m., in room 2322 of the Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Members present: Representatives Shimkus, Gingrey, Pitts, Latta, McKinley, Johnson, Tonko, Green, Capps, McNerney, Dingell, and Waxman (ex officio).

Staff present: Nick Abraham, Legislative Clerk; David McCarthy, Chief Counsel, Environment/Economy; Tina Richards, Counsel; Environment; Chris Sarley, Policy Coordinator, Environment and Economy; Jacqueline Cohen, Democratic Senior Counsel; Greg Dotson, Democratic Staff Director, Energy and the Environment; and Caitlin Haberman, Democratic Policy Analyst.

Mr. SHIMKUS. We are going to call the hearing back to order. This is a continuation of the hearing that started last week, and so on the second panel we have Mr. David Bearden, who is a Specialist in Environmental Policy from the Congressional Research Service, and also joined by Mr. David Trimble, who is the Director of Natural Resources and Environment from the Government Accountability Office.

Gentlemen, your full statements have already been submitted for the record. You have 5 minutes. As you can see, I don't think we are really pressed for anything immediately, so we will be generous. It really gives us a chance to understand this program and as follow-up questions, so with that, I would like to recognize Mr. Bearden for 5 minutes. And let us make sure the microphone is on and it gets pulled close to you.

STATEMENTS OF DAVID M. BEARDEN, SPECIALIST IN ENVIRONMENTAL POLICY FOR THE CONGRESSIONAL RESEARCH SERVICE; AND DAVID TRIMBLE, DIRECTOR OF NATURAL RESOURCES AND ENVIRONMENT, GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF DAVID BEARDEN

Mr. BEARDEN. Chairman Shimkus, Ranking Member Tonko and members of the subcommittee, my name is David Bearden and I am a Specialist in Environmental Policy for the Congressional Research Service. Thank you for inviting me to testify on behalf of CRS on legislation that would amend the Comprehensive Environmental Response, Compensation and Liability Act to address various aspects of the federal and state roles in the cleanup of environmental contamination and the applicability of state clean up requirements at both current and former federal facilities. In brief, the primary areas that the legislation would address include the designation of sites on the National Priorities List; credits toward state matching funds requirements at non-federal facilities; the selection of cleanup actions and opportunities for judicial review of such actions; the establishment of financial responsibility requirements; and the waiver of sovereign immunity at both current and former federal facilities.

In serving the U.S. Congress on a non-partisan and objective basis, CRS takes no position on this legislation but has been asked by the subcommittee to identify the federal and state roles under CERCLA in existing law and the aspects of these roles that the legislation would address. The statements presented in this testimony are based on a preliminary analysis of the legislation within the time available. CRS remains available to assist the subcommittee in its consideration of this legislation, related issues and potential concerns among affected stakeholders.

I will now just provide a brief summary of the existing framework of federal and state roles under CERCLA and then a summary of the main provisions of all three bills.

Congress enacted CERCLA in 1980 in the 96th Congress in response to a growing desire for the federal government to pursue the cleanup of the Nation's most hazardous sites, to protect human health and the environment. Under the Superfund program, the Environmental Protection Agency, EPA, may pursue cleanup and enforcement actions to respond to actual or threatened releases of hazardous substances into the environment. CERCLA established a broad liability scheme that holds past and current owners and operators of facilities, generators of wastes, and transporters of wastes who selected a facility for disposal, liable for cleanup costs, natural resource damages, and the costs of federal public health studies that are conducted by the Agency for Toxic Substances and Disease Registry. In conjunction with this liability scheme, CERCLA directs EPA to establish requirements for private entities to demonstrate their financial capability to satisfy cleanup liability if contamination were to occur, but EPA has not yet promulgated such requirements.

The Superfund Amendments and Reauthorization Act of 1986 in the 99th Congress amended CERCLA to address the applicability

of the statute and state law to federal facilities, and amended various cleanup, liability and enforcement provisions of the statute. Several subsequent laws also have amended CERCLA for specific purposes. With respect to federal and state roles, which is the primary area of focus of the three bills, the Small Business Liability Relief and Brownfields Revitalization Act of 2002, enacted in the 107th Congress, amended CERCLA to authorize federal grants to assist states and local governments for the cleanup of brownfield sites that are not addressed under the Superfund program, to give substantial deference to the states in EPA's designation of sites on the National Priorities List, and to limit the use of federal enforcement authorities under CERCLA to pursue the cleanup of a site, if a state already is pursuing the cleanup under its own law.

CERCLA directs EPA to maintain the National Priorities List to prioritize sites for federal response actions. Under CERCLA, federal response actions may include interim removal actions, as they are called, to address more immediate risks, and broader remedial actions to address long-term risks. Remedial actions also differ in that the use of federal Superfund appropriations is conditional upon the state agreeing to share the costs with the federal government, whereas removal actions may be fully federally funded with Superfund appropriations.

Under federal regulation, a site also must be on the National Priorities List as an additional condition for EPA's use of federal Superfund appropriations to finance the remedial actions. The cleanup of Superfund sites that are financed with private funds from the potentially responsible parties are not subject to this condition, and therefore do not necessarily require listing on the NPL to perform the remedial actions that are not funded with federal tax dollars. EPA may fund removal actions with federal Superfund appropriations to address immediate hazards, regardless of whether a site is on the National Priorities List.

The response authorities of CERCLA also are available to federal agencies for the performance of the cleanup of federal facilities that are funded with separate appropriations apart from Superfund, and these separate appropriations are allocated directly to the agencies that administer those facilities. The Department of Defense and the Department of Energy administer the vast majority of federal facilities where cleanup is performed under the authorities of CERCLA and other relevant statutes.

EPA and the states still play a role, however, in overseeing and enforcing the cleanup of federal facilities. EPA leads the oversight of the cleanup of federal facilities that are on the National Priorities List but still in conjunction with the states, and the states primarily are responsible for leading the oversight of the cleanup of federal facilities that are not on the National Priorities List where EPA does not have a similarly prominent role.

CERCLA authorizes various mechanisms for the states and the public to participate in federal cleanup decisions. However, EPA, or the lead federal agency at a federal facility, generally is responsible for making the federal decisions. Those decisions, though, still may involve the application of state cleanup requirements if they may be more stringent than the federal requirement.

CERCLA authorizes citizen suits, including suits by states, to challenge federal decisions regarding response actions, both remediation and removal, but limits the timing of judicial review until after the action is taken. CERCLA also specifically authorizes states to bring action in U.S. district court to challenge the selection of remedial actions at a federal facility within its borders.

Conditions for the use of federal Superfund appropriations also can be a factor in federal cleanup decisions that are made in consultation with the states at non-federal facilities. The use of federal Superfund appropriations to finance remedial actions generally is conditional upon the state agreeing to pay 10 percent of the capital costs, with the federal government paying 90 percent, and generally 100 percent of the costs of long-term operation and maintenance in maintaining any institutional controls that might be necessary over the long term. There is an exception for the treatment of groundwater under which the federal government may pay the full costs of operation and maintenance for the first 10 years of the remedy after which point the state would assume its responsibility for the 100 percent costs of the operation and maintenance. These state matching funds requirements do not apply to the use of federal Superfund appropriations for removal actions, nor to either remedial or removal actions that are carried out at federal facilities and funded fully by the federal government separately with appropriations to those agencies that administer those facilities.

The legislation that is before the committee, the three bills collectively, would expand the role of the states in the cleanup of contaminated sites under CERCLA beyond the scope of the most recent amendments I mentioned earlier that were enacted in 2002 in the 107th Congress. The following points that I have outlined briefly identify how each bill would alter the state role in comparison to existing law.

The first bill, the Federal and state Partnership for Environmental Protection Act of 2013, would make the following changes to existing law. It would expand consultation with affected states to include not only remedial actions but also removal actions, including consultation with state and local officials at federal facilities. Another provision would expand the categories of non-federal funds that states could apply as credits toward meeting matching funds requirements to include state oversight costs and in-kind expenditures. In-kind expenditures essentially are non-monetary contributions that may offset some of the costs. Another provision would codify in statute EPA's general practice of obtaining the concurrence of the Governor of the state in which a site is located in making a decision to list a site on the National Priorities List and would give greater deference to state priorities in the listing process overall. It would also broaden the opportunity for judicial review of a remedial action, if a state were to object to the selection of the remedial action in writing.

The next bill, the Reducing Excessive Deadline Obligations Act of 2013, has two primary provisions. The first provision would bar federal financial responsibility requirements that EPA may promulgate in the future from preempting state financial responsibility requirements that are in place on the effective date of any federal requirements that EPA may promulgate. The other provi-

sion is related to the Solid Waste Disposal Act and not CERCLA, and it would amend the Solid Waste Disposal Act to require EPA to review and revise regulations promulgated under that statute as determined appropriate by the agency, rather than under existing law requiring review and revision as necessary every 3 years.

The last bill, the Federal Facility Accountability Act of 2013, as its title suggests, would focus on federal facilities, and in two respects would expand the waiver of sovereign immunity at federal facilities to include not only current but also former federal facilities, to encompass the entire phase of the cleanup process for both remedial and removal actions, and to clarify the extent to which substantive and procedural requirements of state law apply to federal facilities regardless of whether a federal facility is on the NPL, the National Priorities List. The other respect of the bill would authorize EPA to review the actions taken by other federal departments and agencies under CERCLA at federal facilities regardless of whether a facility is on the National Priorities List, and also would allow states to request such a review by EPA to ensure consistency with EPA guidelines, rules, regulations or criteria.

That concludes the remarks of my prepared statement, and thank you for the opportunity to appear before the subcommittee today, and I would be happy to address any questions you may have.

[The prepared statement of Mr. Bearden follows:]

Testimony of David M. Bearden
Specialist in Environmental Policy for the Congressional Research Service
Before the House of Representatives Committee on Energy and Commerce,
Subcommittee on Environment and Economy
Hearing on the Federal and State Partnership for Environmental Protection Act of 2013, the Reducing Excessive Deadline Obligations Act of 2013, and the Federal Facility Accountability Act of 2013
on May 22, 2013

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, my name is David Bearden. I am a Specialist in Environmental Policy for the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS on legislation under consideration by the Subcommittee: the Federal and State Partnership for Environmental Protection Act of 2013, the Reducing Excessive Deadline Obligations Act of 2013, and the Federal Facility Accountability Act of 2013.

This legislation would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address various aspects of the federal and state roles in the cleanup of contamination resulting from releases of hazardous substances into the environment, and the applicability of state cleanup requirements at both current and former federal facilities.

In brief, the primary areas that the legislation would address include: (1) the designation of sites on the National Priorities List (NPL), (2) credits toward state matching funds requirements at non-federal facilities, (3) the selection of cleanup actions and opportunities for judicial review of such actions, (4) the establishment of financial responsibility requirements for private entities to demonstrate the capability to satisfy cleanup liability if contamination were to occur, and (5) the waiver of sovereign immunity at both current and former federal facilities.

In serving the U.S. Congress on a non-partisan and objective basis, CRS takes no position on this legislation but has been asked by the Subcommittee to identify the federal and state roles

under CERCLA in existing law and the aspects of these roles that the legislation would address. The statements presented in this testimony are based on a preliminary analysis of the legislation within the time available. CRS remains available to assist the Subcommittee in its consideration of this legislation, related issues, and potential concerns among affected stakeholders.

Cleanup Framework of CERCLA in Existing Law

Congress enacted CERCLA in 1980 (P.L. 96-510) in response to a growing desire for the federal government to pursue the cleanup of the nation's most hazardous sites to protect human health and the environment. Under the Superfund program, the Environmental Protection Agency (EPA) may pursue cleanup and enforcement actions to respond to actual or threatened releases of hazardous substances into the environment. Releases of petroleum and certain other materials are excluded from CERCLA and are covered under other federal laws.

CERCLA established a broad liability scheme that holds past and current owners and operators of facilities, generators of wastes, and transporters of wastes who selected a facility for disposal, liable for cleanup costs, natural resource damages, and the costs of federal public health studies. The liability of these "potentially responsible parties" (PRPs) has been interpreted by the courts over time to be strict, generally joint and several, and retroactive. In conjunction with this liability scheme, CERCLA directs EPA to establish requirements for private entities to demonstrate their financial capability to satisfy cleanup liability if contamination were to occur, but EPA has not yet promulgated such requirements.

The Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499, SARA) amended CERCLA to address the applicability of the statute and state law to federal facilities, and modified various cleanup, liability, and enforcement provisions. Several subsequent laws also have amended CERCLA for specific purposes over time. With respect to federal and state

roles, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (P.L. 107-118) amended CERCLA to authorize federal grants to assist states and local governments with the cleanup of "brownfields" that are not addressed under the Superfund program, to give substantial deference to the states in EPA's designation of sites on the NPL, and to limit the use of the federal enforcement authorities of CERCLA to pursue the cleanup of a site, if a state already is pursuing the cleanup under its own law.

In acknowledgment of the limitation of federal resources to address the many thousands of contaminated sites across the United States, CERCLA directs EPA to maintain the NPL to prioritize sites for federal response actions. Under CERCLA, federal response actions may include interim or less extensive "removal" actions to address more immediate risks, and broader "remedial" actions that are intended to offer a more permanent solution to address potential risks over the long-term. Remedial actions also differ in that the use of federal Superfund appropriations is conditional upon federal-state cost sharing, whereas removal actions may be fully federally funded.

Under federal regulation, a site also must be on the NPL as an additional condition for EPA's use of federal Superfund appropriations to finance remedial actions. The cleanup of Superfund sites that are financed with private funds from the PRPs through enforcement actions are not subject to this condition, and therefore do not necessarily require listing on the NPL for the performance of remedial actions. EPA may fund removal actions with federal Superfund appropriations to address immediate hazards, regardless of whether a site is on the NPL.

The response authorities of CERCLA also are available to federal agencies for the performance of the cleanup of federal facilities, regardless of whether a federal facility is on the NPL. The cleanup of federal facilities is not funded with Superfund appropriations, but with

separate appropriations allocated to the agencies responsible for administering those facilities. The Department of Defense and Department of Energy administer the vast majority of federal facilities where cleanup is performed under CERCLA.

EPA and the states still play a role in overseeing and enforcing the cleanup of federal facilities. EPA leads the oversight of the cleanup of federal facilities on the NPL in conjunction with the states through enforceable interagency agreements with the federal department or agency that administers the facility. However, EPA's enforcement of such agreements may be constrained because of the limited ability of one federal agency to sue another. The states typically lead the oversight of federal facilities not on the NPL.

CERCLA authorizes various mechanisms for the states and the public to participate in federal cleanup decisions. However, EPA, or the lead federal agency at a federal facility, generally is responsible for making federal decisions under the statute. Those decisions may involve the application of state cleanup requirements that are more stringent than federal requirements.

CERCLA authorizes citizen suits (including suits by states) to challenge federal decisions regarding response actions, but limits the timing of judicial review until after the action is taken. CERCLA also specifically authorizes states to bring action in U.S. district court to challenge the selection of remedial actions at federal facilities within their respective borders.

Conditions for the use of federal Superfund appropriations also can be a factor in federal cleanup decisions that are made in consultation with the states. The use of federal Superfund appropriations to finance remedial actions generally is conditional upon the state agreeing to pay 10% of the capital costs, and 100% of the long-term operation and maintenance costs, with the exception of the treatment of groundwater for which federal Superfund appropriations may be

used for the first 10 years after the remedy is in place. These state matching funds requirements do not apply to the use of federal Superfund appropriations for removal actions, nor to either remedial or removal actions at federal facilities, as the cleanup of federal facilities is to be funded with federal appropriations to the extent that the United States is liable under CERCLA.

Legislation to Amend CERCLA

Collectively, the legislation under consideration by the Subcommittee would expand the role of the states in the cleanup of contaminated sites under CERCLA beyond the scope of the most recent amendments enacted in 2002 in the 107th Congress. The following points briefly identify how each bill would alter the state role in comparison to existing law.

Federal and State Partnership for Environmental Protection Act of 2013

- Would expand consultation with affected states to include not only remedial actions but also removal actions, including consultation with state (and local) officials at federal facilities.
- Would expand the categories of non-federal funds that states could apply as credits toward meeting matching funds requirements to include state oversight costs and in-kind expenditures.
- Would codify in statute EPA's general practice of obtaining the concurrence of the Governor of the state in which a site is located in making a decision to list a site on the NPL, and would give greater deference to state priorities in the listing process.
- Would broaden the opportunity for judicial review of a remedial action, if a state were to object to the selection of the remedial action in writing.

Reducing Excessive Deadline Obligations Act of 2013

- Would bar federal financial responsibility requirements that EPA may promulgate in the future from preempting state financial responsibility requirements that are in place on the effective date of any such federal requirements.
- Would amend the Solid Waste Disposal Act to require EPA to review and revise regulations under that statute as determined appropriate by the agency, rather than requiring review and revision, as necessary, every three years.

Federal Facility Accountability Act of 2013

- Would expand the waiver of sovereign immunity at federal facilities to include not only current but also former federal facilities, to encompass the entire phase of the cleanup process for both remedial and removal actions, and to clarify in greater detail the extent to which substantive and procedural cleanup requirements of state law apply to federal facilities regardless of whether a federal facility is on the NPL.
- Would authorize EPA to review the actions taken by other federal departments and agencies under CERCLA at federal facilities regardless of whether a facility is on the NPL, and would allow states to request such a review (by EPA) to ensure consistency with EPA cleanup guidelines, rules, regulations, or criteria.

That concludes the remarks of my prepared statement. Thank you for the opportunity to appear before the Subcommittee today. I would be happy to address any questions you may have.

Mr. SHIMKUS. Thank you, Mr. Bearden.

And now I would like to recognize Mr. David Trimble, who is from the Government Accountability Office. Sir, welcome. Same thing, your full statement is in the record. You have 5 minutes. Obviously, I was very generous because we are here to get a good background on these policies and pieces of legislation, so you are recognized.

STATEMENT OF DAVID TRIMBLE

Mr. TRIMBLE. Thank you. Chairman Shimkus, Ranking Member Tonko and members of the subcommittee, my testimony today focuses on GAO's work on four key issues: the role of the states in cleaning up hazardous waste sites, federal liabilities in management of sites listed on the NPL, the National Priorities List, commonly referred to as Superfund sites, the challenges and liabilities associated with contaminated hardrock mining operations, and litigation under environmental statutes including CERCLA, the statute governing the Superfund program.

First, states play a critical role in cleaning up sites listed on the NPL and severely contaminated sites that are not listed on the NPL. After a hazardous site is identified, EPA often working with a state will evaluate the risks to the environment and to human health and assign a hazard ranking score. Sites posing hazards above a certain threshold are eligible for listing on the NPL. Not all sites with serious contamination and a high score are placed on the NPL, and the EPA policy is to not list such sites without approval from the relevant state. Additionally, EPA cannot use money from Superfund for long-term remediation activities unless the state has also agreed to pay at least 10 percent of these costs. The cleanup of sites not on the NPL can be managed by EPA as a Superfund alternative site or by the states and other entities under other cleanup authorities. In April, we reported that 42 percent of sites assessed with contamination severe enough to be eligible for listing on the NPL were being managed as Superfund sites or Superfund alternative sites. The remaining 58 percent were managed by other cleanup programs. Notably, states managed the cleanup of more Superfund-caliber waste sites outside of the Superfund program than EPA oversees in the Superfund program.

Second, federal agencies, primarily DOD, have substantial cleanup and financial liabilities at NPL sites. Specifically, DOD is responsible for 80 percent of the 156 federal Superfund sites. The cost to clean up these sites represents a significant financial liability for the government. In addition, in 2010, we found that DOD's refusal to sign a required interagency agreement with EPA on how these cleanups should proceed had complicated cleanup at 11 DOD NPL sites. As a result of our work, DOD has decreased this number to two sites. Let me note, however, that these sites are at bases with large military and civilian populations. That report also recommended that EPA seek to increase its authority to hasten cleanups by other federal agencies, but no changes have been made to the relevant Executive Order.

Third, the federal government faces significant financial challenges and liabilities associated with hardrock mining operations. From 1997 to 2008, the federal government spent over $2.6 billion

to reclaim abandoned hardrock mines on federal, private and Indian lands with the EPA paying $2.2 billion of this amount. In 2008, GAO estimated that there were at least 33,000 abandoned hardrock mine sites with environmental problems. One factor that contributes to reclamation costs on federal lands disturbed by mining operations is inadequate financial assurances required by the Bureau of Land Management. These assurances are imposed on new mining operations and are used to reclaim a site if the operator fails to adequately do so. In 2012, BLM reported implementing our recommendation to improve the sufficiency of these assurances.

Finally, EPA often faces litigation over its regulations and other actions. Companies, interest groups, states and citizens can sue EPA under CERCLA and other environmental statutes, and these suits can be costly and time-consuming. Such litigation includes citizen suits to compel EPA to take action when it does not meet deadlines, challenges to regulations and permitting decisions, or lawsuits by potentially responsible parties at hazardous waste sites. In 2011, we reviewed litigation associated with 10 environmental statutes and found such cases averaged about 155 per year, the majority of this litigation related to the Clean Air Act. Overall, trade associations and private companies comprised 48 percent of the litigants followed by environmental groups at 30 percent, and non-federal and other parties made up the remainder. Superfund cases represented about 2 percent of the total cases in our study. This is consistent with our 2009 report on Superfund litigation, which found that litigation had decreased by almost half from fiscal years 1994 through 2007. Regarding the cost of this litigation, we found that the Department of Justice spent about $3.3 million per year defending EPA. Additionally, payments made to the prevailing parties in these cases to cover attorney fees and court costs averaged about $2.1 million per year, with about three-quarters of these payments going to environmental and citizen groups.

This completes my statement. I would be pleased to respond to any questions.

[The prepared statement of Mr. Trimble follows:]

United States Government Accountability Office

Testimony

Before the Subcommittee on Environment and the Economy, Committee on Energy and Commerce, House of

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HAZARDOUS WASTE CLEANUP

Observations on States' Role, Liabilities at DOD and Hardrock Mining Sites, and Litigation Issues

Statement of David Trimble, Director
Natural Resources and Environment

GAO-13-633T

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DRAFT

GAO Highlights

Highlights of GAO-13-633T, a testimony before the Subcommittee on Environment and the Economy, Committee on Energy and Commerce, House of Representatives

May 2013

HAZARDOUS WASTE CLEANUP

Observations on States' Role, Liabilities at DOD and Hardrock Mining Sites, and Litigation Issues

Why GAO Did This Study

According to EPA, the agency that manages the nation's principal hazardous waste cleanup program, one in four Americans lives within 3 miles of a hazardous waste site. Many such sites pose health and other risks, and their cleanup can be lengthy and expensive. EPA's Superfund program, established under CERCLA, provides a process to address contaminated sites. Under CERCLA, parties that contributed to the contamination of a site are generally liable for cleanup and related costs. These parties may include federal agencies, such as DOD, and companies. Based on the risk a site poses, EPA may place the site on the NPL, a list that includes some of the nation's most seriously contaminated sites. As of April 2013, the NPL included about 1,300 sites, and states and federal agencies may address additional contaminated sites outside of EPA's Superfund program. GAO's prior work has identified challenges cleaning up DOD's NPL sites and abandoned mining sites and has assessed litigation related to the Superfund program.

In this testimony, GAO summarizes its work from March 2008 to April 2013 on (1) the role of states in cleaning up hazardous waste sites, (2) DOD's management of its sites on the NPL, (3) federal liabilities from contaminated hardrock mining sites, and (4) litigation under CERCLA and other statutes.

GAO is not making new recommendations but has made numerous recommendations to DOD, EPA, and Interior to better address hazardous waste sites. As described in this statement, the responses to these recommendations have varied.

View GAO-13-633T. For more information, contact David Trimble at (202) 512-3841or trimbled@gao.gov.

What GAO Found

States, in consultation with the Environmental Protection Agency (EPA), participate in the cleanup of hazardous waste sites in several ways. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, sites that meet certain risk thresholds are eligible for placement on the National Priorities List (NPL)—a list that includes some of the nation's most contaminated sites. In this context, states may notify EPA of potential hazardous waste sites, evaluate the health and environmental risks at sites being considered for the NPL, or oversee cleanups of NPL sites. In some cases, EPA may elect to defer sites that are eligible for the NPL to other federal or state cleanup programs. As GAO reported in April 2013, EPA had deferred to states the oversight of the cleanup of 47 percent of sites eligible for the NPL. GAO recommended that EPA provide guidance on the most common type of deferral to states, and EPA agreed with GAO's recommendation. In addition, 47 states have their own versions of the Superfund program.

As of April 2013, the Department of Defense (DOD) is responsible for cleanup at 129 NPL sites (over 80 percent of federal facilities on the NPL). In addition to its NPL sites, GAO reported in 2010 that DOD had over 50,000 areas that required cleanup and that the agency had spent almost $30 billion on cleanup from 1986 to 2008. In July 2010, GAO found that CERCLA requires federal agencies to enter into an interagency agreement with EPA to guide cleanup within a certain period but, as of February 2009, 11 DOD installations had not signed such agreements after 10 or more years on the NPL. DOD has made progress on this issue by decreasing the number of such installations from 11 to 2, but both sites still pose significant risks. GAO recommended that EPA pursue changes to a key executive order that would increase its authority to hasten cleanup at these sites. EPA agreed but has not taken action to have the executive order amended.

GAO's work has identified challenges and liabilities for the federal government stemming from hardrock mining operations, primarily at abandoned mines on federal land. In many cases, mine operators abandoned mines and did not have adequate financial assurance to pay for cleanup. As a result, the government may have to cover these costs. In 2011, GAO found that 57 hardrock mines on federal land managed by the Bureau of Land Management (BLM) had inadequate financial assurance to cover estimated reclamation costs and recommended that BLM improve its ability to evaluate the adequacy of financial assurances. In 2012, BLM reported implementing GAO's recommendation.

CERCLA and other major environmental statutes involve litigation among numerous parties. In addition to cases brought by EPA to enforce laws, litigation includes citizen suits to compel EPA to take action when it does not meet deadlines, and to question regulations and permitting decisions. In addition, potentially responsible parties at hazardous waste sites often file lawsuits against each other or EPA. In 2011, GAO found that about 5 percent of lawsuits against EPA for fiscal years 1995 to 2010 involved CERCLA and that, across 10 environmental statutes, trade associations and private companies comprised 48 percent of the litigants, followed by environmental groups (30 percent), nonfederal governments (12 percent), and other parties (10 percent).

United States Government Accountability Office

DRAFT

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee:

Thank you for inviting me to discuss our work on the federal government's liability for environmental cleanup. The Environmental Protection Agency (EPA) manages the Superfund program—the federal government's principal program to clean up hazardous waste sites—and estimates that one in four Americans lives within 3 miles of a hazardous waste site. Many hazardous waste sites pose serious risks to human health and the environment, and their cleanup can require substantial time and expense. EPA's budget for the Superfund program is approximately $1.2 billion in fiscal year 2013, about 13 percent of the agency's overall budget. Under the Superfund program, EPA can place sites with contamination that is sufficiently severe on the National Priorities List (NPL), which includes sites among the nation's most seriously contaminated.[1] As of April 2013, the NPL included 1,311 sites. Where EPA decides not to address sites eligible for the NPL under the Superfund program, EPA may defer their oversight to other federal and state cleanup programs. Outside of EPA's Superfund program, tens of thousands of contaminated sites are addressed by other federal agencies and states.

For sites on the NPL, EPA oversees the cleanup, which may be performed by potentially responsible parties (PRP) or by EPA itself. These parties generally include current or former owners and operators of a site or the generators or transporters of the hazardous substances. PRPs may include federal agencies, such as the Department of Defense (DOD), which have responsibility and authority for some or all cleanups at their facilities. In fact, as of April 2013, 156 sites on the NPL were federal facilities. While this amounts to about 12 percent of sites on the NPL, some of these sites can be costly to clean up. Federal liabilities for environmental cleanup extend beyond federal sites listed on the NPL. For example, tens of thousands of contaminated hardrock mining sites, only a small number of which are listed on the NPL, can present major environmental cleanup challenges and expenses for the federal government. These challenges include abandoned mines on public land that may require federally funded cleanup and cases where mining operations abandoned a site and did not have sufficient financial assurance to clean up the site. In addition, EPA faces the prospect of litigation over its

[1]There is no legal requirement that EPA clean up a site on the NPL or that it do so under a particular time frame. As we reported in May 2010, EPA's future costs to conduct remedial construction at nonfederal NPL sites will likely exceed recent funding levels. The limited funding, coupled with increasing costs of cleanup, has forced EPA to choose between cleaning up a greater number of sites in less time and a cost-efficient manner or cleaning up fewer sites more efficiently. See GAO, *Superfund: EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, and More Sites Are Expected to Be Added to the National Priorities List*, GAO-10-380 (Washington, D.C.: May 6, 2010).

regulations and other actions, including lawsuits EPA initiates to enforce provisions of the law which, among other things, governs the Superfund program—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[2]

My testimony today is based on reports we issued from March 2008 to April 2013 and addresses (1) the role of states in the cleanup of hazardous waste sites eligible for the NPL; (2) DOD's management of its sites on the NPL; (3) the financial liabilities to the federal government related to environmental cleanup presented by hardrock mining; and (4) the amount, type, and trends of litigation related to CERCLA and other environmental statutes. This statement includes citations for our relevant reports. We conducted this work in accordance with generally accepted government auditing standards. Our issued reports have detailed information about our scope and methodology.

Background

CERCLA gives EPA the authority to respond to actual and threatened releases of hazardous substances to the environment, and of pollutants and contaminants that may pose an imminent and substantial danger to public health or the environment. CERCLA authorizes EPA to compel PRPs to clean up the sites; allows EPA to pay for cleanups and seek reimbursement from PRPs; and establishes a Hazardous Substance Superfund (trust fund) to help EPA pay for cleanups and related program activities. EPA's 10 regional offices implement Superfund within several states and, in some cases, territories. In addition, the law establishes a process for federal agencies to identify their sites with hazardous releases and for the sites to be cleaned up with funding from federal agency appropriations. When EPA decides not to list a site on the NPL or otherwise retain oversight, it may defer oversight of the site's cleanup to other federal and state cleanup programs.

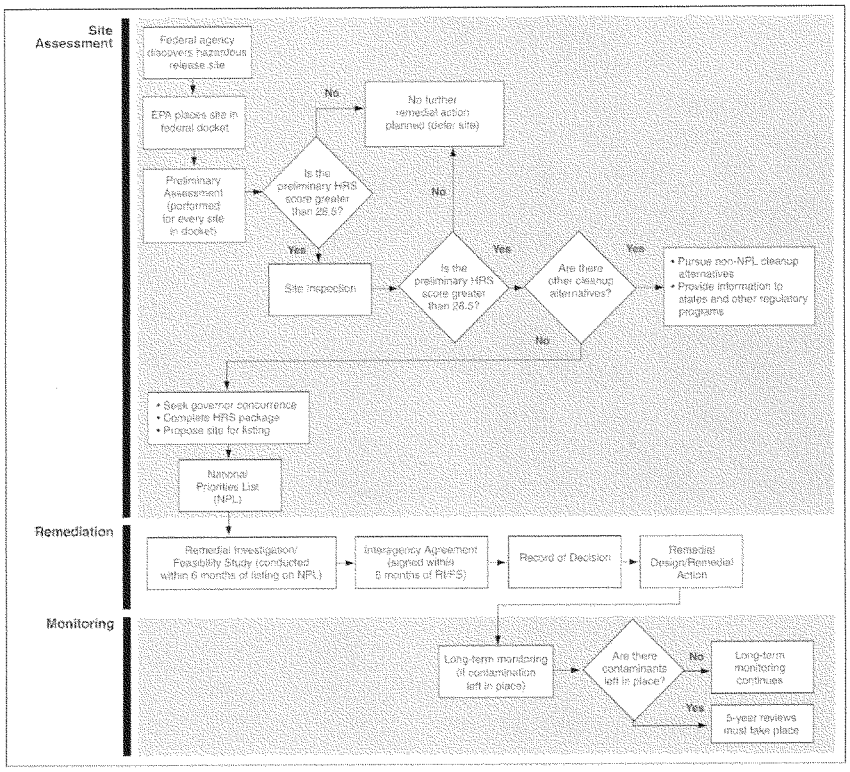
Under CERCLA, PRPs must conduct or pay for the cleanup of hazardous substances. In some cases, however, EPA cannot identify the PRPs, or these parties may be unwilling or financially unable to perform the cleanup. CERCLA authorizes EPA to pay for remedial cleanups at sites on the NPL and seek reimbursement from the PRPs. Historically, the trust fund was financed primarily by taxes on crude oil and certain chemicals, as well as by an environmental tax on

[2]CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (2013)). Hereinafter, references to CERCLA sections are as amended.

corporations based on their taxable income. However, the authority for these taxes expired in 1995 and, shortly thereafter, the balance in the trust fund started diminishing. By the start of fiscal year 2009, the balance of the trust fund had decreased in value from its peak of $5.0 billion in 1997 to $137 million. Since the taxes expired, congressional appropriations have been the largest source of funding for the trust fund. For context, appropriations have averaged about $1.2 billion annually since 1981. Other sources of revenue include interest on the balance of the trust fund, fines and penalties collected for violations of cleanup requirements, and recovery of cleanup costs from PRPs.

Under the Superfund program, EPA assesses hazardous release sites to determine if their contamination makes them eligible for the NPL. While over 40,000 potential hazardous release sites have been reported to the Superfund program over the past 30 years, EPA has only determined a few thousand of these sites pose a sufficient threat to human health and the environment to be eligible for the NPL. CERCLA and its implementing regulations establish a process of specific steps to evaluate and to clean up sites. The basic steps apply to both federal facilities and nonfederal sites. One difference is that CERCLA imposes additional requirements on federal agencies; for example, the law requires that, for federal facilities listed on the NPL, federal agencies must enter into an interagency agreement with EPA that includes schedules for completion of each remedy at the site. The key steps in this process for federal facilities are included in figure 1.

Figure 1: Key Stages of the CERCLA Process to Address and Clean Up Hazardous Waste at Federal Facilities



Source: EPA.

Note: "HRS" stands for Hazard Ranking System, a measure of a site's relative threat to human health and the environment. "RI/FS" stands for remedial investigation and feasibility study, a two-part study of the NPL site after it is listed designed to characterize site conditions and evaluate options to address identified problems, among other things.

During the initial phases of EPA's assessment of sites reported to its Superfund program—known as preliminary assessment and site inspection—EPA regional officials or their state and tribal counterparts evaluate the potential need for additional investigation or action. Specifically, the preliminary assessment phase involves an evaluation of readily available information about a site and its surrounding area to determine if the release or potential release of hazardous

substances poses a sufficient threat to human health and the environment to merit further investigation. If further investigation is needed, a site inspection follows the preliminary assessment. During this phase, investigators typically collect samples to identify the hazardous substances. Information from the preliminary assessment and site inspection is used to calculate and document a site's preliminary Hazard Ranking System (HRS) score, which indicates a site's relative threat to human health and the environment based on potential pathways of contamination. Sites with a HRS score of 28.50 or greater become eligible for listing on the NPL. The HRS calculation is not, however, intended to determine the extent of contamination or the appropriate cleanup approach. This occurs later when EPA, based on available information, selects an appropriate cleanup approach for those sites it decides to add to the NPL. In some cases, EPA may conduct a short-term cleanup known as a removal action or otherwise delay selection of a long-term cleanup approach.

As we reported in April 2013, as of December 2012, EPA had identified over 3,400 sites—both federal facilities and nonfederal sites—that were reported to the Superfund program and have contamination that makes them eligible for listing on the NPL.[3] Of these, 1,311 sites were on the NPL as of April 2013. EPA deferred most of the rest to cleanup approaches outside the Superfund program.[4] As we reported in May 2010, according to EPA headquarters officials, the number of sites proposed for listing on the NPL had decreased over time as a result of the expanded use of other cleanup programs, including state programs.[5] However, we also reported at that time that EPA regional officials estimated that an average of 20 to 25 sites per year—higher than the average of 16 over the previous 5 years—would be added to the NPL over the following 5 years. Most of the regional officials noted that economic conditions—which can limit states' abilities to clean up sites under their own programs and PRPs' abilities to pay for cleanup—were a contributing factor to the expected increase in sites listed on the NPL. So far, these estimations have been borne out—according to EPA's website, the agency added an average of 23 sites each year to the NPL in fiscal years 2010 through 2012.

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[3]GAO, *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List*, GAO-13-252 (Washington, D.C.: Apr. 9, 2013).

[4]The number of NPL sites does not include sites proposed to or deleted from the NPL. Sites that have been proposed for listing on the NPL, are currently on the NPL, have been deleted from the NPL, or have been removed from proposal can always be identified as such in the Superfund program's database.

[5]GAO-10-380.

States Play a Critical Role in Characterizing and Cleaning Up Contaminated Sites

As we reported in April 2013, states, in consultation with EPA, participate in the identification and cleanup of hazardous waste sites eligible for the NPL in many ways.[6] Examples of this participation include the following:

- States may notify EPA of potential hazardous waste sites for listing in the Superfund program database;
- States may act under cooperative agreements with EPA to evaluate the relative potential for sites being considered for the NPL to pose a threat to human health and the environment;
- As a matter of policy, EPA seeks concurrence from state governors or environmental agency heads before proposing a site for listing on the NPL;
- States may assume the lead oversight role at NPL sites under cooperative agreements with EPA; and
- EPA may only pay for a remedial action at a site if the relevant state agrees, among other things, to pay a portion of the cleanup expenses, as well as all operations and maintenance costs after construction of the cleanup remedy is completed.

In addition to overseeing cleanup at some sites on the NPL, states may oversee cleanup at sites that are eligible for listing on the NPL but that were not reported to EPA for listing in the Superfund program database. States do not have an obligation to report all potentially eligible sites to the federal Superfund program, and several of the environmental officials from 13 states we contacted in conducting the work for our April 2013 report confirmed that they have conducted or overseen cleanups at sites not listed in the Superfund program database that may have been eligible for the NPL.

Alternatively, EPA may choose not to list sites that have been reported and that are eligible for listing on the NPL and instead defer oversight of these sites to programs outside of the Superfund program—typically to states. In fact, as we reported in April 2013, this approach is the most common for cleanup of sites that are eligible for listing on the NPL. As of December 2012, of the 3,402 sites EPA identified as eligible for the NPL, EPA regions had deferred

[6]GAO-13-252.

oversight of 1,984 sites to cleanup approaches outside the Superfund program, including 1,606 deferrals to states (47 percent of all eligible sites). EPA officials in all 10 regions indicated that states' preferences influence EPA's selection of the cleanup program at sites eligible for the NPL.

Most of these deferrals to states were made as Other Cleanup Activity (OCA) deferrals. OCA deferral to a state places a site under that particular state's environmental regulations, rather than CERCLA authorities. As we reported in April 2013, EPA has not issued guidance for these deferrals as it has for other cleanup approaches. Moreover, EPA's program guidance does not clearly define types of OCA deferrals or specify in detail the documentation EPA regions should have to support their decisions on OCA deferrals. OCA deferral to a state involves no formal EPA oversight other than periodic discussions between EPA regional officials and state officials. For OCA deferrals to states, EPA regions' tracking activities range from checking state websites to meeting with states to receive status updates every 3 months, according to regional officials.

In addition, according to EPA regional officials, the amount and type of documentation regions collect to support OCA deferrals covers a broad range, including no written documentation, an e-mail from a state official, letters from state officials attesting to the cleanup, or a copy of the legal order or agreement between the state and PRP. Without clearer guidance on OCA deferrals, EPA does not have reasonable assurance that its regions consistently track these sites or that their documentation will be appropriate or sufficient to verify that these sites have been deferred or have completed cleanup. In April of this year, we recommended that EPA provide guidance to its regions that defines each type of OCA deferral and what constitutes adequate documentation for OCA deferral and completion of cleanup. The agency agreed with this recommendation, acknowledging the need for more guidance.

State cleanup programs vary in their capacity and resources to manage the cleanup of hazardous waste sites, according to EPA and state officials. According to officials in the EPA region with the most OCA deferrals to states, states in the region have mature environmental programs willing and capable of overseeing many sites, which makes the OCA deferral to states well-suited to that region. In contrast, officials we spoke with in some regions noted that they needed to consider states' capacity to oversee a site before using the OCA deferral to states. Nine states have no OCA deferrals, and other states oversee hundreds of these sites, with the most in Massachusetts (247 sites), New Jersey (221), and California (180). Several of the

environmental officials from 13 states we contacted confirmed that states' use of and experience with OCA deferrals can differ substantially. One state official noted that these differences are likely related to how industrialized a state may be and the extent of cleanup programs in a given state. According to officials in one region, EPA has access to more resources than states and typically addresses sites that require greater or more specialized resources through the NPL approach. For example, regional officials noted, states face different limitations that can prevent them from pursuing cleanup under their programs, including: technical capacity, legal resources, and financial resources. In addition, EPA officials in four regions noted examples where a state environmental program requested that the Superfund program pursue NPL listing because the state was having trouble getting a PRP to cooperate or the PRP went bankrupt.

Finally, states have oversight of many sites that do not pose sufficient health or environmental risks to be eligible for listing on the NPL. Forty-seven states address such sites under their own versions of the Superfund program.

DOD Is Responsible for Many Contaminated Sites, Including Over 80 Percent of Federal Facilities on the NPL

DOD is responsible for the majority of federal facilities on the NPL. Specifically, federal facilities comprise 156 (12 percent) of the 1,311 sites listed on the NPL, with DOD responsible for 129 of these sites (83 percent of federal facilities on the NPL).[7] Legal responsibility for cleanup of federal facilities stems from a variety of sources, including Section 120 of CERCLA and a key executive order.[8] Among other things, section 120 stipulates that each federal agency shall be subject to and must comply with the act as would a private party, including with regard to liability. Section 120 also establishes key responsibilities of federal agencies for their sites, such as notification of discovered contamination to a central docket and a requirement to enter into interagency agreements with EPA to govern the cleanup for NPL-listed sites. Importantly, under the executive order, DOD and the Department of Energy have authority to clean up all of their

[7]Data on the number of NPL sites were current as of April 2013 and exclude sites proposed to or deleted from the NPL.

[8]CERCLA § 120 is codified at 42 U.S.C. § 9620 (2013). Executive Order 12580, Superfund Implementation, 52 Fed. Reg. 2923 (Jan. 23, 1987).

NPL and other contaminated sites, while EPA has authority for managing cleanup of other agencies' NPL sites.[9]

When federal agencies clean up an NPL site under the Superfund process, they must meet the same standards as any other responsible party. Thus, EPA establishes or approves standards for remedial actions on a site-specific basis by identifying "applicable or relevant and appropriate requirements" (ARAR). These requirements include standards under any federal law and standards under certain state laws or regulations that are more stringent than corresponding federal law and are communicated in a timely manner to the entity leading a cleanup. For example, some states where all groundwater is protected as a potential source of drinking water may have drinking water standards that are more stringent than federal ones, or they may address contaminants that are not federally regulated. If contamination at a federal facility in such a state threatens groundwater, the state standard may be identified as an ARAR. Selection of ARARs is site-specific based on the circumstances of the site.

Past DOD activities and industrial facilities contaminated millions of acres of soil and water on and near DOD sites in the United States and its territories. Environmental contaminants found at military installations include solvents and corrosives; fuel; paint strippers and thinners; metals, such as lead, cadmium, and chromium; nerve agents; and unexploded ordnance. The law requires DOD to conduct environmental restoration activities at areas located on former and active defense properties that were contaminated while under its jurisdiction. We reported in March 2010 that DOD has identified over 31,600 areas that are eligible for cleanup, including about 4,700 areas on formerly used defense sites that were closed before October 2006; 21,500 areas on active installations; and 5,400 areas identified by several Base Realignment and Closure commissions.[10] As we noted in July 2010, across all environmental cleanup and restoration activities at its installations, including NPL and non-NPL sites, DOD spent almost $30 billion from 1986 to 2008.[11]

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[9]These other agencies retain financial responsibility for cleanup.

[10]GAO, *Environmental Contamination: Information on the Funding and Cleanup Status of Defense Sites*, GAO-10-547T (Washington, D.C.: Mar. 17, 2010). For purposes of listing on the NPL, an entire installation typically counts as a single site even in cases where that installation may have multiple sources of contamination. Conversely, DOD considers an area of contamination to be a "site" such that a single installation may have dozens of sites. For purposes of this report, we use the term "area" to refer to a DOD site, e.g., an area of contamination.

[11]GAO, *Superfund: Interagency Agreements and Improved Project Management Needed to Achieve Cleanup Progress at Key Defense Installations*, GAO-10-348 (Washington, D.C.: July 15, 2010).

Our prior work has identified challenges stemming from the fact that DOD has not always adhered to the CERCLA requirement to enter into interagency agreements with EPA at NPL sites. Specifically, in July 2010,[12] we reported that although CERCLA requires federal agencies to enter into an interagency agreement with EPA to guide cleanup within a certain period,[13] as of February 2009, 11 DOD installations had not signed such agreements after 10 or more years on the NPL. DOD has made progress on this issue by decreasing the number of such installations from 11 to 2, but both sites still pose significant risks. For example, Tyndall Air Force Base in Panama City, Florida, one of two DOD installations that have yet to sign interagency agreements with EPA, has been in noncompliance with CERCLA for more than a decade. EPA added the 29,000-acre site to the NPL in 1997 due to extensive contamination and high concentrations of probable human carcinogens and other contaminants, including DDT, which is present at concentrations some 200 times greater than EPA's risk-based standards for people and the environment. According to EPA, the Air Force has taken the position that it can unilaterally decide if and when to investigate, characterize, and clean up contamination and what work is appropriate and protective. As EPA stated in a January 2013 letter to the Air Force and DOD, the Air Force is neglecting EPA's experience in hazardous waste cleanups, and it is failing to meet its legal obligations under CERCLA.

At installations that have interagency agreements, site management plans include detailed schedules and become part of the interagency agreement, establishing a legal basis for timely completion of the work. DOD also faces consequences and penalties if it does not adhere to the agreement. At installations without interagency agreements, however, EPA has limited ability to compel an agency to comply with CERCLA.[14] Not having interagency agreements has contributed to a variety of obstacles and delayed cleanup progress at DOD installations. For example, in the absence of interagency agreements, DOD may fund work at other sites ahead of NPL sites. In July 2010, we recommended that EPA take steps to modify the long-standing Superfund executive order to gain the authority to issue certain unilateral administrative orders to executive agencies, among other things. EPA agreed with the recommendation but has not

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[12]GAO-10-348.

[13]EPA and the federal agency must enter into the interagency agreement within 6 months of the conclusion of the remedial investigation and feasibility study, according to CERCLA.

[14]The lack of an interagency agreement can also limit the ability of citizens and other parties to compel action.

yet take action to modify the executive order; further, until the administration amends the executive order, EPA's authority remains limited. We also suggested that Congress should consider amending CERCLA to authorize EPA—after an appropriate notification period—to impose penalties to enforce cleanup requirements at federal facilities. At this time, Congress has not taken action on this suggestion.

Another critical issue at contaminated DOD sites relates to the department's response to recommendations made by the Agency for Toxic Substances and Disease Registry (ATSDR) within the Department of Health and Human Services.[15] Specifically, ATSDR conducts a health assessment of each site proposed for the NPL that may result in recommendations to the responsible agency and include actions for reducing the public health risk, among other things. A health assessment involves examining the relationship between actual exposures to contaminants and subsequent signs of disease and illness. In May 2012, we reported on the database used to track ATSDR public health assessment recommendations and DOD's implementation of those recommendations.[16] Such recommendations might include eliminating or reducing harmful exposures, or obtaining critical missing data to assist the health assessment. We found that DOD officials responsible for overseeing implementation of these recommendations did not know what actions, if any, installations had taken on about 80 percent of the approximately 1,200 recommendations ATSDR had made since 1986. In addition, we found that guidance for the Defense Environmental Restoration Program—under which DOD conducts cleanup activities at its installations—was silent regarding actions DOD should take in response to these recommendations.

Furthermore, we reported that the guidance did not address if, or when, DOD should voluntarily seek a public health assessment at NPL sites beyond the initial assessment completed by ATSDR. This is important because additional contaminants or sources of potential harm to human health may be found after the initial ATSDR health assessment that could render the

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[15]CERCLA authorized the establishment of ATSDR to assess the presence and nature of health hazards to communities affected by Superfund sites, to identify actions to prevent or reduce harmful exposures, and to expand the knowledge base about the health effects that result from exposure to hazardous substances.

[16]GAO, *Defense Infrastructure: DOD Can Improve Its Response to Environmental Exposures on Military Installations*, GAO-12-412 (Washington, D.C.: May 1, 2012).

original ATSDR health assessment obsolete. According to federal internal control standards,[17] management should assess the risks faced from external (and internal) sources and decide what actions to take to mitigate them. While DOD officials said that DOD relies on the judgment of environmental professionals at installations, without a standard set of guidelines on when to request a public health assessment other than an initial assessment for a site on the NPL, DOD does not have assurance that it is consistently identifying and addressing possible health risks from exposures at some NPL sites and non-NPL sites. We therefore recommended that DOD establish procedures to comprehensively track and document the status and nature of DOD responses to ATSDR recommendations and findings of significant risk to ensure that DOD and its components monitor these recommendations and findings of significant risk and take timely response actions. We also recommended that DOD establish a policy that identifies when installations should consider requesting public health assessments in addition to the initial assessments at NPL sites. DOD partially concurred with the first recommendation and said that it would review its procedures for tracking ATSDR recommendations and make the appropriate changes if necessary. We continue to believe that DOD should improve its procedures to adequately address vital public health issues. DOD did not concur with the second recommendation, and said that the appropriate policies were already in place. Our findings demonstrated that this was not the case, and we continue to believe that DOD should implement the recommendation. DOD has not implemented either recommendation.

The Federal Government Faces Liabilities from Abandoned Hardrock Mine Sites and Ensuring Adequate Financial Assurance for Liabilities from Current Mining Operations

Our previous work has found that hardrock mine sites present liabilities to the federal government when they are abandoned or have inadequate financial assurance.[18] As we reported in July 2011, the General Mining Act of 1872 encouraged the development of the West by allowing individuals to stake claims and obtain exclusive rights to the gold, silver, copper, and other valuable hardrock mineral deposits on land belonging to the United States.[19] Since then,

[17]GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

[18]See, for example, GAO, *Abandoned Mines: Information on the Number of Hardrock Mines, Cost of Cleanup, and Value of Financial Assurances*, GAO-11-834T (Washington, D.C.: July 14, 2011); and GAO, *Hardrock Mining: BLM Needs to Revise Its Systems for Assessing the Adequacy of Financial Assurances*, GAO-12-189R (Washington, D.C.: Dec. 12, 2011).

[19]GAO-11-834T.

thousands of operators have extracted billions of dollars worth of hardrock minerals from federal land managed by the Department of the Interior's Bureau of Land Management (BLM) and the Department of Agriculture's Forest Service—the two principal agencies responsible for federal lands open for hardrock mining. BLM issued regulations in 1981 requiring all operators of these mines to reclaim the land when their operations cease, but some did not and abandoned these mines. As a result, thousands of acres of federal land previously used for mining and related operations now pose serious environmental and physical safety hazards. These hazards include toxic or acidic water that contaminates soil and groundwater and physical safety hazards such as concealed shafts, unstable mine structures, or explosives. Our previous work had shown that there were no definitive estimates of the number of abandoned hardrock mines on federal and other lands. Thus, in 2008, we developed a standard definition for abandoned hardrock mining sites and used this definition to identify at least 161,000 abandoned hardrock mine sites in the 12 western states and Alaska, where most hardrock mining occurs. At least 33,000 of these sites had environmental degradation such as contaminated water and arsenic-contaminated tailings piles.

Cleanup costs for these abandoned mines vary by type and size of the operation. For example, the cost of plugging holes is usually small, but reclamation costs for large mining operations can reach tens of millions of dollars. As we reported in March 2008, from 1997 to 2008, four federal agencies—BLM, the Forest Service, EPA, and the Department of the Interior's Office of Surface Mining Reclamation and Enforcement—funded the cleanup and reclamation of some of these abandoned hardrock mine sites, spending at least $2.6 billion to reclaim abandoned hardrock mines on federal, state, private, and American Indian lands.[20] Of this amount, EPA spent $2.2 billion. EPA's funding under the Superfund program, among other things, focuses on the cleanup and long-term health effects of air, ground, or water pollution caused by abandoned hardrock mine sites—primarily those on nonfederal land. As we reported in July 2009, from fiscal years 1983 through 2007, EPA added 33 nonfederal mining sites to the NPL.[21] One-third of these sites, the highest proportion of any other nonfederal site type, were megasites where actual or expected cleanup costs were expected to reach $50 million or more.

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[20]GAO, *Hardrock Mining: Information on Abandoned Mines and Value and Coverage of Financial Assurances on BLM Land*, GAO-08-574T (Washington, D.C.: Mar. 12, 2008).

[21]GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements*, GAO-09-656 (Washington, D.C.: July 15, 2009).

In December 2011 we identified inadequacies with financial assurance mechanisms, such as bonds intended to ensure that mine operators have the ability to pay for any cleanup stemming from their operations.[22] Such financial assurances are a critical tool in shifting potential cleanup liabilities from the government to those responsible for any contamination. Beginning in 2001, BLM required all mining operators to provide bonds or other financial assurances before beginning exploration or mining operations on BLM land. These financial assurances must cover, among other things, the reclamation costs for BLM land disturbed by hardrock operations.

In addition, we have repeatedly reported that operators of hardrock mines on BLM lands have not provided financial assurances sufficient to cover estimated reclamation costs. In December 2011, for example, we found that BLM's financial assurances for some hardrock operations continued to be inadequate.[23] At that time, we found that mine operators had provided financial assurances valued at approximately $1.5 billion to guarantee reclamation costs for 1,365 hardrock operations on federal land managed by BLM. Of these, we found that 57 hardrock operations had inadequate financial assurances—about $24 million less than needed to cover estimated reclamation costs. We therefore recommended that BLM revise its financial assurance data and reporting systems to calculate and report the value of inadequate hardrock financial assurances for each mining operation to more accurately represent the adequacy of its financial assurances. The Department of the Interior concurred with our recommendation and, in 2012, BLM reported to us that it had implemented our recommendation.

CERCLA and Other Environmental Statutes Involve Litigation among Numerous Parties

As the primary federal agency charged with implementing many of the nation's environmental laws, EPA often faces the prospect of litigation over its regulations and other actions. Generally, the federal government has immunity from lawsuits, but federal laws authorize three types of suits related to EPA's implementation of many major environmental laws, including CERCLA,

[22]GAO-12-189R. For additional GAO reports related to the adequacy of financial assurances, see GAO, *Environmental Liabilities: Hardrock Mining Cleanup Obligations*, GAO-06-884T (Washington, D.C.: June 14, 2006), GAO, *Phosphate Mining: Oversight Has Strengthened, but Financial Assurances and Coordination Still Need Improvement*, GAO-12-505 (Washington, D.C.: May 4, 2012), and GAO, *Uranium Mining: Opportunities Exist to Improve Oversight of Financial Assurances*, GAO-12-544 (Washington, D.C.: May 17, 2012).

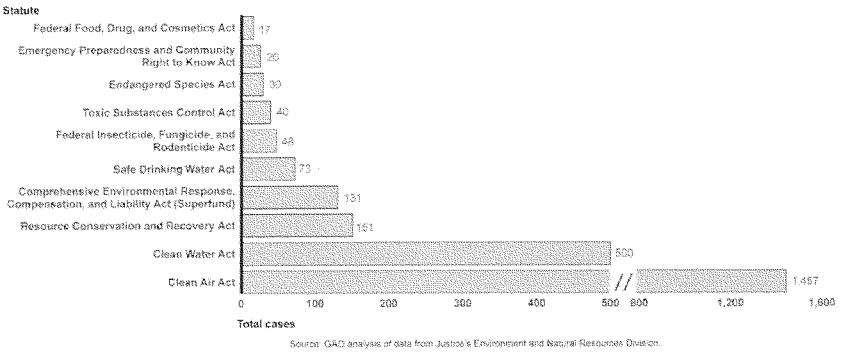
[23]GAO-12-189R.

the Clean Air Act, and the Clean Water Act, among others. First, most of the major environmental statutes include "citizen suit" provisions authorizing citizens—including individuals, associations, businesses, and state and local governments—to sue EPA when the agency fails to perform an action mandated by law. These suits are often referred to as "agency-forcing" or "deadline" suits. Second, the major environmental statutes typically include judicial review provisions authorizing citizens to challenge certain EPA actions, such as promulgating regulations or issuing permits. Third, the Administrative Procedure Act authorizes challenges to certain "final" actions, such as rulemakings and decisions on permit applications. As a result, even if a particular environmental statute does not authorize a challenge against EPA for a final decision or regulation, the Administrative Procedure Act may do so. EPA's CERCLA actions such as cleanup remedies (after they are implemented) and promulgation of regulations may be subject to challenge in court.

In August 2011, we reported on environmental litigation and cases against EPA across 10 environmental statutes filed for fiscal years 1995 to 2010.[24] Of the approximately 2,500 cases we reviewed, about 5 percent of cases against EPA involved CERCLA. As shown in figure 2, the majority of the cases were brought under the Clean Air Act (59 percent of cases) and the Clean Water Act (20 percent of cases).

[24]GAO, *Environmental Litigation: Cases against EPA and Associated Costs over Time*, GAO-11-650 (Washington, D.C.: Aug. 1, 2011).

Figure 2: Environmental Cases Filed against EPA by Statute, Fiscal Year 1995 through Fiscal Year 2010



Note: Nine cases did not have information on statute.

The lead plaintiffs filing cases against EPA across all of these statutes during the 16-year period fit into several categories. The largest category comprised trade associations (25 percent), followed by private companies (23 percent), local environmental groups and citizens' groups (16 percent), and national environmental groups (14 percent). Individuals, states and territories, municipal and regional government entities, unions and workers' groups, tribes, universities, and a small number of others we could not identify made up the remaining plaintiffs (see table 1).

Table 1: Share of Cases by Lead Plaintiff Type: Fiscal Year 1995 through Fiscal Year 2010

Type of group[a]	Number of cases	Percentage
Trade associations	622	25
Private companies	566	23
Local environmental and citizens' groups	388	16
National environmental groups	338	14
States, territories, municipalities, and regional government entities	297	12
Individuals	185	7
Unions, workers' groups, universities, and tribes	46	2
Other	33	1
Unknown	7	1[b]
Total	**2,482**	**100**

Source: GAO.
[a]For more information on each of these groups, see appendix I of GAO-11-650.
[b]Less than 1 percent.

According to the stakeholders we interviewed for our August 2011 report,[25] a number of factors—including EPA's failure to meet statutory deadlines—affect plaintiffs' decisions to bring litigation against EPA.[26] For example, if EPA does not meet its statutory deadlines, organizations or individuals might sue to enforce the deadline. In such suits, interested parties seek a court order or a settlement requiring EPA to implement its statutory responsibilities.

EPA may also initiate litigation against PRPs under CERCLA seeking to compel these parties to clean up contaminated sites or to seek reimbursement for cleanup EPA has conducted. In July 2009, we reported that EPA's approach for enforcing CERCLA was criticized in the past as leading to lengthy negotiations and protracted litigation, resulting in high costs for the government, as well as the PRPs.[27] While the federal government files many CERCLA cases, states, private parties, and others may also initiate litigation under the act for a variety of reasons, including compelling others to contribute toward site cleanup costs. We also found that Superfund litigation—measured by the number, duration, and complexity of cases—decreased

[25]To get stakeholders' views on any environmental litigation trends and the factors that underlie them, we interviewed officials from EPA and the Department of Justice; representatives of six environmental groups, six industry associations, and the National Association of Attorneys General; representatives of six state attorneys general or state environmental offices; and a university law professor who is expert in data on citizen suits. The findings from our interviews with stakeholders cannot be generalized to those with whom we did not speak.

[26]GAO-11-650.

[27]GAO-09-656.

from fiscal years 1994 through 2007, the most recent available data at the time. According to our analysis, the number of CERCLA cases filed decreased by 48 percent, from 214 cases filed in fiscal year 1994 to 111 cases filed in fiscal year 2007. We reported that, while the number of cases filed by the federal and state governments remained relatively constant, the drop-off stemmed primarily from a decrease in litigation filed by other types of plaintiffs, such as businesses or private individuals. According to agency officials and attorneys we interviewed, CERCLA-related litigation has also decreased because (1) the number of new sites added to the NPL declined; (2) fewer sites required cleanup, and parties had less reason to go to court as cleanups progressed; (3) EPA promoted settlements, rather than court cases, with PRPs; and (4) the courts clarified several legal uncertainties.

In July 2009, we found that, while CERCLA litigation could impose substantial costs for the government and PRPs, several important trends were likely decreasing the overall amount of litigation and associated costs.[28] Attorneys with two firms noted that, because PRPs were increasingly likely to settle out of court, a decline in the number of cases filed by these parties had contributed to the decrease in the number of new CERCLA cases and potentially to lower overall CERCLA litigation costs. Further, the decreasing duration of cases as a result of previously negotiated settlements had probably contributed to a decrease in costs. The time spent in out-of-court negotiations, either among PRPs or with EPA, typically costs less than the time spent in court, according to attorneys with whom we spoke. For example, EPA and Department of Justice officials and private attorneys said that the costs of the discovery phase of litigation—when parties to a lawsuit may request and obtain information from each other, such as evidence that supports their claims or defenses—were particularly high. Finally, the decreasing complexity of CERCLA cases—in particular, the decreasing number of parties involved—has likely contributed to a decrease in total litigation costs. EPA's expenditures for litigation, which decreased by half, from more than $50 million in fiscal year 1999 to $25 million in fiscal year 2007, provide further evidence of this trend.

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Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to answer any questions you have at this time.

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[28]GAO-09-656.

GAO Contact and Staff Acknowledgments

If you or your staff members have any questions about this testimony, please contact me at (202) 512-3841 or trimbled@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Michael Hix, Susan Iott, and Diane Raynes, Assistant Directors; and Liz Beardsley; Anne Hobson; Rich Johnson; Nico Sloss; and Emily Suarez-Harris made key contributions to this testimony.

(361492)

Mr. SHIMKUS. Thank you, and now I would like to recognize myself for 5 minutes for initial questions.

Before I go on to the prepared questions, Mr. Bearden, I was involved with the, I think you called it the Small Business Liability Relief Act mentioned in the opening statement. That was one of the pieces of legislation that I helped originally cosponsor to get to small businesses, the Main Street stores, out of this litigation trap from the potential responsible parties who then would go after, and these folks were de minimis parties to the suit, and it was a great victory, and I think it helped keep the small actors out of the litigation. So thanks for mentioning that. I did mention it last week but I didn't remember the name, couldn't remember the year it passed and all that other stuff.

Mr. Bearden, can you explain the preference in CERCLA and environmental law generally for non-preemption of state laws, and then tell us if the REDO Act would further that objective.

Mr. BEARDEN. Well, in general, there is a provision in existing law and CERCLA that doesn't allow preemption of state laws, or prevent state laws, and states are free, of course, to enact their own cleanup laws, and many have; this is sort of a general premise with respect to the bill that would specifically add preemption in the circumstance of a financial responsibility requirement. So in that case, when EPA promulgates financial responsibility requirements and then in applying those requirements, it would not be allowed to preempt a state requirement that is in place on the effective date.

Mr. SHIMKUS. Would the Federal Facilities Accountability Act also further that objective?

Mr. BEARDEN. Could you restate the question, please?

Mr. SHIMKUS. Would the Federal Facilities Accountability Act also further that objective?

Mr. BEARDEN. Oh, the objective of preemption?

Mr. SHIMKUS. Correct.

Mr. BEARDEN. It expands the waiver of sovereign immunity to apply state substantive and procedural requirements to federal facilities, so it is similar to that objective in terms of allowing state law to apply.

Mr. SHIMKUS. Thank you. In your opinion, are there aspects of CERCLA that could be improved or "modernized", in particularly the waiver of sovereign immunity, and do the bills the subcommittee is considering today take steps toward making some improvements to the existing statute?

Mr. BEARDEN. Well, CRS takes no position or opinion about the legislation, but what I could say in response to your question is that what the bills would do are similar in the overall policy vein of the 2002 amendments that would amend the law in ways to be consistent with a greater number of state laws that are in place and to address some longstanding issues about whether the waiver of sovereign immunity applies to both current and former federal facilities, as those issues have lingered for a number of years.

Mr. SHIMKUS. So those are possible positive provisions. Is there anything in the legislation that could be positive that we may have left out that could do the same thing and move us forward?

Mr. BEARDEN. Well, in terms of positive, that of course would be a judgment call, and again, CRS would take no position on it, but the types of issues that are addressed in the bills are numerous longstanding issues that have been concerns of the states and other stakeholders about the federal and state roles, so they are not new issues; they are continuing issues that have been addressed by Congress previously in different ways.

Mr. SHIMKUS. Thank you. Mr. Trimble, your testimony said as a matter of policy, EPA seeks concurrence from state governors or environmental agency heads before proposing a site on the National Priorities List. If it is a matter of established EPA policy, do you see a problem with codifying the policy in the statute?

Mr. TRIMBLE. We have not done specific work on that. I think the questions that would have to be looked at whether there are specific cases where EPA might still need the authority to list a site over state objection, and I am thinking off the top of my head, I am thinking key issues may be on sites that sort of cross borders between states so there could be a dispute between states or could be perhaps a situation where the state is somehow responsible for the pollution, but I am just——

Mr. SHIMKUS. But you don't know of any particular example that we could site right now? I understand that concern, but I am just wondering if there is an actual case.

Mr. TRIMBLE. I don't know, sir.

Mr. SHIMKUS. CERCLA and the regulations implementing CERCLA already provides the states with limited consulting role before remedy selection. Do you see a problem with amending the statute to codify the regulations and assure that states are consulted during selection of the remedy?

Mr. TRIMBLE. Again, we are not taking a position on the legislation. We have not done any work on this issue of how effective the state consultation mechanisms are within the Superfund program. I think it is an interesting question, but that is not something that we have delved into in our past body of work.

Mr. SHIMKUS. In testimony last week, it was interesting, the point being, there was some desire to ensure that they have consultation early in the remedy because their complaint was, we have the costs at the end, we have the operational and maintenance costs at the end, and so maybe we should have some role in saying how the remedy or at least give our opinion because we are going to be on the hook for the longevity of the program.

Mr. TRIMBLE. Yes, and I think again, because of the financial requirements for the state to kick in 10 percent on the remedial costs and also to sign up for the lifetime costs of the operation and maintenance, there is a hook for the state, again, but we have not looked at whether that gives them enough leverage in the process to protect their interests. I think one of the questions that came up last week, and it is to your point, is, you know, how effective is the cost-benefit analysis EPA is doing when they are choosing their path forward and does that bias toward short upfront costs and higher long-term costs or not, but that is a good question but it is not something we have looked at.

Mr. SHIMKUS. Great. Thank you. The chair now recognizes the ranking member of the subcommittee, Mr. Tonko, for 5 minutes.

Mr. TONKO. Thank you. Thank you very much. I thank the chair for reconvening our hearing today. We may not cover every issue, but as our additional witnesses appear, they help broaden and improve the record, so thank you very much.

The hearing last week gave me reservations about the bills under consideration. Not a single witness gave unqualified support to the bills we are examining today. In fact, we heard testimony that one of the bills we are considering would increase litigation and delay the cleanup of contaminated sites. One of the majority's witnesses explained that Superfund now contains a bar on pre-enforcement judicial review. This provision is important because it prevents litigation from delaying needed actions to address releases of hazardous substances that threaten human health and the environment.

So Mr. Bearden, one of the bills we are considering today would reverse this longstanding policy, would it not?

Mr. BEARDEN. Yes, with respect to states filing objections to the selection of a remedy.

Mr. TONKO. If enacted, a responsible party or anyone else, for that matter, could go to court and sue EPA before a cleanup even begins. Is that correct?

Mr. BEARDEN. If a state were to file a written objection and someone were to have standing under that provision, yes.

Mr. TONKO. And that would be before the cleanup begins?

Mr. BEARDEN. The way the provision is worded, the trigger of the timing is when the state files its written objection.

Mr. TONKO. OK. That leg could delay then the cleanup of contaminated sites, could it not?

Mr. BEARDEN. That would have to be demonstrated over time. Whether it would delay it would depend on the nature of the individual suit.

Mr. TONKO. We also received testimony last week that a responsible party could have a financial incentive to go to court to delay cleanup and argue for a less protective cleanup remedy. Do you agree with that assessment?

Mr. BEARDEN. That would involve speculation, and what a party may be motivated by, CRS cannot comment on that, but again, anyone who may have standing under that provision once the state files its objection could at least pursue the matter.

Mr. TONKO. Which would affect the time element. The end result could be that judges decide how to clean up Superfund sites, and none of the witnesses last week seemed to think that that would be a good scenario.

Mr. Trimble, we have seen the problems with litigation, haven't we? Has litigation been a problem under Superfund in the past?

Mr. TRIMBLE. As we have reported, I think initially there was a heavy amount of litigation but slowed over time as the court settled some legal issues and the number of sites being added slowed down, and the EPA increased its reliance on settlement agreements out of court. The number of those cases has dramatically gone down. Right now, I believe it's 2 to 5 percent of all litigation cases that we looked at in our list, not as large as you would think it would be, given the universe.

Mr. TONKO. And can you give us a sense of the costs of those litigations?

Mr. TRIMBLE. Yes. There are a couple of costs. One is the Department of Justice costs to defend EPA, and the numbers we have are for about 10 environmental statutes, and I think their costs were about $3 million per year, if I am remembering correctly, and that payments were about $2 million pear year.

Mr. TONKO. And what have the recent trends been in Superfund litigation over the recent years?

Mr. TRIMBLE. Well, in our report from a couple years ago, we found that it had decreased, I believe, by over half.

Mr. TONKO. And that is in duration and in cost?

Mr. TRIMBLE. That was just number of cases.

Mr. TONKO. OK. And can you speak to the complexity of those cases?

Mr. TRIMBLE. No, I don't have any information on the complexity in terms of the trends of those.

Mr. TONKO. Well, that certainly is a positive trend, but I am concerned that it could be reversed by lifting the bar on pre-enforcement judicial review. Is that a legitimate concern, in your opinion?

Mr. TRIMBLE. Well, again, we don't opine on the pending bills, but clearly as sort of the rules of the road have settled, the litigation has declined over time in the program.

Mr. TONKO. Mr. Chair, I hope we can give this the bipartisan attention it deserves. No one, in my opinion, would be well served if we end up moving legislation that increases litigation and therefore would cause delays in the cleanup of contaminated sites, which would then really speak to the overall mission statement and soulfulness of the legislation. So with that, Mr. Chair, I yield back.

Mr. SHIMKUS. The gentleman yields back his time, and I want to assure him that as conservative Republicans, additional litigation is something that we are not interested in. So I think there is some language that could be added to ensure that that does not happen.

The chair now recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTA. Thank you, Mr. Chairman, and gentlemen, thanks very much for your testimony today.

Mr. Trimble, if I could start my questions with you. In the 1990s, GAO reported that within the EPA's cleanup budget for CERCLA, less than 50 cents of the dollar was spent on dirt-moving cleanup versus oversight and administrative costs. Is that still the case?

Mr. TRIMBLE. We have not done recent work on taking apart their costs for the recent cleanup so I am not sure what the ratio is. I know there is a lot of work, I am sure still even today, in terms of investigation and assessment as opposed to final construction.

Mr. LATTA. Well, I guess when you say that you haven't really been able to take it apart, is there a way that you could get a current amount?

Mr. TRIMBLE. It is not something we readily have. We would have to do a review on that.

Mr. LATTA. If you could provide that, I think the Committee would like to know what that ratio is now because if it is still at

that 50/50—because I know of sites out there that really needed cleaned up, and at 50 cents on the dollar, that is not helping those sites.

If I could go on then, it seems also that many states have developed constructive working relationships with the Department of Defense, particularly utilizing the Defense-state Memorandum of Agreement. Are you familiar with the general working relationship between other federal land managers and states on non-NPL sites?

Mr. TRIMBLE. I think we have done some work. I am personally not that familiar with it. I know we had done work on the cleanup of mines, so the relationship with the EPA and BLM, for example, and we have done work in that area.

Mr. LATTA. Let me ask this: is there a distinction between the relationship between DOD and DOE may have with the states versus the federal land managers, for example?

Mr. TRIMBLE. I am not familiar with it. Again, we have not looked into the relationship between states and DOD or states and EPA, for that matter. Regarding DOD, we have reported on difficulties where DOD has refused to sign interagency agreements with EPA governing the cleanup of NPL sites.

Mr. LATTA. You say that DOD has not signed. Is there a reason for that?

Mr. TRIMBLE. Not that we can understand. This is an ongoing issue. In our report from a couple years ago, we had identified 11 sites where they had refused to sign the agreement, which is required under CERCLA. After our report, they took action, and now there are only two sites. One of these is Tindall Air Force Base, and even in that situation with Tindall, EPA has issued a RCRA order, which DOD has also not complied with. So there are still letters going back and forth regarding the matter. Regarding the RCRA matter at DOJ, DOD objected to EPA issuing the order. DOJ upheld EPA's authority to issue it, and we don't have any ongoing work on this, we are just following the issue because it is something we have done work in the past on, but it is a significant issue in terms of hampering the ability of the EPA to oversee the effectiveness of the cleanup.

Mr. LATTA. Thank you.

Mr. Bearden, if I could ask you quickly, can you explain the state cost share requirement under CERCLA and maybe give us some insight regarding why states are concerned with the EPA selecting the remedies that focus on short-term containment rather than long-term stewardship?

Mr. BEARDEN. The federal-state cost sharing proportion, as outlined in my prepared statement, is generally 90 percent share of the federal government for the capital costs of the remedial action, 10 percent shared by the state, and again, 100 percent of operation and maintenance with the exception of treatment of groundwater. So for containment methods that may be a concern for the state in terms of being responsible for 100 percent of the long-term operation and maintenance, for example, if there is a waste cap that has to be maintained for many years, if not decades, the state would be fully responsible for those costs under existing law.

Mr. LATTA. Let me just follow up with that. Would a change in the cost share provision in CERCLA address these state concerns?

Mr. BEARDEN. If the cost share provision were changed to have the state bear less than 100 percent, then that would increase the necessity for federal resources and then it may affect decisions that are made. The requirement in existing law is for EPA to consider short- and long-term cost-effectiveness in assessing the selection of the remedy, so there is a statutory requirement to consider cost-effectiveness.

Mr. LATTA. OK. And could you also explain how the criteria for selecting remedial action may be relevant, and would they also need to be addressed?

Mr. BEARDEN. I am not sure if I understand your question, sir.

Mr. LATTA. Well, in explaining the criteria for selecting remedial action.

Mr. BEARDEN. The criteria for selecting remedial action under existing law are that there be applicable, relevant and appropriate requirements. There is a whole host of criteria in statute and regulation on determining what is applicable, relevant and appropriate at a site. Generally, a state requirement can be applied as well if it is more stringent than the federal requirement. But then again, those criteria may allow for exclusions of some standards under those criteria.

Mr. LATTA. Just briefly, if I may, Mr. Chairman, I see my time is expired, but would also need to be addressed, do you think, those remedial actions if we are looking at that? Should those actions be addressed out there?

Mr. BEARDEN. Well, if one is looking at the federal and state roles in making those decisions and one is concerned about who is sharing the cost, one would need to consider the existing criteria under which those decisions would be made.

Mr. LATTA. Thank you. Mr. Chairman, my time is expired and I yield back. Thank you very much.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the chairman emeritus of the committee, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy and I commend you for holding this hearing. I want to begin with congratulations to Mr. Bearden and Mr. Trimble. You have given good testimony this morning, and your agencies have been agencies that this committee has looked to most urgently for your help in times past as well as today. These questions are for Mr. Trimble, and I am hopeful to that the degree you can you will answer yes or no.

Relating to the amendments to Section 108 of CERCLA, can you tell the subcommittee how many states have promulgated financial responsibility requirements?

Mr. TRIMBLE. I do not know the answer.

Mr. DINGELL. Could you check and submit that?

Mr. TRIMBLE. I can check to see if we have that.

Mr. DINGELL. And perhaps you would want to make a comment on that, Mr. Trimble, but I assume you will want to do that for the record, or rather Mr. Bearden.

What are the amounts set in each state and for what classes of facilities? I assume that is a matter that you will have to submit for the record also.

Now, the next question: does anything prevent a state from obtaining funding from fees, taxes or other sources of revenue to clean up toxic waste sites in the respective states and thus have total control over the remedy selected or removal action taken? Yes or no. This is to Mr. Trimble.

Mr. TRIMBLE. Not to my knowledge.

Mr. DINGELL. What does that mean?

Mr. TRIMBLE. No.

Mr. DINGELL. Next question, if you please, Mr. Trimble. Section 113(h) provides new opportunity for lawsuits where a state simply writes a letter objecting to a remedy selected by the President after such letter is posted by the state. Would this new provision also allow the responsible party who polluted the site in the first place to litigate and to challenge the remedy? Yes or no.

Mr. TRIMBLE. I am not a lawyer, but I would think it would.

Mr. DINGELL. You would think it would. Do you have a comment on that, Mr. Bearden?

Mr. BEARDEN. I addressed that question, a similar question, earlier. Assuming someone would have standing under that provision, the trigger would be, as you mentioned, the state filing a written objection to the selection of the remedy.

Mr. DINGELL. Thank you. Now, this is to Mr. Trimble. Mr. Trimble, would this provision allow an environmental group to also challenge the remedy if they could get a state to write such a letter? Yes or no.

Mr. TRIMBLE. Yes.

Mr. DINGELL. And I would assume that almost anybody who could involve themselves in this could enter the litigation of the question, could they not?

Mr. TRIMBLE. I would defer to Mr. Bearden but I——

Mr. DINGELL. Please, Mr. Trimble.

Mr. TRIMBLE. I would assume so, but again, we have not done audit work in this area but my understanding would be that is the case.

Mr. DINGELL. Mr. Bearden?

Mr. BEARDEN. As with any litigation, it would depend on whether someone has standing, and a judge would have to decide that based on the circumstances.

Mr. DINGELL. We would significantly increase the number of persons who have standing by this provision, would we not?

Mr. BEARDEN. It does broaden the opportunity for judicial review.

Mr. DINGELL. Now, what happens to the citizens and the surrounding communities that is being exposed to the hazardous substance and hazardous conditions or to communities and persons in the communities who wish the site to be redeveloped to create jobs while the remedy decision is litigated in the federal courts? They just have to sit and grind their teeth, don't they? Yes or no.

Mr. TRIMBLE. I don't know about the grinding of the teeth but——

Mr. DINGELL. I know if I were, I would. This has a significant chance of increasing the number of litigants and the amount of time that is involved in concluding the cleanup of these sites, does it not?

Mr. TRIMBLE. I would suspect that the delay would add to the time, yes.

Mr. DINGELL. All right. Mr. Chairman, as I stated last Friday, I do not see the factual record in this matter justifying significant changes to the existing law here. The changes to Section 113(h) expand the opportunities for litigation, meaning communities would have to live longer without a cleanup remedy. Section 121(f) of current law already details requirements for substantial and meaningful involvement by each state in initiation, development and selection of remedial actions. Then there is an amendment to Section 108. In this section, the Congress wanted to EPA to establish financial responsibility requirements for various classes of facilities so that they could maintain evidence of financial responsibility consistent with the degree and the duration of the risk associated with the production, transportation, treatment, storage or disposal of hazardous substances. The Agency has been dilatory in implementing this provision. However, instead of calling the EPA to task for failing to act, the legislation here seems to have a goal to eliminate the one provision that was imposing a mandatory duty on EPA to initiate the action. I feel with regret that the amendments appear to be solutions in search of a problem, and I hope that as we continue our discussion of these matters and our evaluation of these matters, it will be possible to address the concerns that I have expressed, and I thank you for letting me run over time.

Mr. SHIMKUS. And I thank the gentleman. The chair now recognizes the vice chairman of the subcommittee, Mr. Gingrey, for 5 minutes.

Mr. GINGREY. I thank the chairman for yielding, and Mr. Trimble, I will address my first question to you. In an October 2009 report on formerly used defense sites—I think that's GAO report 1046—GAO found that the Army Corps has not consistently conducted CERCLA 5-year reviews to assure continued protectiveness of remedies on sites where the chosen remedy does not allow for unrestricted use and unrestricted exposure. So did GAO find that the Corps routinely complies with state land-use control and environmental covenant requirements for such sites?

Mr. TRIMBLE. I do not recall from that report if it got into the details of where there was noncompliance of state-specific requirements. The finding was, if you go through remedial action and you clean up a site and you say your construction is complete and you are entering the operation and maintenance phase, at that point you have to monitor it every 5 years to make sure it is still in good shape. What that review found was that for the formerly used defense sites, the Army Corps was not doing a good job at monitoring those sites to make sure that everything was still as it should be or if new contamination had emerged or new remedies would have to be put in place. Now, the basis for how it could have gone off the rails might have been state requirements versus federal requirements, and I don't know off the top of my head if that report got into that level of detail.

Mr. GINGREY. Would that be true for commercial sites as well?

Mr. TRIMBLE. The 5-year requirement would be there but who would be doing it would be different.

Mr. GINGREY. But the 5-year requirement is there.

Mr. Bearden, we also understand that there are EPA regulations pertaining to consultations with the states regarding remedy selection, and we understand that the statute already requires consultation at certain points in the process. Do you think that codifying that regulatory practice in statute would be a bad thing?

Mr. BEARDEN. Well, there are many instances where Congress chooses to codify a regulatory requirement to elevate it in statute, and that is a policy decision of the Congress.

Mr. GINGREY. Well, wouldn't codifying the regulations regarding consultation regarding remedy selection ensure consistency among all the EPA regions and ensure that other federal agencies also consult with states when selecting a remedy?

Mr. BEARDEN. Well, the regulatory requirements already apply to all regions and to other federal agencies who implement a national contingency plan, which are the regulations to which you are referring. Whether in practice they implement them consistently may be a question, but they already are required to follow those regulations.

Mr. GINGREY. Well, the question was, wouldn't codifying the regulations make this work better and more consistently?

Mr. BEARDEN. It would elevate it as a statutory requirement. It already is a requirement. There may be questions of application on a consistent basis.

Mr. GINGREY. Well, that is my whole point. CERCLA specifically requires consultation with the states before selecting a remedy. The Federal-state Partnership for Environmental Protection Act would amend the timing of the consultation to ensure that states are consulted during the process of selecting a remedy. What is your opinion about changing the timing for the consultation?

Mr. BEARDEN. Well, CRS would make no opinion on any amendments, but in terms of timing, that difference would be in current law, it is in determining the remedy, and that may be interpreted as the point at which you are selecting as opposed to earlier in the process before a determination is made, so the bill would expand the time frame to an earlier stage of the process in statute.

Mr. GINGREY. Mr. Chairman, I see I have got about 45 seconds, if anyone on this side, or do you want me to yield back to you.

Mr. SHIMKUS. Just yield back.

Mr. GINGREY. I will yield back.

Mr. SHIMKUS. The gentleman yields back. The chair now recognizes the gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman, for holding this follow-up hearing.

Mr. Bearden, in your testimony you stated that the states have input into the designation of the NPLs. Can the EPA list sites on the NPL without state concurrence or cooperation?

Mr. BEARDEN. EPA has the statutory authority to list a site without state concurrence. I don't know of an example in which that has occurred. The amendments in 2002 address that very issue that limited EPA's authority to list a site without the state's concurrence. A state may request EPA to defer and there would have to be a set of conditions that EPA would determine that a state was not making adequate progress toward the cleanup in order to

list the site despite a state's request to defer the listing. So it is more limited in current law as a result of the 2002 amendments.

Mr. MCNERNEY. Well, last week we heard from state organizations who claim to have little or no input into the process. Could you explain the disconnect?

Mr. BEARDEN. Well, I can't speak to their level of understanding but if one reads Section 105(h) of CERCLA, which was added again in the 2002 amendments, a state merely has to request that EPA not list a site, and at that point that limits EPA's authority, again, unless a determination is made under the statutory criteria that listing is necessary to protect human health and the environment.

Mr. MCNERNEY. OK. There is a disconnect there, clearly. You said that the Federal Facility Accountability Act of 2013 would hold federal agencies more accountable at federal facilities to include current and former federal facilities to encompass the entire phase of the cleanup process and to clarify in greater detail the extent to which substantive and procedural cleanup requirements of state law apply to federal facilities. Can you explain the impact that this would have on listing of NPLs?

Mr. BEARDEN. Well, it would not have a direct bearing on the listing of sites on the National Priorities List. It would determine, based on the language in the bill, whether it would apply to either National Priorities List sites and non-National Priorities List sites. It would determine what requirements that are substantive and procedural of the state may be applied to the cleanup. It would determine how the cleanup may be performed and apply regardless of listing status.

Mr. MCNERNEY. Thank you. Mr. Trimble, in your testimony you stated that CERCLA authorizes the EPA to compel potentially responsible parties to clean up their sites. Do you think that the proposed bills would undermine the EPA's authority in this compelling the potentially responsible parties to clean up their sites?

Mr. TRIMBLE. I don't know if I have any work that would speak directly to that, and I think you would have to see how these things were implemented. I think if EPA is restricted in taking immediate, sort of response actions, that could be one issue that could come up. I am not sure I have much more to offer than that on that question.

Mr. MCNERNEY. Well, the authority for funding the actual cleanup expired 18 years ago despite the increasing financial liability since that time. Rather than trying to restructure the authority in CERCLA, Congress should, in my opinion, reinstate the fees on which the old funds relied. Are there other funding sources that would be viable to supplement the fund?

Mr. TRIMBLE. GAO has not taken a position or looked at alternative funding issues for Superfund. The tax was one option. Right now it is coming out of general taxes, general fund. We have done work looking at anticipated future costs in the Superfund program, and those costs are very difficult to measure for a variety of reasons. Superfund program managers have estimated that their costs will likely exceed available monies going forward as many of these sites get more complex and complicated, for example, some of the mining sites. But we don't have an opinion. It is more of a policy

question in terms of where the money comes from, so we don't have a position on that.

Mr. MCNERNEY. But there is going to be a critical shortage of funds from all sources to clean up these sites.

Mr. TRIMBLE. Well, the program will continue to need a lot of money going forward.

Mr. MCNERNEY. Thank you. I yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman, for the time, and gentlemen, thank you both for being here with us today.

Mr. Trimble, has your office ever conducted a review of other federal agencies' implementation of institutional controls as a part of removal or remedial actions conducted pursuant to authorities granted under CERCLA or Executive Order 12580?

Mr. TRIMBLE. To my knowledge, we haven't. I mean, I can certainly check when I go back, but I am not familiar with prior work on that issue.

Mr. JOHNSON. Would you please check and get back with us?

Mr. TRIMBLE. Absolutely.

Mr. JOHNSON. I would appreciate that. Do you think it would be constructive to conduct such a review?

Mr. TRIMBLE. Absolutely.

Mr. JOHNSON. Let me go also to you, Mr. Trimble. In June of 2006, GAO conducted a review of EPA's implementation of institutional controls by the EPA Superfund program. In this or any subsequent review, were you able to ascertain whether EPA routinely complies or requires compliance with state land-use control or environmental covenant laws and regulations?

Mr. TRIMBLE. And I apologize, I am not familiar with that report and I would love to take that for the record, if I could.

Mr. JOHNSON. Good. I would appreciate that as well. Would it be fair to anticipate that requiring federal agencies, in your mind, would it be fair to anticipating that requiring federal agencies to comply with state laws that require that institutional control be implemented and enforced in perpetuity that this would help ensure that these controls are in fact maintained for as long as they are necessary to protect human health and the environmental?

Mr. TRIMBLE. I am curious about the work we have done in the past but I think the key question is whether or not they currently are considered in the existing procedures and processes, whether or not there is a disconnect between the states' desires to apply certain controls and whether those are actually going on into effect and whether or not they have enough leverage to make that happen. If there is a breakdown there, then certainly there is an issue to be looked at.

Mr. JOHNSON. Thank you. If you would get back to the committee on that, I would appreciate it.

Mr. TRIMBLE. Absolutely.

Mr. JOHNSON. Mr. Chairman, with that, I will yield back my time.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentlelady from California, Ms. Capps, for 5 minutes.

Mrs. CAPPS. The bills before us may affect many aspects of the program's ability to accomplish this goal but my time is limited so I want to focus on one particular provision. My first question is going to be for you, Mr. Bearden. The federal and state partnership bill we are examining includes an amendment that could complicate and impede, in my opinion, the streamlined process currently in place for short-term Superfund removal actions. So I wanted to ask you, Mr. Bearden, can you explain what removal actions are and why we need to be able to undertake them quickly?

Mr. BEARDEN. Removal actions can be conducted in two different capacities. One is referred to programmatically as time critical. The other is non-time critical. At any site where a release is reported and EPA, state and local officials become aware of it, the very earliest actions to stabilize the site may be considered in practical terms to be the early emergency phase of the response, but the removal action can continue much longer than that, especially the non-time-critical removal actions. So there are various phases even for the removal aspect of the process.

Mrs. CAPPS. So some removal actions are very pressing and are needed to address imminent public health threats. I mean, that could be the trigger that necessitates quick action. Am I right?

Mr. BEARDEN. Correct. The initial response is a removal, and the very earliest stage of the response is to stabilize the site and prevent potentially harmful exposures at the very earliest stages.

Mrs. CAPPS. OK. Moving on, these imminent threats are why these actions have always been done in a streamlined process. In testimony they provided last week, the EPA expressed concern that this legislation as currently drafted would require consultation before removal actions could even begin. The Agency said the bill could, and this is a quote from EPA, "The bill could have an adverse impact on your emergency removal program by introducing potential delays when EPA needs to conduct time-critical emergency removal actions." Having a Superfund site in my district, this is a big concern for me, the timing that we are talking about.

So Mr. Bearden, do you agree with EPA's assessment that this procedural change has a potential to delay removal actions?

Mr. BEARDEN. Well, CRS would not agree or disagree with an agency position but what I can say is, at the very earliest stages of the emergency response, even under the regulations of the National Contingency Plan that EPA promulgated, state and local officials are expected in most cases to be the first responders. So it is actually the state and local officials who are on site. Most often it is the local fire department, local police department, to stabilize the emergency conditions and then it becomes elevated to EPA's attention.

Mrs. CAPPS. And your careful delineation of those steps indicates that the reason they are done that way is to enable a prompt response and timely response.

I have only one question left, but I want to make sure that I ask you, Mr. Trimble, the GAO has done work on contamination at Superfund sites nationwide and on health assessments of Superfund sites done by the Agency for Toxic Substance and Disease Registry. These assessments find risks of cancer, development issues, neurological effects. So my question to you, Mr. Bearden,

what could be the consequences of delaying emergency removal actions?

Mr. BEARDEN. Assuming the delay actually resulted in increased exposure to whatever contaminants, then the problems being cited by ATSDR could be expected to be great.

Mrs. CAPPS. So you two are sort of in agreement with the notion that if something is discovered, that the local responders really are in the best position because they are close and can make that initial assessment. It doesn't remove EPA's responsibility but it allows the emergency response to happen the way emergency responders are trained to do. They come in and make an assessment when there is a little more time in their favor. Would you agree? Any other comments you wish to make on either of these points, either of you?

Mr. BEARDEN. No.

Mrs. CAPPS. Then I will yield back the balance of my time.

Mr. SHIMKUS. The gentlelady yields back her time. The chair now recognizes the gentleman from Florida, Mr. Bilirakis, for 5 minutes.

Mr. BILIRAKIS. Thank you. I appreciate it, Mr. Chairman.

Mr. Bearden, what recourse do states currently have if they disagree with an EPA decision or remedy and what recourse do states have if they disagree with another federal agency's decision or remedy?

Mr. BEARDEN. Under the current existing mechanism, if it is a site that would be funded with federal Superfund appropriations for the remedial action, since the state is responsible for sharing the cost, as I outlined in my prepared statement, the state may choose not to provide those matching funds, and under existing law in CERCLA, EPA would not have the authority to use the federal Superfund appropriations. So that is some leverage that the state could be provided, and that is the underlying intent of the way the matching funds requirements are structured to have a factor be included in the federal decision on whether or not the state agrees to provide its match. So those again are circumstances where Superfund appropriations are used so that would not apply to sites where private potentially responsible party funds are used through enforcement actions. In those cases, then the state input is limited to the consultation process under existing law.

In terms of federal facilities, as was mentioned earlier, there is a provision in existing law for states to challenge a selection of a remedial action in a U.S. District Court as outlined in my statement, so that is a mechanism specifically at federal facilities where it would be administered and funded by other federal agencies like the Department of Defense and Department of Energy.

Mr. BILIRAKIS. Thank you. Mr. Trimble, during the first day of this hearing, the subcommittee heard testimony comparing the compliance rate of federal facilities under the Clean Water Act and the RCRA. The testimony indicated that due to the ability of the states to impose and collect penalties under RCRA but not under the Clean Water Act, that RCRA experiences a significantly higher compliance rate by federal facilities than does the Clean Water Act. Has GAO ever conducted a similar evaluation, and if so, what did you find?

Mr. TRIMBLE. Again, to my knowledge, we have not done such a study. I am happy again to look to make sure I am not missing something when I say that. I think in general, the issue of having a stick to ensure compliance makes people behave better. As I noted earlier, we have made recommendations in terms of EPA's ability to make other federal agencies comply. I think that the issue of DOD's noncompliance with the requirement that they sign an interagency agreement with the EPA governing the cleanup at two NPL sites, Tindall Air Force Base in particular comes to mind, GAO has made recommendations in the past as a matter of congressional consideration to give EPA more authority to force compliance by DOD when they are faced with these kinds of situations.

Mr. BILIRAKIS. OK. One more question, Mr. Chairman.

Mr. Trimble, in your testimony you mention Executive Order 12580. Does this Executive Order enable some or all federal agencies including those that are potentially responsible parties to self-regulate and make determinations regarding their compliance with state and federal cleanup requirements, and if you can please explain briefly?

Mr. TRIMBLE. Again, I will probably lean on David to help me out here.

Mr. BILIRAKIS. OK. That would be great.

Mr. TRIMBLE. But I think it gives agencies like DOE and DOD the authority to manage the cleanups. EPA is still in sort of a partner position but also to provide independent oversight on those activities to make sure the cleanups are done appropriately, which, again, speaks to the need for that interagency agreement at places like Tindall to make sure they are being done appropriately on time and to the correct standards.

Mr. BILIRAKIS. Yes, please.

Mr. BEARDEN. Yes. All I would add to that is, when it is a federal agency like the Department of Defense, Department of Energy, there can be other federal agencies as well, the Executive Order that you cited authorizes that agency to execute the President's authority for the response action, which is carrying out the cleanup itself. But when it is a National Priorities List site and a federal facility, as Mr. Trimble mentioned, EPA has a prominent oversight role, and actually under existing law has final decision-making authority at the federal level for selecting the cleanup actions and the deference is to EPA, not the federal agency responsible for carrying out the cleanup. And in terms of state involvement, if it is a non-National Priorities List site, the state primarily is responsible for overseeing that cleanup carried out with the President's delegated authorities under the Executive Order.

Mr. BILIRAKIS. Thank you. I yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from Pennsylvania, Mr. Pitts, for 5 minutes.

Mr. PITTS. Thank you, Mr. Chairman. I just had a couple questions. Sorry to be in and out with meetings. I apologize of this has been asked.

Mr. Bearden, we understand that it is currently EPA's policy not to list a site on the National Priorities List over the objection of the

state. Do you think that codifying the EPA policy in the statute would ensure that states could count on this policy?

Mr. BEARDEN. Well, codifying it in statute and making it binding by law would certainly require EPA to adhere to that policy.

Mr. PITTS. Wouldn't codifying the policy to not list a site on the National Priorities List eliminate any potential inconsistent among the regions?

Mr. BEARDEN. Yes, there would not be any discretion in implementing the existing policy if it were to become a uniform statutory requirement in all cases.

Mr. PITTS. Now, do you have any comments or opinions regarding whether it would be benefit to authorize EPA to review actions taken by other federal agencies under CERCLA to ensure consistency with EPA cleanup guidelines, rules and regulations?

Mr. BEARDEN. Well, under existing law, when it is a federal facility on the National Priorities List, already EPA has the authority under the interagency agreement to make a decision on the final remedy selection. So there already is that mechanism for ultimate review in making a decision.

Mr. TRIMBLE. If I could add to that, what is missing, though, is giving EPA the stick if they find noncompliance. So I believe the way the language is written, it allows EPA to review, but what happens if EPA finds somebody is in noncompliance? And that is sort of the situation we have today.

Mr. PITTS. Thank you. Thank you, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time. The chair wants to ask unanimous consent for a couple letters to be submitted in the record, one letter from public interest groups on RCRA Section 202(b) and CERCLA 108(b), a letter from other public interest groups on CERCLA Section 113(h) and Section 105, and a letter from Headwaters Resources, also signed by Boral Material Technologies. They were referred to in the first testimony, and I quote a line in here: "Headwaters and Boral utilize Section 202(b) of RCRA in an attempt to end the recent uncertainty as a matter of overall governance. We think Section 202(b) RCRA makes for poor public policy. It could enable special interest groups through deadline suits to set EPA's agenda." So we will submit those into the record.

[The information appears at the conclusion of the hearing.]

Mr. SHIMKUS. I am joined by my colleague from Texas, Mr. Green. You are recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. I apologize to our witnesses. We are balancing two committees at the same time, and I just finished in the O&I Committee.

I want to thank you for holding the hearing today. I am happy to see GAO and CRS come before us subcommittee to speak on proposals to amend CERCLA and RCRA.

I have a very urban district in Houston, and it is East Harris County, which is a heavy industrial large petrochemical complex in the country, and there are a number of Superfund sites in and near our district that I have been involved with other the years. The most recent one, although it has been there a while, includes the U.S. oil recovery site in Pasadena, which was added to the National Priorities List last year. From my experience, the Superfund pro-

gram has played a value role in protecting the environment and human health of my constituents and for Americans for all 50 states, and I am concerned how the proposed legislation would change this program.

Mr. Bearden, is it true that the EPA is already obligated by federal statute to give substantial deference to the states on naming sites to the NPL?

Mr. BEARDEN. The substantial deference is a result of the 2002 amendments. EPA may still list a site if EPA determines it is necessary to protect human health and the environment but generally defers to the state if they desire not to list the site.

Mr. GREEN. Well, the two I have been involved in, we got concurrence from the state agency. In fact the state agency was very happy to have them listed on the site including the current one.

Mr. Bearden, is it that true that the 2002 amendments to limit EPA's enforcement authorities to CERCLA to pursue the cleanup of a site if a state is already pursuing the cleanup under its own law?

Mr. BEARDEN. Yes. The 2002 amendments address that issue.

Mr. GREEN. You know, again, my experience with Texas is that we have had good cooperation between our regional office on our Superfund sites. I wish we didn't have them, but again, in an industrial area, that is going to happen if you have been producing chemicals and things for 60, 70 years.

Mr. Bearden or Mr. Trimble, to your knowledge, has a site ever been added to the NPL without the concurrence of the governor of the state in which a site is located?

Mr. BEARDEN. I am not aware of one myself.

Mr. TRIMBLE. I am not either.

Mr. GREEN. Mr. Trimble, in your testimony you noted that over 40,000 potential hazardous release sites have been reported to EPA over the past 30 years and yet EPA has determined only a few thousand of those sites for NPL designation. Is that true?

Mr. TRIMBLE. That is correct.

Mr. GREEN. What happens to those sites that are reported to EPA and not added to the NPL?

Mr. TRIMBLE. They are generally cleaned up under other cleanup authorities, so in our most recent report, we note that sites that are assessed at a level where the contamination would make them eligible for Superfund, so they are severely contaminated sites, the majority of those sites actually are not handled by the Superfund program but are cleaned up under cleanup authorities principally managed by the states. The states manage about 47 percent of all those sites.

Mr. GREEN. So the states handle about—so some of the sites are deferred to the states and so that is about 47 percent of them?

Mr. TRIMBLE. Yes, the states handle more Superfund-caliber sites than EPA does under the Superfund program.

Mr. GREEN. You know, in my experience, though, I haven't had the state being one to take it over because it has always been EPA oversight in cleaning up. Our problem is making sure we do due diligence and find a responsible party. Otherwise it is going to be the taxpayer that ultimately does it, which makes it harder, Mr.

Chairman, when we don't have budget appropriations. That is why responsible parties are really important.

You stated in your testimony the number of NPL site designations has increased in recent years. Is that true?

Mr. TRIMBLE. That is correct. I believe it is running about 22 a year.

Mr. GREEN. And again, a few years ago, in Congressman Ted Poe's district we were borders. It is a dioxin facility that actually submerged back in the 1960s and nobody knew about it, but we always knew that the Port of Houston had higher dioxin levels, but my industries that were there were being blamed for it and yet it was from an old site that very quickly Congressman Poe and I worked with EPA to be able to put it on the NPL. So it was a very bipartisan effort, and again, the state was happy that we finally were able to find the source of that. We still have a cleanup problem. It is encapsulated. How do you deal with sediment in a river that is, you know, 40 years old. Can you explain the number of designations has increased and why the number of designations increased in recent years?

Mr. TRIMBLE. A couple of factors that we have discussed in our reports. One is, it is often linked to states' abilities to take on these sites so with the economic downturn in the last few years, the states' ability or willingness to take on the cleanup responsibilities for these has gone down, which means the burden gets shifted to the federal government. And then also there is some emergence of a growing number of complicated sites, like abandoned mine sites, that have come on over.

Mr. GREEN. Thank you, Mr. Chairman, for having the hearing.

Mr. SHIMKUS. The gentleman's time is expired. The chair now recognizes the ranking member of the full committee, Mr. Waxman, for 5 minutes.

Mr. WAXMAN. Thank you very much, Mr. Chairman. I thank you for reconvening the hearing today, and I am pleased that we have the opportunity to hear from knowledgeable experts about the Superfund program.

The legislation before us has been presented as correcting a problem where states are not sufficiently consulted in the decisions to clean up contaminated sites through the Superfund program. The argument is that although Superfund is a federal program carried out by federal employees using federal resources, a state should be able to slate sites for cleanup, veto sites from being slated for cleanup, have a greater say in cleanup decisions, and even collect their attorney fees from the U.S. taxpayer when they sue the federal government. I am not sure this approach strikes the right balance.

Mr. Trimble, if a state wants more control over the cleanup of a contaminated site, the state can simply conduct its own cleanup under state law and retain full control of all decisions. Isn't that right?

Mr. TRIMBLE. That is correct.

Mr. WAXMAN. And in fact, this happens regularly, doesn't it?

Mr. TRIMBLE. Yes, it does. About 47 percent of all Superfund-caliber sites are managed by the states.

Mr. WAXMAN. The states don't always do that, though, because they want federal resources and expertise brought to bear to get sites cleaned up. Isn't that correct?

Mr. TRIMBLE. That is correct.

Mr. WAXMAN. In fact, the states often request that EPA come in and conduct expensive removal actions and response actions, don't they?

Mr. TRIMBLE. Yes.

Mr. WAXMAN. The federal government pays the entire cost of a removal action. The states pay just 10 percent of the cost of a response action. The rest is picked up by the federal government. Is that correct?

Mr. TRIMBLE. I believe that is true for remedial actions. I am not sure about removal.

Mr. WAXMAN. And there is a great variation among the states in their capacity and resources to carry out site cleanups, isn't there? Some are better at it than others?

Mr. TRIMBLE. Absolutely.

Mr. WAXMAN. Even though Superfund is a federal program, the law provides for significant state involvement. Under the statute as it currently stands, EPA is required to provide "substantial and meaningful participation" to states.

Mr. Trimble, under current law, are states involved in suggesting sites for cleanup under Superfund?

Mr. TRIMBLE. They are, yes, in terms of reporting sites with contamination and then EPA has a consultative process.

Mr. WAXMAN. So they can propose sites and have the ability to directly list one site on the National Priorities List. Isn't that the case?

Mr. TRIMBLE. I would defer to Mr. Bearden for a more thorough answer on that, but I don't think they have the authority to list. I mean, I wouldn't go quite that far.

Mr. WAXMAN. Let me continue with my questioning for you. Under current law, EPA seeks concurrence from states before slating a site for cleanup on the National Priorities List. Is that correct?

Mr. TRIMBLE. Under policy, correct.

Mr. WAXMAN. Under current law, states can block EPA from carrying out a selected response action by not agreeing to pay the cost share for that response action. Isn't that right?

Mr. TRIMBLE. Yes, EPA could not use funds to clean that site up under the Superfund program without state concurrence.

Mr. WAXMAN. Finally, Mr. Trimble, if a state wants to take a leadership role at a Superfund site under current law, they can assume the lead under cooperative agreements with EPA. Isn't that correct?

Mr. TRIMBLE. That is correct.

Mr. WAXMAN. Thank you. It is natural that a state would want to be able to tell EPA what to focus on and what to spend money on and what not to spend money on. It is natural that a state would want federal resources available for use at their discretion. But this is a national program that must be available to clean up the most contaminated sites in every state. It is our job to ensure a balanced approach.

Mr. Chairman, I have serious concerns about certain aspects of these bills. I think they are a work in progress. If you are interested in moving these bills, I urge you to convene a process that would allow us to examine whether there are problems here that need to be addressed and how to address them.

I thank the witnesses, and I hope the chairman will consult with us on some of these ideas.

Mr. SHIMKUS. The gentleman yields back his time. Just to address the ranking member, we have already had some staff attempts to talk about this. This is a legislative hearing. I think there are two issues raised on some of the provisions that it would be helpful to get input and maybe move forward, and we will let our staffs give that a try first, and if members want to be engaged, they know where to find me.

With that, we want to thank our second panel for coming. This is a legislative hearing, which is for us to gather input, which we have done today with your help and your expertise. We thank you, and with that, the hearing is now adjourned.

[Whereupon, at 11:33 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

MEMORANDUM June 26, 2013

To: House Committee on Energy and Commerce
Subcommittee on Environment and the Economy
Attention: Nick Abraham

From: David M. Bearden
Specialist in Environmental Policy
Resources, Science, and Industry Division

Subject: **Responses to Questions for the Record of a Hearing held by the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce on May 22, 2013**

This memorandum responds to seven questions you submitted for the record of the hearing held by the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce on May 22, 2013, at which I testified on behalf of the Congressional Research Service (CRS). The hearing examined three legislative proposals: Federal and State Partnership for Environmental Protection Act of 2013, Reducing Excessive Deadline Obligations Act of 2013, and Federal Facility Accountability Act of 2013. As addressed in my prepared statement presented at the hearing, this legislation would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] to address various aspects of the federal and state roles in the cleanup of contamination resulting from releases of hazardous substances into the environment, and the applicability of state cleanup requirements at both current and former federal facilities. I have prepared the following responses to the seven questions you submitted to CRS for the hearing record. Each question and response is presented separately below in the same order as outlined in the June 12, 2013 letter from Chairman Shimkus. If you have any additional questions, you may contact me at 7-2390 or at dbearden@crs.loc.gov.

Question 1

The Environmental Protection Agency (EPA) must already consult States in selecting a removal action (40 CFR 300.525). Would codification of that regulation in statute change the status quo?

Response

Section 300.525(e) of the regulations of the National Oil and Hazardous Substances Pollution Contingency Plan (often referred to as the National Contingency Plan or NCP for short) requires EPA to

[1] 42 U.S.C. § 9601 et seq.

"consult with a state on all removal actions to be conducted in that state."[2] The regulations of the NCP establish the procedures for implementing the authorities of CERCLA to respond to releases of hazardous substances into the environment.[3] Removal actions generally are the initial federal response actions taken at a site that are intended to address more immediate risks.[4] Remedial actions generally are more extensive measures that are intended to offer a more permanent solution to address potential risks over the long-term.[5] Removal actions may be used in the interim to stabilize site conditions (such as stopping the spread of contamination) and to prevent potentially harmful exposures while remedial actions are developed. At sites where less extensive cleanup is needed, a removal action may constitute the entire scope of the federal response under CERCLA and may not involve a remedial action in such instances.

Section 121(f) of CERCLA requires states to be provided the opportunity for "substantial and meaningful" involvement in the initiation, development, and selection of remedial actions by the federal government.[6] However, the statute does not include a similar requirement for removal actions. This difference in statutory treatment for the involvement of states in large part may be attributed to the participation of states in sharing the costs of remedial actions funded with federal Superfund appropriations by EPA. As a condition for the use of federal Superfund appropriations to finance a remedial action, Section 104(c)(3) of CERCLA requires states to provide certain assurances, including agreeing generally to pay 10% of the capital costs of the remedial action and 100% of the costs of "all future maintenance" of that action.[7] Section 104(c)(6) provides an exception for the treatment of groundwater for which federal funds may be used for the first 10 years once the remedial action is in place and operating as intended.[8] This matching funds requirement is limited to sites that EPA has designated on the National Priorities List (NPL), as a site first must be listed on the NPL to be eligible for the use of federal Superfund appropriations to finance remedial actions.[9]

Although removal actions generally are not subject to this matching funds requirement, Section 104(c)(3) does specify that states also must agree to provide "all future maintenance" of removal actions at a site as an additional condition for the use of federal Superfund appropriations to finance remedial actions at that same site. Furthermore, Section 300.415(k) of the NCP specifies that arrangement for "post-removal site control" by the state is encouraged to the extent practicable, prior to the initiation of the removal action.[10] In conjunction with these statutory and regulatory provisions, Section 300.525(e) of the NCP requires EPA to "consult with a state on all removal actions to be conducted in that state," as noted above.

Whether to codify the regulatory requirement of Section 300.525(e) of the NCP in statute would be a policy decision of Congress. Promulgated federal regulations already constitute binding requirements. As

[2] 40 C.F.R. § 300.525(e).

[3] 40 C.F.R. Part 300. Subpart E establishes procedures and criteria for taking federal actions to respond to releases of hazardous substances into the environment. Subpart F establishes procedures for the involvement of states in such federal response actions. As authorized in Section 104 of CERCLA, the NCP also addresses federal actions to respond to releases of pollutants or contaminants into the environment that may present an imminent and substantial danger to the public health or welfare.

[4] 42 U.S.C. § 9601(23).

[5] 42 U.S.C. § 9601(24).

[6] 42 U.S.C. § 9621(f).

[7] 42 U.S.C. § 9604(c)(3). If a site was owned or operated by the state, or a political subdivision of the state, at the time of the disposal of hazardous substances, the state would be responsible for paying at least 50% or more of the response costs at the site. State costs in such instances would be dependent upon the degree of the responsibility of the state at the site. Section 300.525(b) of the NCP clarifies the applicability of this provision to include removal costs.

[8] 42 U.S.C. § 9604(c)(6).

[9] 40 C.F.R. § 300.425(b).

[10] 40 C.F.R. § 300.415(k).

such, codifying a regulatory requirement in statute may have the practical effect of continuing existing practice, but would make any potential revisions then subject to amendment by Congress rather than revision by the requisite federal department or agency responsible for the promulgation of the regulations. Section 105(a) of CERCLA authorizes the President to revise and promulgate the regulations of the NCP.[11] This responsibility of the President is delegated to the Environmental Protection Agency (EPA) by Executive Order 12580.[12]

The Federal and State Partnership for Environmental Protection Act of 2013 would amend Section 104(a)(2) of CERCLA to require the President to consult with states in the undertaking of removal actions by the federal government. Section 104(a)(2) in existing law requires the President to consider the contribution that a removal action may make to the "efficient" performance of a long-term remedial action, but does not require consultation with the state.[13] Executive Order 12580 delegated the President's response authorities under Section 104 of CERCLA to EPA in the inland zone, the U.S. Coast Guard in the coastal zone, and federal departments and agencies that administer federal facilities. Accordingly, the amendment to Section 104(a)(2) to require the President to consult with states in undertaking removal actions would apply not only to EPA (as in Section 300.525(e) of the NCP), but also to other federal departments and agencies with delegated federal response authorities under CERCLA.

The amendment also potentially could have a bearing on the opportunity for citizen suits, if a federal department or agency were to fail to consult with a state in the undertaking of a removal action in that state. Section 310(a) of CERCLA authorizes any person to commence a civil action for failure of the President or any other officer of the United States to perform a non-discretionary duty under the statute.[14] The extent to which this authority may be available to compel a federal department or agency to consult with a state in undertaking a removal action would depend on whether consultation required under the amendment may be interpreted as a non-discretionary duty (although it likely would considering the use of the term "shall" with respect to consult). Still, such challenges may be limited. Section 113(h)(4) of CERCLA limits the timing of judicial review of a removal (or remedial) action until after the action is "taken" and explicitly bars challenges regarding a removal action if that action would precede a remedial action undertaken at the same site.[15]

Question 2

States may perform certain removal-type actions that obviate the need for an EPA removal action at the site, contribute to the benefit of the long-term remedial action, or reduce the cost of the long-term remedial action at the site. Do States typically get credit for this work toward the 10% cost-share under 104(c)(3)?

Response

Section 104(c)(5) of CERCLA requires EPA (as delegated by Executive Order 12580) to grant a state a credit for the costs of a remedial action the state incurs toward the requirement for the state to match 10% of the capital costs of the remedial action under Section 104(c)(3) as a condition for the use of federal

[11] 42 U.S.C. § 9605(a).

[12] Executive Order 12580, Superfund Implementation, January 23, 1987, 52 *Federal Register* 2923.

[13] 42 U.S.C. § 9604(a)(2).

[14] 42 U.S.C. § 9659(a).

[15] 42 U.S.C. § 9613(h)(4).

Superfund appropriations to finance the remedial action.[16] Such credit generally is limited to amounts expended by the state specifically for elements of a remedial action, as provided under a contract or cooperative agreement with EPA. Section 104(c)(5) limits the types of expenditures for which a state may receive such credit to expenditures that are reasonable, documented, direct out-of-pocket expenditures of non-federal funds, subject to determination by EPA.

There is one potential exception in existing law under which a state may receive a credit for costs it incurred for a removal action to apply toward the state cost-share for a remedial action. The timing of such a removal action is limited to a specific, historical time frame prior to the enactment of CERCLA on December 11, 1980. Section 104(c)(5)(C) allows a credit to be applied to a state cost-share for a remedial action for funds expended or obligated by the state (or a political subdivision thereof) after January 1, 1978, and before December 11, 1980, for "cost-eligible response actions."[17] Section 101(25) of CERCLA defines the term "response" to include either a removal or a remedial action.[18] The regulations that EPA promulgated to govern cooperative agreements and contracts with states reflect this limitation on the timing of response expenditures that may be applied as credits. The regulations specify that a state "may claim credit for response activity obligations or expenditures incurred by the State or political subdivision between January 1, 1978, and December 11, 1980" and that a state "may not claim credit for removal actions taken after December 11, 1980."[19]

The Federal and State Partnership for Environmental Protection Act of 2013 would amend Section 104(c)(5) of CERCLA to allow a state to receive credit for amounts expended by the state for a removal action after December 11, 1980. The bill would amend Section 104(c)(5)(A) to allow state credits for removal actions conducted at sites on the NPL that are performed under a cooperative agreement or contract with EPA. The bill also would amend Section 104(c)(5)(B) to allow state credits for expenditures for removal actions incurred prior to the listing of a site on the NPL, or prior to the state entering into a cooperative agreement or contract with EPA, but under the same conditions in existing law for allowing credits for remedial actions. These conditions include that the site is subsequently listed on the NPL, the state subsequently enters into a cooperative agreement or contract with EPA, and EPA determines that the earlier expenditures of the state otherwise would have been eligible, if they had been incurred after the site was listed on the NPL or the state had entered into a cooperative agreement or contract.

As a practical matter, a removal action may contribute to the performance of a remedial action and thereby help to lower the costs of the remedial action. As discussed with respect to Question 1, Section 104(a)(2) of CERCLA in existing law directs removal actions undertaken by the federal government to contribute to the "efficient performance" of a remedial action over the long-term, to the extent practicable. Conversely, there may be some instances in which a removal action may not contribute to the performance of a remedial action because of practical constraints. In such instances, a removal action may not help to offset the costs of the remedial action. The Federal and State Partnership for Environmental Protection Act of 2013 would not make such a practical distinction with respect to when a state may receive a credit for expenditures incurred for a removal action. Rather, the bill would appear more broadly to authorize state credits for removal actions to be applied toward state cost-shares for remedial actions, subject to the conditions noted above.

[16] 42 U.S.C. § 9604(c)(5).

[17] 42 U.S.C. § 9604(c)(5)(C).

[18] 42 U.S.C. § 9601(25).

[19] 40 C.F.R. § 35.6285(c).

Question 3

Does allowing States to get credit for these removal-type actions somehow require that there be a cost-share for removal actions?

Response

None of the three bills examined at the hearing noted in this memorandum would amend the criteria for state matching funds in Section 104(c)(3) of CERCLA to alter the applicability of those criteria to remedial actions in a manner that would apply to removal actions. As noted in the response to Question 1, Section 104(c)(3) in existing law does require a state to agree to assume responsibility for "all future maintenance" of removal actions conducted at a site as a condition for the use of federal Superfund appropriations to finance *remedial actions* at that same site. However, the capital costs of a removal action may be fully funded with federal Superfund appropriations (unless the state itself is a responsible party). As discussed with respect to Question 2, the Federal and State Partnership for Environmental Protection Act of 2013 would allow a state to receive a credit for amounts expended by the state on a removal action at a site to apply toward the requirement for the state to match 10% of the capital costs of a *remedial action* at that site. However, no provisions in the bill would appear to create a new state matching funds requirement for the financing of a removal action itself with federal Superfund appropriations.

Question 4

Is the concept of providing credit for in-kind contributions (toward the 10% cost share for remedial action) a novel concept under CERCLA? If not, please explain the context in which in-kind contributions are permitted?

Response

The statutory provisions of CERCLA in existing law do not explicitly address the application of in-kind contributions as a credit toward a state cost-share of a remedial action financed with federal Superfund appropriations. However, the regulations that EPA promulgated to govern cooperative agreements and contracts with states under CERCLA to govern state cost-shares do allow the application of in-kind contributions toward payment of such cost-shares. Under these regulations, the allowance of in-kind contributions as payment toward a state cost-share is conditional upon the state first entering into a support agency cooperative agreement with EPA.[20] In such instances, in-kind contributions may be applied as a credit toward a state cost-share for a remedial action under existing regulation, although not expressly provided in statute under CERCLA. As a practical matter, in-kind contributions may provide equipment or services that could help to offset the costs of a remedial action, if such equipment or services otherwise would have been necessary to procure to carry out that action. EPA regulations define in-kind contributions as:

> The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.[21]

[20] 40 C.F.R. § 35.6285(b) and 40 C.F.R. § 35.6815(a)(1).

[21] 40 C.F.R. § 35.6015.

The Federal and State Partnership for Environmental Protection Act of 2013 would amend Section 104(c)(5)(A) of CERCLA to clarify in statute that the use of non-federal funds by a state as a credit toward its cost-share for a remedial action could include "in-kind expenditures" incurred by the state. The scope of the definition of the term in-kind expenditures in the bill is similar in some respects to the scope of in-kind contributions in existing EPA regulation, but broader in other respects including basing contributions on fair market value. However, related EPA regulations that govern the use of non-federal funds to satisfy matching funds requirements or cost-shares do allow for consideration of the market value of donated property, equipment, or supplies.[22] The Federal and State Partnership for Environmental Protection Act of 2013 would define in-kind expenditures as:

> expenditures for, or contributions of, real property, equipment, goods, and services, valued at a fair market value, that are provided for the removal or remedial action at the facility, and amounts derived from materials recycled, recovered, or reclaimed from the facility, valued at a fair market value, that are used to fund or offset all or a portion of the cost of the removal or remedial action.

Question 5

Please explain the contrast between how a currently owned federal facility would fund a cleanup versus how formerly owned defense sites would pay for a cleanup generally and does that funding mechanism also apply with respect to compliance with State cleanup requirements.

Response

Although CERCLA broadly authorizes the cleanup of contamination resulting from releases of hazardous substances at federal facilities, other related statutes also may apply to certain aspects of the cleanup of an individual facility to address specific types of wastes or contamination. The corrective action authorities of the Solid Waste Disposal Act (also referred to as the Resource Conservation and Recovery Act or RCRA) apply to the cleanup of hazardous wastes.[23] Section 101(14) of CERCLA defines the term "hazardous substance" generally to include wastes possessing the characteristics of hazardous wastes identified or listed under RCRA.[24] Consequently, the cleanup of hazardous wastes under RCRA may be incorporated as an element of a cleanup performed more broadly under CERCLA, and often is in practice at a federal facility. The Atomic Energy Act[25] and other related statutes apply to the cleanup of certain nuclear materials and types of radiological contamination that are excluded from the authorities of CERCLA. As a matter of implementation, the cleanup of a federal facility may involve the application of these statutes by the administering federal department or agency in a collective approach to address differing types of wastes and contamination among individual parcels located on the facility.

Through the annual discretionary appropriations process, Congress appropriates funding to various accounts of federal departments and agencies to pay for the performance of the cleanup of federal facilities administered by those respective departments and agencies under the above authorities. The vast

[22] 40 C.F.R. § 31.24.

[23] 42 U.S.C. § 6901 et seq. The Solid Waste Disposal Act often is referred to as the Resource Conservation and Recovery Act (RCRA, P.L. 94-580) because it substantially amended the Solid Waste Disposal Act in 1976 to regulate the storage, treatment, and disposal of hazardous wastes. The Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616) amended the Solid Waste Disposal Act to authorize corrective actions for the cleanup of environmental contamination from hazardous wastes, among other purposes.

[24] 42 U.S.C. § 9601(14).

[25] 42 U.S.C. § 2011 et seq.

majority of federal funds available for the cleanup of federal facilities are appropriated to accounts administered by the Department of Defense (DOD) and the Department of Energy (DOE) for the cleanup of federal facilities which served national defense purposes. There are separate accounts dedicated to the cleanup of national defense facilities currently owned by the federal government, and national defense facilities that the federal government owned or operated in the past. Federal public land management agencies, such as the Bureau of Land Management and U.S. Forest Service, also receive funding to administer the cleanup of sizeable inventories of contaminated sites, including mining sites. Congress appropriates several billion dollars annually to fund the cleanup of federal facilities.

DOD primarily administers the cleanup of active and decommissioned U.S. military facilities located in the United States under the Defense Environmental Restoration Program. Section 211 of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499) established this program and directed DOD to implement it in accordance with CERCLA and in consultation with EPA.[26] RCRA corrective actions also may be incorporated under this program as an element of the cleanup to address contamination from hazardous wastes that had been subject to permits under RCRA. Congress appropriates funding to the Defense Environmental Restoration Accounts of the Army, Navy, Air Force, and Defense-wide agencies principally for the cleanup of active U.S. military facilities located in the United States. The Base Closure Accounts of DOD separately fund the cleanup of U.S. military facilities designated for closure under consolidated Base Realignment and Closure (BRAC) rounds that began in 1988.[27] Cleanup performed by DOD at BRAC facilities to prepare them for reuse typically is done under federal ownership prior to transfer for reuse. As amended in 1986, Section 120(h) of CERCLA generally requires remedial actions to be in place and operating "properly and successfully" prior to transfer out of federal ownership.[28] The Defense Environmental Restoration Account for Formerly Used Defense Sites (FUDS) funds the cleanup of U.S. military facilities that were decommissioned prior to 1986 and at which the contamination occurred at the time the facility was under the jurisdiction of DOD. Many of these properties were transferred out of federal ownership before the property transfer requirements of CERCLA were added in the 1986 amendments.[29] The FUDS inventory constitutes the largest number of former federal facilities at which cleanup is performed by the federal government.

DOE administers the cleanup of U.S. nuclear weapons production facilities and federal nuclear research facilities under the Office of Environmental Management. Three appropriations accounts fund the Office of Environmental Management. The Defense Environmental Cleanup account constitutes the vast majority of the funding for the Office of Environmental Management and is devoted to the cleanup of former nuclear weapons production facilities. The Non-Defense Environmental Cleanup account funds the cleanup of wastes and contamination resulting from federal nuclear energy research, and the Uranium Enrichment D&D Fund account finances the cleanup of facilities that were used to enrich uranium for national defense (and civilian) purposes. Once the cleanup of a facility is complete under the Office of Environmental Management, it is transferred to the Office of Legacy Management and other offices within DOE for the long-term operation, maintenance, and monitoring, for which separate funding is appropriated.[30] Congress also appropriates funding to the Army Corps of Engineers for the Formerly

[26] 10 U.S.C. § 2700 et seq. These authorities also apply to the cleanup of unexploded ordnance and the demolition and removal of unsafe buildings and structures. The National Defense Authorization Act for FY2002 (P.L. 107-107) amended these authorities to direct DOD to clean up military munitions on decommissioned training ranges and munitions disposal sites in the United States.

[27] Congress has authorized consolidated BRAC rounds in 1988, 1991, 1993, 1995, and 2005.

[28] 42 U.S.C. § 9620(h).

[29] The performance of the cleanup of a former defense site by DOD is subject to access provided by the current property owner.

[30] The Office of Legacy Management administers the long-stewardship of DOE facilities that do not have a continuing mission once cleanup remedies are in place. Facilities that have a continuing mission after completion of cleanup are transferred to the DOE offices that administer those missions, which are responsible for their long-term stewardship.

Utilized Sites Remedial Action Program (FUSRAP) to clean up former facilities that were involved in the early years of the U.S. nuclear weapons program. The FUSRAP inventory of sites was transferred from DOE to the Corps in 1997.[31] Once the Corps completes the cleanup of a FUSRAP site, it is transferred back to DOE for long-term stewardship under the Office of Legacy Management.[32]

Funding appropriated to DOD, DOE, and other federal departments and agencies for the performance of the cleanup of federal facilities still does not constitute a federal cleanup liability fund in a broader sense. Although these funds are authorized to pay for the performance of the cleanup of the federal government's own facilities, the funds are not more broadly authorized to pay cost-recovery or contribution claims that may be submitted to the United States by non-federal parties who may have incurred cleanup costs for which liability may be shared with the federal government.[33] A U.S. Comptroller General decision in 1993 ruled that the Judgment Fund of the U.S. Treasury was the appropriate source of federal payment for litigative awards or compromise settlements for cost-recovery or contribution claims to satisfy the federal share of cleanup liability under CERCLA.[34] By statute, the Judgment Fund is a permanent, indefinite appropriation that is intended to pay monetary claims against the United States, which are not otherwise provided by Congress through separate appropriations.[35]

The application of state requirements to the cleanup of federal facilities generally would be funded through appropriations for the performance of the cleanup by federal departments and agencies, as would the application of federal cleanup requirements. Section 121(d) of CERCLA authorizes the application of state standards, requirements, criteria, or limitations to remedial actions selected by the federal government, if they are more stringent than federal standards, requirements, criteria or limitations.[36] Section 120(a)(4) of CERCLA also explicitly authorizes the application of state laws to removal and remedial actions at federal facilities that are not on the NPL.[37] State requirements may be applied to federal facilities on the NPL under Section 121(d). The Federal Facility Accountability Act of 2013 would amend Section 120(a)(4) to clarify the application of "substantive and procedural requirements" of state law to federal facilities and to expand such application explicitly to include both current and former federal facilities regardless of whether they are on the NPL.

The eligibility of a federal department or agency cleanup appropriation for payment of a state fine or penalty for violation of a cleanup requirement would depend on whether the fine or penalty was assessed administratively or owed as a result of a litigative award or compromise settlement. A U.S. Comptroller General decision in 1979 ruled that an administrative fine or penalty that may be assessed at a federal facility for violation of a requirement applicable to a particular action may be paid with a federal department or agency appropriation, if the requirement were relevant to the performance of the action for

[31] Enacted October 13, 1997, the Energy and Water Development Appropriations Act for FY1998 (P.L. 105-62) directed DOE to transfer the cleanup of 21 FUSRAP sites to the Army Corps of Engineers. DOE has remained responsible for determining the eligibility of additional sites, and Congress has designated certain sites in legislation.

[32] Memorandum of Understanding between the U.S. Department Of Energy and the U.S. Army Corps Of Engineers Regarding Program Administration and Execution of the Formerly Utilized Sites Remedial Action Program (FUSRAP), March 1999.

[33] In relatively few instances, Congress has authorized the use of federal cleanup appropriations for the payment of cost-recovery or contribution claims for federal liability at specific defense facilities, but the appropriations generally are authorized for the performance of the cleanup of federal facilities by the federal government, not the payment of such claims.

[34] See General Accounting Office, *The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act*, B-253179, November 29, 1993, available on GAO's website: http://archive.gao.gov/lglpdf63/151167.pdf

[35] 31 U.S.C. § 1304.

[36] 42 U.S.C. § 9621(d).

[37] 42 U.S.C. § 9620(a)(4).

which the appropriation was made.[38] If a state fine or penalty were owed as a result of a litigative award or compromise settlement, the 1979 U.S. Comptroller General decision ruled that the Judgment Fund would be the appropriate source of federal funds for payment instead.

Question 6

Has CRS identified inconsistencies among the EPA Regions with respect to interpretation and implementation of policies regarding remedy selection, listing sites on the National Priorities List, or with respect to remediation at federal facilities?

Response[39]

CRS has not undertaken research to determine whether there may be variability among the individual EPA Regions in interpreting and implementing agency policies that address the selection of remedial (or removal) actions, the listing of sites on the NPL, or the oversight of the performance of the cleanup of federal facilities by the federal departments and agencies that administer those facilities. There may be considerable variability in the outcome of decisions for these purposes among the EPA Regions on a site-specific basis, because of unique or differing circumstances and conditions at each location. For example, a specific type of remedial action may be selected at one site but not another, because of the differing nature of the contamination and potential risks, or because of practicality or cost considerations relative to the scope of the action that would be performed at each site. Differences in state requirements applicable to cleanup also may result in variability among the EPA Regions in the selection of remedial actions. With respect to which sites are listed on the NPL, the eligibility of a site for listing is based primarily upon the severity of the potential hazards, as evaluated under the Hazard Ranking System of the NCP.[40] Sites that score a minimum threshold of hazard are eligible, whereas those scoring below this threshold are not.[41] Whether an eligible site may be listed on the NPL would depend upon numerous other factors, including whether the site may be deferred to the state to pursue the cleanup under its own authorities instead.

Although the outcome of decisions may vary among the EPA Regions on a site-specific basis, the policies that EPA Headquarters adopts to implement the authorities of CERCLA and the NCP generally apply to all EPA Regions in terms of the procedures and criteria under which decisions are to be made and actions are to be taken.[42] Numerous reports issued by the EPA Office of the Inspector General (OIG) have examined various aspects of the implementation of the authorities of CERCLA and the NCP under the Superfund program among the individual EPA Regions. These OIG reports have identified variability among the EPA Regions in implementing various aspects of the Superfund program at certain points in time, including elements of the remedial process, deletion of sites from the NPL, EPA oversight of federal facilities, and other aspects. These OIG reports typically contain recommendations that EPA may execute to mitigate any identified inconsistencies or deficiencies. A compilation of EPA OIG reports on the

[38] See General Accounting Office, B-194508, July 19, 1979, 58 Comp. Gen. 667, available on GAO's website: http://www.gao.gov/products/451187#mt=e-report

[39] Jerry Yen, CRS Environmental Policy Intern, Resources, Science, and Industry Division, contributed to the preparation of this response regarding potential variability among EPA Regions in implementing the Superfund program.

[40] 40 C.F.R. Part 300, Appendix A.

[41] The Hazard Ranking System is based on a scoring scale of 1 to 100. Sites scoring 28.5 and higher generally are eligible for listing on the NPL.

[42] For additional information, see the compilation of relevant law, regulation, policy, and guidance available on EPA's Superfund program website: http://www.epa.gov/superfund/policy/index.htm

implementation of the Superfund program is available on the EPA OIG website.[43] Subsequent to the issuance of these reports, EPA may have taken specific actions to mitigate inconsistencies or deficiencies that the OIG initially had identified, and the issues may since have been resolved in such instances.

Question 7

Does EPA currently have authority to ensure that other federal agencies rules, regulations, policies, interpretations, and application to sites concerning the implementation of CERCLA Removal and Remedial Programs are consistent with EPA rules, regulations, policies, interpretations? If so, please identify the authority.

Response[44]

Section 120(a)(2) of CERCLA subjects federal facilities to all "guidelines, rules, regulations, and criteria" applicable to the performance of preliminary assessments, evaluation for listing of a facility on the NPL, and remedial actions in the same manner and to the same extent as non-federal facilities.[45] This provision also bars a federal department or agency from adopting or utilizing any such guidelines, rules, regulations, or criteria that are inconsistent with those established by EPA under CERCLA. The Federal Facility Accountability Act of 2013 would amend Section 120(a)(2) to broaden its applicability to response actions, which in effect would encompass *both* removal and remedial actions. As discussed with respect to Question 2, Section 101(25) of CERCLA defines the term "response" to include either a removal or a remedial action.[46] The Federal Facility Accountability Act of 2013 also would amend Section 120(a)(2) explicitly to subject former federal facilities to this provision in addition to current federal facilities, and would authorize EPA to review actions or regulations of other federal departments and agencies taken under their delegated authorities of CERCLA to determine whether they are consistent with EPA guidelines, rules, regulations, or criteria.

EPA's authority to ensure that a federal facility complies with Section 120(a)(2) in applying guidelines, rules, regulations, and criteria established under CERLCA primarily is rooted in Section 120(e) of the statute.[47] This oversight authority of EPA is limited to federal facilities that are listed on the NPL. The states play a more prominent role in overseeing the cleanup of federal facilities not listed on the NPL. As discussed with respect to Question 5, Section 120(a)(4) of CERCLA explicitly authorizes the application of state laws regarding removal actions, remedial actions, and enforcement at federal facilities that are not on the NPL.[48] Once an interagency agreement at a federal facility on the NPL is finalized, EPA may enforce the terms of the agreement through administrative civil penalties under Section 109 of CERCLA.[49] Section 106(a) also authorizes the President (as delegated to EPA) to issue administrative

[43] EPA OIG Superfund and Land Reports: http://www.epa.gov/oig/reports/reportsByTopic/Superfund_and_Land_Reports.html

[44] This response identifies the provisions of CERCLA under which EPA typically oversees the cleanup of federal facilities in practice. However, interpretations among federal departments and agencies may vary in some instances as a matter of carrying out their respective authorities, for which further analysis of potential legal issues may be warranted.

[45] 42 U.S.C. § 9620(a)(2).

[46] 42 U.S.C. § 9601(25).

[47] 42 U.S.C. § 9620(e).

[48] 42 U.S.C. § 9620(a)(4).

[49] 42 U.S.C. § 9609. The payment of an administrative penalty assessed by EPA under CERCLA against another federal department or agency is executed through a transfer of appropriations from the respective account of the other federal department or agency to the Superfund account of EPA, and therefore has no net effect on the federal budget.

orders to require the abatement of an imminent and substantial endangerment to the public health or welfare because of an actual or threatened release of a hazardous substance.[50] However, the availability of this enforcement mechanism at a federal facility is subject to the concurrence of the U.S. Attorney General under Executive Order 12850, and therefore would be constrained absent such concurrence.

The taking of judicial enforcement actions by EPA at federal facilities under Section 109 or Section 106(a) typically has been avoided because of the long-standing position within the Executive Branch that the ability of one federal department or agency to sue another is generally limited. Because of potential conflict of interest, the Department of Justice could be precluded in court from representing both a federal department or agency pursuing a judicial penalty or a judicial order and the department or agency subject to the penalty or order. In light of such complications, a 1979 Executive Order outlines a process for the U.S. Attorney General to resolve legal disputes among federal departments or agencies prior to proceeding in court.[51] For these reasons, interagency agreements under Section 120(e) have been the primary mechanism in practice under which EPA oversees the cleanup of federal facilities on the NPL to ensure compliance with applicable requirements established under CERCLA.

Within 6 months of the listing of a federal facility on the NPL, Section 120(e)(1) requires the federal department or agency with administrative jurisdiction over the facility to consult with EPA (and the state) to begin a Remedial Investigation/Feasibility Study (RI/FS).[52] A RI/FS involves an investigation of contamination to assess potential risks to human health and the environment, and a study of the feasibility of the remedial alternatives to address those risks. While consultation with EPA is required, CERCLA does not give explicit decision-making authority to EPA to dictate precisely how a federal department or agency performs this investigation and study phase of the cleanup process at a federal facility.

Within 180 days of the completion of the RI/FS and review by EPA, Section 120(e)(2) requires the federal department or agency with administrative jurisdiction over the facility to enter into an interagency agreement with EPA to govern the remedial actions to be taken at that facility.[53] This agreement provides an opportunity for EPA to formalize how the other federal department or agency will carry out the cleanup of the facility to satisfy the requirements of CERCLA. In practice, states also may be signatories to these interagency agreements to fulfill the opportunity provided under Section 121(f) for "substantial and meaningful" involvement in the initiation, development, and selection of remedial actions.[54] Section 120(e)(4) identifies four elements that are to be included in each interagency agreement:

- a list of the remedial alternatives considered at the facility;
- identification of the remedial actions selected from among the alternatives;
- a schedule for completing each remedial action; and
- arrangement for any long-term operation and maintenance activities that may be necessary to ensure the performance of the remedial actions over time.[55]

[50] 42 U.S.C. § 9606(a).

[51] Executive Order 12146, Management of Federal Legal Resources, July 18, 1979, 44 *Federal Register* 42657.

[52] 42 U.S.C. § 9620(e)(1).

[53] 42 U.S.C. § 9620(e)(2).

[54] 42 U.S.C. § 9621(f).

[55] 42 U.S.C. § 9620(e)(4).

If EPA and the federal department or agency with administrative jurisdiction over the facility cannot agree on the selection of the remedial actions in negotiating an interagency agreement, Section 120(e)(4)(A) authorizes the Administrator of EPA to resolve the dispute and select the remedial actions he or she deems most appropriate to protect human health and the environment.[56] Although the Administrator may delegate this dispute-resolution authority to an officer or employee of EPA, Section 120(g) prohibits the transfer of the Administrator's authorities under Section 120 to any other agency, official, or employee of the United States, by Executive Order of the President or otherwise, or to any other person.[57] This prohibition primarily is intended to ensure that the role of the Administrator of EPA is maintained in making the final determination with regard to the selection of remedial actions.

CERCLA does not provide the Administrator of EPA similarly explicit final decision-making authority with respect to other elements of an interagency agreement for a federal facility listed on the NPL, namely the schedule for completing the remedial actions and arrangement for any long-term operation and maintenance activities that may be necessary to ensure the performance of those actions over time. These latter elements would appear to be subject to negotiation between EPA and the federal department or agency with administrative jurisdiction over the facility. If consensus cannot be reached and the agreement finalized within the statutory deadline of 180 days from the completion of the RI/FS, Section 120(e)(5) requires the federal department or agency with administrative jurisdiction over the facility to report the delay to Congress.[58]

With respect to the timing of the cleanup, Section 120(e)(3) requires the federal department or agency with administrative jurisdiction over the facility to complete the remedial actions "as expeditiously as practicable" once those actions are selected, but does not indicate a specific time frame or deadline for their completion.[59] The timing of a remedial action ultimately would depend on numerous factors such as the technical feasibility of the action, the availability of appropriations by Congress, and the competing cleanup priorities of other facilities administered by the federal department or agency. Accordingly, Section 120(e)(3) requires federal agencies to notify Congress of the amount of funding needed to carry out the selected remedial actions at their facilities in their annual budget requests.

Notably, the lack of a final interagency agreement governing an entire facility does not preclude individual remedial actions from proceeding to address discrete contaminated sites at a facility. Furthermore, removal actions are not subject to an interagency agreement under Section 120(e). The main reason for this difference is that the time required to finalize an agreement may delay a removal action needed to address more immediate hazards. Because of these reasons, some cleanup actions may proceed without an interagency agreement in place, in effect leaving EPA with less formal means to oversee the cleanup. Over time, nearly all of the federal facilities listed on the NPL have an interagency agreement in place under CERCLA to govern the cleanup, with relatively few exceptions. Many of these agreements have been revised multiple times as more has been learned about cleanup challenges. At the hearing noted in this memorandum, the Government Accountability Office testified that two federal facilities administered by DOD had not yet finalized an interagency agreement with EPA to govern the cleanup.[60]

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[56] 42 U.S.C. § 9620(e)(4)(A).

[57] 42 U.S.C. § 9620(g).

[58] 42 U.S.C. § 9620(e)(5).

[59] 42 U.S.C. § 9620(e)(3).

[60] Government Accountability Office, Testimony before the Subcommittee on Environment and the Economy, Committee on Energy and Commerce, House of Representatives, *Hazardous Waste Cleanup: Observations on States' Role, Liabilities at DOD and Hardrock Mining Sites, and Litigation Issues,* GAO-13-633T, May 22, 2013.

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ONE HUNDRED THIRTEENTH CONGRESS

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June 12, 2013

Mr. David Trimble
Director
Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Trimble:

Thank you for appearing before the Subcommittee on Environment and the Economy on Wednesday, May 22, 2013, to testify at the hearing on three legislative proposals entitled the "Federal and State Partnership for Environmental Protection Act of 2013"; the "Reducing Excessive Deadline Obligations Act of 2013"; and the "Federal Facility Accountability Act of 2013."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

Also attached are Member requests made during the hearing. The format of your responses to these requests should follow the same format as your responses to the additional questions for the record.

To facilitate the printing of the hearing record, please respond to these questions and requests by the close of business on Wednesday, June 26, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Nick.Abraham@mail.house.gov and mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member,
Subcommittee on Environment and the Economy

Attachments

GAO Responses to Questions for the Record
Hearing before the Subcommittee on Environment and the Economy
Committee on Energy and Commerce, U.S. House of Representatives
On May 22, 2013

Member Requests for the Record

The Honorable Bill Johnson

1. In June of 2006, GAO conducted a review of EPA's implementation of institutional controls by the EPA Superfund program. In this or any subsequent review, were you able to ascertain whether EPA routinely complies or requires compliance with State land-use control or environmental covenant laws and regulations?

- GAO's findings with regard to EPA's implementation of institutional controls at Superfund sites were included in our reports *Hazardous Waste Sites: Improved Effectiveness of Controls at Sites Could Better Protect the Public* (GAO-05-163, Jan. 28, 2005) and *Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public (*GA0-06-900T, June 15, 2006). These reports did not specifically address the issue of whether EPA routinely complies or requires compliance with State land-use control or environmental covenant laws and regulations. However, GAO did find that EPA faces challenges in ensuring that institutional controls are adequately implemented, monitored, and enforced. Institutional controls at the Superfund sites GAO reviewed, for example, were often not implemented before the cleanup was completed, as EPA requires. In addition, EPA may have difficulties ensuring that the terms of institutional controls can be enforced at some Superfund and RCRA sites: that is, some controls are informational in nature and do not legally limit or restrict use of the property, and, in some cases, state laws may limit the options available to enforce institutional controls.

The Honorable John D. Dingell

1. Relating to the amendments to Section 108 of CERCLA, can you tell the subcommittee how many States have promulgated financial responsibility requirements?

- GAO has not looked into this issue in any of our past work.

2. What are the amounts set in each State and for what classes of facilities?

- As noted above, GAO has not looked into this issue in any of our past work.

Additional Questions for the Record

The Honorable John Shimkus

1. Has GAO identified inconsistencies among the EPA Regions with respect to interpretation and implementation of policies regarding remedy selection, listing sites on the National Priorities List, or with respect to remediation at federal facilities?

- GAO has not specifically addressed whether EPA Regions may inconsistently interpret and implement policies regarding remedy selection, listing sites on the National Priorities List, or remediation at federal facilities, and has not identified any such inconsistencies in past work. With regard to Regions' listing of sites on the National Priorities List (NPL), GAO's recent report *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List* (GAO-13-252, April 9, 2013), shows that the number of sites listed on the NPL varies widely by Region. According to officials in one region, EPA has access to more resources than states and typically addresses sites that require greater or more specialized resources through the NPL approach. For example, regional officials noted, states face different limitations that can prevent them from pursuing cleanup under their programs including: technical capacity, legal resources, and financial resources. In addition, EPA officials in four regions noted examples where a state environmental program requested that the Superfund program pursue NPL listing because the state was having trouble getting a potentially responsible party (PRP) to cooperate or the PRP went bankrupt.

The Honorable Ralph M. Hall

I am aware of a very promising initiative involving the Superfund program of EPA and the Civil Works program of the Corps of Engineers that is focused on restoring contaminated urban rivers, which pose some of the most difficult challenges of all Superfund sites across the nation. That initiative, referred to as the Urban Rivers Restoration Initiative, gives States a much greater role in proposing and managing restoration at Superfund sites on urban rivers due to the Federal-State partnership relationship inherent in the Water Resource Development Authorities of the Corps. The proposal has been examined with positive results and recommendations for expansion by the EPA IG.

1. Might you provide what steps you might take in this Administration to provide greater support and more enthusiastic backing for this proposal?

- GAO has not reviewed this initiative and, therefore, cannot comment on the proposal.

The Honorable Henry A. Waxman

Based on your testimony during a hearing in the Environment and the Economy Subcommittee in May, it seems that the majority of contaminated sites are currently being cleaned up by Other Cleanup Activity deferrals, many of them to states.

1. Based on your analysis of contaminated sites currently being cleaned up under Other Cleanup Activity deferrals, is there a need for a more defined or consistent federal role, when cleanups are deferred to states?

- GAO's recent report *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List* (GAO-13-252, April 9, 2013) reported that a majority (52 percent) of sites eligible for listing on the NPL is currently being addressed as Other Cleanup Activity (OCA) deferrals. GAO found that, as of December 2012, of the 3,402 sites EPA identified as potentially eligible for the NPL, EPA has deferred oversight of 1,766 OCA deferrals to states and other entities. However, EPA has not issued guidance for OCA deferrals as it has for the other cleanup approaches. Moreover, EPA's program guidance does not clearly define each type of OCA deferral or specify in detail the documentation EPA regions should have to support their decisions on OCA deferrals. Without clearer guidance on OCA deferrals, EPA cannot be reasonably assured that its regions are consistently tracking these sites or that their documentation will be appropriate or sufficient to verify that these sites have been deferred or have completed cleanup. GAO recommended that EPA provide guidance to EPA regions that defines each type of OCA deferral and what constitutes adequate documentation for OCA deferral and completion of cleanup. EPA agreed with this recommendation.

Although there is no record of heavy litigation under the deadlines targeted in the Reducing Excessive Deadline Obligations Act of 2013, there is an informative record of deadline lawsuits and litigation in general against the Environmental Protection Agency (EPA).

2. What is the primary category of plaintiff bringing deadline lawsuits against EPA?

- Our report, *Environmental Litigation: Cases against EPA and Associated Costs over Time* (GAO-11-650), issued August 1, 2011, identified categories of plaintiffs that brought suit against EPA under 10 major environmental acts, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund. The data used in that analysis did not include reliable information on the claim(s) in each lawsuit and as a result, we were not able to determine whether the litigation was filed as a deadline suit or under other claims. Deadline suits are not, however, significant in the CERCLA context; they are generally used in connection with statutes that specify that EPA shall issue a regulation or perform an action by a certain date, and most of the CERCLA regulations were issued years ago.

3. What are the other major categories of plaintiffs, in order?

- Our report, *Environmental Litigation: Cases against EPA and Associated Costs over Time* (GAO-11-650), identified categories of plaintiffs that brought suit against EPA under 10 major environmental acts, including CERCLA. For the nearly 2,500 lawsuits filed from fiscal year 1995 through fiscal year 2010, the categories of plaintiff were trade associations (25 percent); private companies (23 percent); local environmental and citizen groups (16 percent); national environmental groups (14 percent); states, territories, municipalities, and regional government entities (12 percent); individuals (7

percent); unions, workers' groups, universities, and tribes (2 percent); other (1 percent); and unknown (less than 1 percent).

Under section 108 of Superfund, EPA has been working to establish financial responsibility requirements for hardrock mining. Financial responsibility requirements would ensure that any company undertaking this dangerous practice has the resources necessary to cover the costs of anticipated clean up needs.

4. What are some of the environmental and health risks associated with hardrock mines?

- As we have reported previously, hardrock mining operations have the potential to create serious environmental and physical safety hazards. Mining operations can extract millions of tons of material, much of which is left at the mine site in the form of waste rock piles and mine tailings. When exposed to air and water, acids and metals can leach out of these wastes and contaminate surface and ground water. For example, during the extraction of uranium (a hardrock mineral), the waste rock piles that are formed can introduce radionuclides such as radium, and heavy metals such as selenium and arsenic into the environment. The mine structures used to extract the minerals, such as open pits or underground shafts and tunnels, can also become sources of contamination. In addition, physical safety hazards may be created on the land disturbed by mining operations. These hazards may include open or concealed shafts, unstable or decaying structures, or explosives.

The Government Accountability Office (GAO) has studied some financial responsibility requirements for hardrock mining, and evaluated their adequacy.

5. Do all financial responsibility requirements for hardrock mining provide the same protections for taxpayers?

- The Bureau of Land Management (BLM) and the Environmental Protection Agency (EPA) have expressed concerns with one particular type of financial assurance known as corporate guarantees. Corporate guarantees are promises by mine operators, sometimes accompanied by a test of financial stability, to fulfill their environmental reclamation or remediation obligations. However, these guarantees do not require that funds be set aside by the operators to pay such costs. In 2000, BLM stopped accepting corporate guarantees for new mining operations, stating that they are less secure than other forms of financial assurance, particularly in light of fluctuating commodity prices and the potential for an operator to declare bankruptcy. Similarly, EPA has stated that corporate guarantees offer EPA minimal long-term assurance that a company with an environmental liability will be able to fulfill its financial obligations. EPA does not have regulations on the use of corporate guarantees as financial assurances under CERCLA, however, and still accepts them to ensure mine operators remediate contamination from hardrock mines under CERCLA settlement agreements.

6. Is it correct to say that some financial responsibility requirements for hardrock mining may require bonds or insurance for too small an amount, or may be limited in the types of reclamation or cleanup activities they cover?

- This statement is correct. In reports issued in 2005, 2008, and 2012, we analyzed BLM financial assurances and determined that the financial assurances in place were or may be inadequate to cover estimated reclamation costs. For example, in 2012 we determined that BLM held financial assurances valued at approximately $1.5 billion to guarantee reclamation costs for 1,365 hardrock operations on federal land managed by BLM. At that time, however, 57 hardrock operations had inadequate financial assurances—amounting to about $24 million less than needed to fully cover estimated reclamation costs. Furthermore, of the 11 BLM state offices with a hardrock mining program, only 2 —Montana and Wyoming—had fully implemented a 2009 BLM policy designed to improve the management of hardrock financial assurances by conducting timely reviews of financial assurances and ensuring that financial assurances for hardrock operations under their purview were adequate..

In introducing the Federal Facility Accountability Act of 20 13 during a hearing in the Environment and the Economy Subcommittee in May, Chairman Shimkus said that the bill would amend Superfund by requiring federal Superfund sites to comply with the same state laws and regulations as private entities.

7. Does Superfund impose additional requirements on federal agencies, beyond what applies to private entities?

- Yes, Superfund imposes additional requirements on federal agencies.

8. Please describe those additional requirements?

- Section 120 of CERCLA, as amended, requires federal agencies to comply with CERCLA and submit information to EPA on certain potentially hazardous releases. EPA maintains this information in a Federal Agency Hazardous Waste Compliance Docket which includes a history of federal facilities that generate, transport, store, or dispose of hazardous waste or which have had some type of hazardous substance release or spill. For each site on the docket, CERCLA Section 120 requires EPA to take steps to ensure that a preliminary site assessment is conducted by the responsible federal agency.

  The preliminary assessment, which is generally based on site records and other information regarding hazardous substances stored or disposed of at the facility, forms the basis for EPA to evaluate the site for listing on the NPL. EPA reviews preliminary site assessments to determine whether a site poses little or no threat to human health and the environment or requires further investigation or assessment for possible cleanup. Based on this assessment, EPA may then score and rank the site based on whether the contamination presents a potential threat to human health and the environment. If a site scores at or above a minimum threshold for cleanup under CERCLA, EPA may place the site on the NPL or defer it to another regulatory authority, such as a state agency, for

cleanup under other statutory authorities or programs, such as the Resource Conservation and Recovery Act (RCRA).

Section 120 of CERCLA also establishes specific procedures for cleaning up federal facilities on the NPL. As part of its oversight responsibility, EPA works with federal agencies to evaluate the nature and extent of contamination at a site, select a remedy, track cleanup, and monitor the remedy's effectiveness in protecting human health and the environment. Under Section 120 of CERCLA, the relevant federal agency and EPA are required to enter into an interagency agreement within 180 days of the completion of EPA's review of the remedial investigation and feasibility study at a site. These agreements are required to include, at a minimum, a review of the alternative remedies considered and the selected remedy, a schedule for cleanup, and plans for long-term operations and maintenance. The Federal Facility Accountability Act of 2013 would broaden the applicability of state requirements to cleanups at federal facilities by, for example, extending these requirements to NPL sites, and would specifically waive the federal government's sovereign immunity from suits with respect to these requirements.

During the hearing, witnesses testified that cleanups at formerly used defense sites may be delayed by the Department of Defense claiming sovereign immunity.

9. What responsibility does the Department of Defense have for contamination at former defense properties, if that contamination happened while the site was under the Department's jurisdiction?

- Under the Defense Environmental Restoration Program (DERP), DOD is required to carry out a program of environmental restoration activities at sites located on former and active defense installations that were contaminated while under DOD's jurisdiction. The goals of the program include the identification, investigation, research and development, and cleanup of contamination from hazardous substances, pollutants, and contaminants; the correction of other environmental damage (such as detection and disposal of unexploded ordnance) which creates an imminent and substantial endangerment to public health or welfare or the environment; and demolition and removal of unsafe buildings and structures.

  The DERP was established by section 211 of the Superfund Amendments and Reauthorization Act of 1986 which amended CERCLA. In implementing the DERP, DOD is required to carry out its activities addressing hazardous substances, pollutants, or contaminants in a manner consistent with section 120 of CERCLA (see the response to question 8).

  DOD is responsible for cleaning up its releases of hazardous substances under DERP, in accordance with CERCLA. The remedy chosen for such a release must meet certain standards for contaminants set under state or federal laws or regulations. If there is no standard for a given contaminant, DOD must still achieve a degree of cleanup, which at a minimum, assures protection of human health and the environment.

GAO has spent a considerable amount of time looking at Department of Defense Superfund sites, and has offered several recommendations to improve those cleanups.

10. Are the GAO's recommendations to improve the cleanups of Department of Defense Superfund sites reflected in the Federal Facility Accountability Act of 2013?

- The Federal Facility Accountability Act of 2013 would not specifically implement recommendations or matters for Congressional consideration included in recent GAO reports on DOD cleanup activities. We have not analyzed the extent to which the bill's provisions could nevertheless facilitate the timely and effective cleanup of DOD facilities.

11. Does the Federal Facility Accountability Act of 2013 reflect issues GAO has identified in its oversight of Superfund cleanups at federal facilities?

- In our federal facilities Superfund cleanup work we have identified a number of issues meriting further attention from Congress and EPA, including the need for greater EPA enforcement authority at DOD sites and a uniform method for reporting cleanup progress at DOD installations. The bill would seek to enhance state enforcement authority over DOD cleanup activities, and give EPA additional authority to review certain cleanup activities carried out by federal agencies. It would not specifically provide for any sanctions against federal agencies that EPA finds, as a result of its reviews, to be acting inconsistently with applicable rules, regulations, or guidelines.

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