113TH CONGRESS
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HOUSE OF REPRESENTATIVES
REPT. 113–178
Part 1

FEDERAL AND STATE PARTNERSHIP FOR ENVIRONMENTAL PROTECTION ACT OF 2013

JULY 30, 2013.—Ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2226]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2226) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purpose and Summary	3
Background and Need for Legislation	3
Hearings	4
Committee Consideration	5
Committee Votes	5
Committee Oversight Findings	7
Statement of General Performance Goals and Objectives	7
New Budget Authority, Entitlement Authority, and Tax Expenditures	7
Earmark, Limited Tax Benefits, and Limited Tariff Benefits	7
Committee Cost Estimate	7
Congressional Budget Office Estimate	7
Federal Mandates Statement	8
Duplication of Federal Programs	9

29–006

Disclosure of Directed Rule Makings 9
Advisory Committee Statement 9
Applicability to Legislative Branch 9
Section-by-Section Analysis of the Legislation 9
Changes in Existing Law Made by the Bill, as Reported 11
Dissenting Views 15

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. CONSULTATION WITH STATES.

(a) REMOVAL.—Section 104(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604(a)(2)) is amended by striking "Any removal action undertaken by the President under this subsection (or by any other person referred to in section 122) should" and inserting "In undertaking a removal action under this subsection, the President (or any other person undertaking a removal action pursuant to section 122) shall consult with the affected State or States. Such removal action should".

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

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

(d) CONSULTATION WITH STATE AND LOCAL OFFICIALS.—Section 120(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(f)) is amended—

(1) by striking "shall afford to" and inserting "shall consult with";

(2) by inserting "and shall provide such State and local officials" before "the opportunity to participate in"; and

(3) by adding at the end the following: "If State or local officials make a determination not to participate in the planning and selection of the remedial action, such determination shall be documented in the administrative record regarding the selection of the response action.".

SEC. 3. STATE CREDIT FOR OTHER CONTRIBUTIONS.

Section 104(c)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604(c)(5)) is amended—

(1) in subparagraph (A)—

(A) by inserting "removal at such facility, or for" before "remedial action"; and

(B) by striking "non-Federal funds." and inserting "non-Federal funds, including oversight costs and in-kind expenditures. For purposes of this paragraph, in-kind expenditures shall include 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."; and

(2) in subparagraph (B), by inserting "removal or" after "under this paragraph shall include expenses for".

SEC. 4. STATE CONCURRENCE WITH LISTING ON THE NATIONAL PRIORITIES LIST.

(a) BASIS FOR RECOMMENDATION.—Section 105(a)(8)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605(a)(8)(B)) is amended—

(1) by inserting "Not later than 90 days after any revision of the national list, with respect to a priority not included on the revised national list, upon request of the State that submitted the priority for consideration under this subparagraph, the President shall provide to such State, in writing, the basis for not including such priority on such revised national list. The President may not add a facility to the national list over the written objection of the State, unless (i) the State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party, (ii) the President determines that the contamination has migrated across a State boundary, resulting

in the need for response actions in multiple States, or (iii) the criteria under the national contingency plan for issuance of a health advisory have been met." after "the President shall consider any priorities established by the States."; and

(2) by striking "To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as" and all that follows through the semicolon at the end, and inserting "Not more frequently than once every 5 years, a State may designate a facility that meets the criteria set forth in subparagraph (A) of this paragraph, which shall be included on the national list;".

(b) STATE INVOLVEMENT.—Section 121(f)(1)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9621(f)(1)(C)) is amended by striking "deleting sites from" and inserting "adding sites to, and deleting sites from,".

SEC. 5. STATE ENVIRONMENTAL COVENANT LAW.

Section 121(d)(2)(A)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9621(d)(2)(A)(ii)) is amended by striking "State environmental or facility siting law" and inserting "State environmental, facility siting, or environmental covenant law, or under a State law or regulation requiring the use of engineering controls or land use controls,".

PURPOSE AND SUMMARY

The legislation codifies existing policy and regulations to ensure that States have a meaningful role in response actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). It allows States to provide input regarding removal actions and the selection of remedial actions. The bill also allows States to seek in-kind credit toward State cost share requirements for providing goods and services that directly benefit removal and remedial actions. The legislation also authorizes States to identify a site for listing on the National Priorities List (NPL) every five years and ensures that States are able to object to the listing of sites to the NPL. The legislation also provides that State environmental covenant laws and other engineering or land use control laws and regulations are properly considered under CERCLA.

BACKGROUND AND NEED FOR LEGISLATION

CERCLA is primarily implemented by the Environmental Protection Agency (EPA), but a direct and significant State role is crucial to getting contaminated facilities cleaned up. CERCLA requires that States contribute a portion of the cleanup costs for sites that will be listed on the National Priorities List (NPL) and requires that States be afforded the opportunity for "substantial and meaningful involvement" in the "initiation, development, and selection of remedial actions to be undertaken in that State."

The State role in the CERCLA process frequently includes conducting a preliminary assessment regarding whether a site poses a threat to human health and the environment and whether additional investigation is required. As a result of these preliminary evaluations, many facilities choose to conduct voluntary actions under other authorities, including State authorities. The resulting leveraging of Federal funds appropriated to implement the CERCLA program leads to more cleanups and compliance for the same or lower Federal investment. However, this also could lead to certain conflicts regarding the administration of CERCLA and State cleanup programs with respect to identification and prioritization of sites to be cleaned up. In addition, when sites are

remediated using the Superfund, States must provide 10% of the cost of implementation of the remedy and the entire cost of long-term operation and maintenance (O&M), which may last for decades or longer in the case of heavily contaminated sites. The financial burden of the 10% cost-share and the often unknown future cost of the long-term O&M may present significant resource issues for State environmental budgets and planning. Although States currently have a role in the investigation and evaluation process leading up to the selection of a remedy, CERCLA does not require EPA to allow States to participate in the actual selection of the remedy. EPA may select remedies that require significant long-term O&M instead of remedies that may have higher up-front costs, but less expensive O&M costs. This shifts a higher percentage of the overall remediation cost from the Federal government to the State as an unfunded Federal mandate. In order to minimize conflicts and maximize cleanups, it is critical that EPA and the States coordinate closely regarding the identification of facilities for listing on the NPL and the selection of remedies.

CERCLA currently allows States to receive credit toward their 10% cost share requirement for remedial actions at NPL sites, but only for the actual expenditure of State funds. States contribute to response actions by many means other than direct cash contributions. State contributions may consist of removal actions prior to the listing of a site on the NPL, contribution of recyclable materials from the site, which are sold to help offset the cost of the remedy, personnel and equipment to conduct site investigation, maintenance, monitoring, and oversight activities. States have experienced mixed results in the various regions under current EPA policy and practice in their attempts to receive credit for these activities toward State cost-share requirements. The amendment to section 104(c)(5) will ensure that State in-kind contributions to CERCLA response actions are evaluated and credited consistently toward a State's cost-share requirements.

CERCLA allows the use of risk-based remedies, which often rely on the imposition of administrative, institutional, engineering, or other land use controls to prevent exposure to contamination. These land use controls may include such restrictions as prohibition on the use of groundwater from a site, prohibition on future use of a property for residential or other purposes, prohibition on subsurface excavations or construction, and installation and maintenance of permanent barriers to prevent access or contact with residual contaminants. Generally, such restrictions are required to be maintained in perpetuity or at least for as long as the potential for exposure to the contamination exists. In order to ensure the long term permanence and enforceability of these requirements, many States have adopted environmental covenant laws and regulations and similar land use control requirements to enable and enforce such protections as a part of environmental remedies. The amendment to section 121(d)(2)(A)(ii) will ensure that State environmental covenant laws and regulations are included as applicable relevant and appropriate requirements (ARARs) under CERCLA.

HEARINGS

The Subcommittee on Environment and the Economy held a hearing on a discussion draft entitled "Federal and State Partner-

ship for Environmental Protection Act of 2013" on May 17 and 22, 2013. The Subcommittee received testimony from:

- 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;
- Dan Miller, Senior Assistant Attorney General, Natural Resources and Environment Division, Colorado Department of Law;
- Abigail Dillen, Coal Program Director, Earthjustice;
- Thomas Duch, City Manager, City of Garfield, New Jersey;
- David Bearden, Specialist in Environmental Policy, Congressional Research Service; and,
- David Trimble, Director, Natural Resources and Environment, Government Accountability Office.

COMMITTEE CONSIDERATION

On June 5 and 6, 2013, the Subcommittee on Environment and the Economy met in open markup session and approved H.R. 2226, "Federal and State Partnership for Environmental Protection Act of 2013" for full Committee consideration, without amendment, by a record vote of 11 yeas and 7 nays.

On June 18 and 19, 2013, the full Committee on Energy and Commerce met in open markup session and considered H.R. 2226. During the markup, one amendment was offered by Mr. Johnson and was adopted by voice vote. On June 19, 2013, the Committee ordered H.R. 2226 favorably reported to the House, as amended, by a recorded vote of 27 ayes and 19 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There was one record vote taken in connection with ordering H.R. 2226 reported. A motion by Mr. Upton to order H.R. 2226 reported to the House, with amendment, was agreed to by a record vote of 27 ayes and 19 nays. The following reflects the recorded votes taken during the Committee consideration:

COMMITTEE ON ENERGY AND COMMERCE -- 113TH CONGRESS
ROLL CALL VOTE # 20

BILL: H.R. 2226, the "Federal and State Partnership for Environmental Protection Act of 2013"

AMENDMENT: A motion by Mr. Upton to order H.R. 2226 favorably reported to the House, as amended. (Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 27 yeas and 19 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Hall	X			Mr. Dingell		X	
Mr. Barton	X			Mr. Markey			
Mr. Whitfield	X			Mr. Pallone			
Mr. Shimkus	X			Mr. Rush			
Mr. Pitts	X			Ms. Eshoo		X	
Mr. Walden	X			Mr. Engel		X	
Mr. Terry	X			Mr. Green			
Mr. Rogers	X			Ms. DeGette		X	
Mr. Murphy	X			Mrs. Capps		X	
Mr. Burgess				Mr. Doyle		X	
Mrs. Blackburn				Ms. Schakowsky		X	
Mr. Gingrey	X			Mr. Matheson		X	
Mr. Scalise	X			Mr. Butterfield		X	
Mr. Latta	X			Mr. Barrow		X	
Mrs. McMorris Rodgers	X			Ms. Matsui		X	
Mr. Harper	X			Ms. Christensen			
Mr. Lance	X			Ms. Castor		X	
Mr. Cassidy				Mr. Sarbanes		X	
Mr. Guthrie	X			Mr. McNerney		X	
Mr. Olson	X			Mr. Braley		X	
Mr. McKinley	X			Mr. Welch		X	
Mr. Gardner	X			Mr. Lujan		X	
Mr. Pompeo	X			Mr. Tonko		X	
Mr. Kinzinger	X						
Mr. Griffith	X						
Mr. Bilirakis	X						
Mr. Johnson	X						
Mr. Long	X						
Mrs. Ellmers	X						

06/19/2013

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goals and objectives of H.R. 2226 are to codify existing policy and clarify the current text of the statute to ensure that States have a meaningful role in the removal and remedial process under the Comprehensive Environmental Response, Compensation, and Liability Act.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 2226, "Federal and State Partnership for Environmental Protection Act of 2013," would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 2226, "Federal and State Partnership for Environmental Protection Act of 2013," contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 10, 2013.

Hon. FRED UPTON,
Chairman, Committee on Energy and Commerce, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2226, the Federal and State Partnership for Environmental Protection Act of 2013.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Maggie Morrissey and Susanne S. Mehlman.

Sincerely,

ROBERT A. SUNSHINE
(For Douglas W. Elmendorf, Director).

Enclosure.

H.R. 2226—Federal and State Partnership for Environmental Protection Act of 2013

H.R. 2226 would amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to clarify that the Environmental Protection Agency (EPA) should consult with affected states when undertaking actions to remove or remediate hazardous waste from the environment. H.R. 2226 also would expand credits given toward a state's share of cleanup costs at remedial sites to include in-kind contributions made during removal actions under certain conditions. (Under CERCLA, a *removal* action is defined as a short-term or emergency action that may be necessary to address a release or threat of a release of a hazardous substance. In contrast, a *remedial* action is less time-critical and instead addresses long-term threats to human health and the environment at a site.) Under current law, states are responsible for 10 percent of the cost of remedial actions at a site. Finally, the bill would prohibit EPA from listing a site on the National Priorities List (NPL) over the objections of the state (with a few exceptions) and would give greater deference to state priorities in the listing process. (The NPL is the list of hazardous waste sites eligible for cleanup under CERCLA.)

CBO estimates that, in some cases, implementing this legislation could affect the pace of discretionary spending if priorities for cleanup activities change. However, CBO expects that total costs to fulfill federal responsibilities under CERCLA would be little changed under this legislation. Giving states credit for removal activities that they would have performed in any event could increase EPA's remedial costs. However, if states perform additional or more extensive removal actions because of the availability of the credit, the cost to the federal government of subsequent remedial actions could decrease. On balance, CBO estimates that expanding the credit available to states to include certain removal expenses would not have a significant impact on the federal budget.

Pay-as-you-go procedures do not apply because enacting this bill would not affect direct spending or revenues.

H.R. 2226 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no cost on state, local, or tribal governments.

The CBO staff contacts for this estimate are Maggie Morrissey and Susanne S. Mehlman. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2226 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 2226 specifically directs to be completed 2 specific rule makings within the meaning of 5 U.S.C. 551.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1—Short title

This section entitles the Act the "Federal and State Partnership for Environmental Protection Act of 2013."

Section 2—Consultation with States

This section amends section 104(a)(2) of CERLCA to require the President to consult with States in undertaking a removal action. The Committee acknowledges that the National Contingency Plan (NCP), specifically, 40 CFR 300.525, requires EPA to consult with a State on all removal actions to be conducted in the State. The Committee, however, intends to codify the existing regulation and policy in the statute. The Committee acknowledges that situations may arise in which EPA may need to do an emergency removal. The Committee expects that because of EPA's existing regulation requiring consultation with States on all removal actions, this statutory change will not change the Agency's practice of consulting with States and will not impede the Agency's ability to do an emergency removal.

This section also amends section 104(c)(2) of CERCLA to require that the President consult with the affected State during the process of and when selecting a remedial action. The Committee acknowledges that current law requires EPA to consult with States before selecting a remedial action. The Committee intends that EPA consult with States throughout the entire process of selecting the appropriate remedial action. In order to effectuate that policy, this section also amends section 104(c)(4) of CERCLA to ensure consultation with the affected State or States in selecting a remedial action and section 120(f) of CERCLA to require consultation

with State and local officials in the planning and selection of a remedial action for Federal facilities.

Section 3—State credit for other contributions

This section amends section 104(c)(5) of CERCLA to credit States toward the 10% cost share under section 104(c)(3) for expenditures made for a removal action, for in-kind contributions such as real property, equipment, goods, and services provided for removal or remedial action at the facility, or amounts derived from materials recycled, recovered, or reclaimed from the facility that are used to fund or offset all or a portion of the cost of a removal or remedial action. The Committee acknowledges that CERCLA currently allows States credit toward the 10% cost share for direct, out-of-pocket, non-Federal funds expended by the State. The Committee acknowledges that there are many ways States contribute to a long-term remedy that are not direct expenditures of non-Federal funds. The Committee also acknowledges that it is a policy of EPA to allow for certain in-kind contributions made by the State if they directly benefit the CERCLA-funded cleanup. The Committee intends to codify the policy and allow States to get credit for in-kind contributions of real property, goods, services, equipment, and amounts derived from materials recycled or recovered from the facility.

The Committee acknowledges that CERCLA limits when States may receive credit toward the cost share requirement to the time when a State expends funds for a remedial action. The Committee acknowledges however, that States often conduct removal actions that directly benefit the long-term remedial action and obviate or reduce a removal action by EPA. The Committee acknowledges that there is not a cost share requirement for States with respect to removal actions, and no such additional cost share requirement is intended by this legislation. However, because a State conducting a removal action or taking some removal-type action in advance of the final remedy selection lessens the potential Federal expenditures at the site with respect to the permanent remedy, the Committee intends that States receive credit toward the 10% cost share for the remedial action.

Section 4—State concurrence with listing on the national priorities list

This section amends section 105(a)(8)(B) of CERCLA to provide (1) that not later than 90 days after any revision to the NPL, with respect to any site recommended by a State, but not selected for inclusion on the NPL, the President must provide, in writing, to the State the basis for not including the site. Section 4 also strikes the concept of the "highest priority facilities" and the "top priority among known response targets;" and (2) allows States, not more than once every 5 years, to designate to the NPL a facility that meets the listing criteria. The Committee intends to codify current EPA policy to not list a site on the NPL over the objection of a State.

This section also amends section 121(f)(1)(C) of CERCLA by acknowledging that EPA should seek State concurrence when adding sites to the NPL as well as when deleting sites from the NPL.

Section 5—State environmental covenant law

This section amends section 121(d)(2)(A)(ii) of CERCLA by adding "State environmental covenant law" and "State law or regulation requiring the use of engineering or land use controls" to the list of State requirements that can be considered applicable or relevant and appropriate. CERCLA section 121(d)(2)(A) requires that remedial actions meet any Federal standards, requirements, criteria, or limitations that are determined to be legally applicable or relevant and appropriate. Section 121(d)(2)(A)(ii) requires that such State requirements (applicable relevant and appropriate requirements (ARARs)) be met if they are more stringent than Federal requirements. Concerned that EPA and other Federal agencies implementing CERCLA may fail to recognize State environmental covenant laws and other land use control laws and regulations as ARARs on the purported basis that such laws and requirements are not "environmental laws" or "facility siting laws," the Committee included the amendment to section 121(d)(2)(A)(ii) to address this issue. This section clarifies that such State laws and requirements are to be considered ARARs under CERCLA.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

* * * * * * *

TITLE I—HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

* * * * * * *

RESPONSE AUTHORITIES

SEC. 104. (a)(1) * * *

(2) REMOVAL ACTION.—[Any removal action undertaken by the President under this subsection (or by any other person referred to in section 122) should] *In undertaking a removal action under this subsection, the President (or any other person undertaking a removal action pursuant to section 122) shall consult with the affected State or States. Such removal action should*, to the extent the President deems practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned.

* * * * * * *

(c)(1) * * *

(2) The President shall consult with the affected State or States [before determining any appropriate remedial action] *during the process of selecting, and in selecting, any appropriate remedial ac-*

tion to be taken pursuant to the authority granted under subsection (a) of this section.

* * * * * * *

(4) SELECTION OF REMEDIAL ACTION.—The President [shall select remedial actions] *shall, in consultation with the affected State or States, select remedial actions* to carry out this section in accordance with section 121 of this Act (relating to cleanup standards).

(5) STATE CREDITS.—

(A) GRANTING OF CREDIT.—The President shall grant a State a credit against the share of the costs, for which it is responsible under paragraph (3) with respect to a facility listed on the National Priorities List under the National Contingency Plan, for amounts expended by a State for *removal at such facility, or for* remedial action at such facility pursuant to a contract or cooperative agreement with the President. The credit under this paragraph shall be limited to those State expenses which the President determines to be reasonable, documented, direct out-of-pocket expenditures of [non-Federal funds.] *non-Federal funds, including oversight costs and in-kind expenditures. For purposes of this paragraph, in-kind expenditures shall include 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.*

(B) EXPENSES BEFORE LISTING OR AGREEMENT.—The credit under this paragraph shall include expenses for *removal or* 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 under subsection (d) for the facility if—

(i) * * *

* * * * * * *

NATIONAL CONTINGENCY PLAN

SEC. 105. (a) REVISION AND REPUBLICATION.—Within one hundred and eighty days after the enactment of this Act, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 311 of the Federal Water Pollution Control Act, to reflect and effectuate the responsibilities and powers created by this Act, in addition to those matters specified in section 311(c)(2). Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) * * *

* * * * * * *

(8)(A) * * *

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. Within one year after the date of enactment of this Act, and annually thereafter, each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. [To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment among the known facilities in such State. A State shall be allowed to designate its highest priority facility only once. Other priority facilities or incidents may be listed singly or grouped for response priority purposes;] *Not later than 90 days after any revision of the national list, with respect to a priority not included on the revised national list, upon request of the State that submitted the priority for consideration under this subparagraph, the President shall provide to such State, in writing, the basis for not including such priority on such revised national list. The President may not add a facility to the national list over the written objection of the State, unless (i) the State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party, (ii) the President determines that the contamination has migrated across a State boundary, resulting in the need for response actions in multiple States, or (iii) the criteria under the national contingency plan for issuance of a health advisory have been met. Not more frequently than once every 5 years, a State may designate a facility that meets the criteria set forth in subparagraph (A) of this paragraph, which shall be included on the national list;*

* * * * * * *

SEC. 120. FEDERAL FACILITIES.

(a) * * *

* * * * * * *

(f) STATE AND LOCAL PARTICIPATION.—The Administrator and each department, agency, or instrumentality responsible for compliance with this section [shall afford to] *shall consult with* relevant State and local officials *and shall provide such State and local officials* the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 121. *If State or local officials make a determination not to participate in the planning and selection of the remedial action, such*

determination shall be documented in the administrative record regarding the selection of the response action.

* * * * * * *

SEC. 121. CLEANUP STANDARDS.

(a) * * *

* * * * * * *

(d) DEGREE OF CLEANUP.—(1) * * *

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—

(i) * * *

(ii) any promulgated standard, requirement, criteria, or limitation under a [State environmental or facility siting law] *State environmental, facility siting, or environmental covenant law, or under a State law or regulation requiring the use of engineering controls or land use controls,* that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

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(f) STATE INVOLVEMENT.—(1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) * * *

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(C) State concurrence in [deleting sites from] *adding sites to, and deleting sites from,* the National Priorities List.

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DISSENTING VIEWS

The Federal and State Partnership for Environmental Protection Act is not based on an oversight record before the Committee and has not been endorsed by stakeholders. It is therefore unclear what issue the bill is intended to address. According to the majority's report, the bill "codifies existing policy and regulations to ensure that States have a meaningful role in response actions" under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, the Superfund statute). But the Superfund statute already explicitly requires a meaningful role for states, and in fact, states participate in every stage of Superfund cleanups.

This legislation would make the following significant changes to current law:

- Shift the balance of cleanup costs between states and the Environmental Protection Agency (EPA) by allowing states to count costs of removal actions, which are calculated separate from response actions, and "in kind contributions" towards their 10% contribution to response actions at national priority list (NPL) sites.[1]
- Allow states to force listing of a site on the NPL once every five years, increased from one time over the life of the program under the existing law, potentially significantly increasing the inventory of sites to be cleaned up with federal funds.[2]
- Rewrite established terminology relating to state consultation with undefined terms.[3]
- Allow states to collect attorneys' fees and oversight costs from the federal funds designated for cleanups.
- Require consultation with states before removal actions, the short-term actions taken to address serious immediate threats, potentially delaying important actions to protect public health.[4]

This bill 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.

At the May 22, 2013, hearing on this bill, the Subcommittee on Environment and the Economy heard that states currently have extensive opportunities to be involved in clean up decisions under current law.[5] The Subcommittee also heard that, if a state wants

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[1] H.R. 2226, the "Federal and State Partnership for Environmental Protection Act of 2013" at § 3.

[2] *Id.* at § 4(a)(2).

[3] *See, e.g., id.* at § 2(d).

[4] *Id.* at § 2(a).

[5] House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, *Legislative Hearing on H.R.__ the "Federal and State Partnership for Environmental Protection Act of 2013;" H.R.__, the "Reducing Excessive Deadline Obligations Act of 2013;" and H.R.__, the "Federal Facility Accountability Act of 2013."* 113th Cong. (May 22, 2013).

complete control over the clean-up of a contaminated site, the state can simply conduct its own clean-up under state law and retain full control of all decisions.[6] The question presented in this bill is how much control should be given to states over federal funds that are needed nationwide to clean up the highest priority sites first. The Superfund program is an essential public health program with a national scope. If one state is empowered by this legislation to monopolize more of the federal Superfund, by adding more sites to the NPL, demanding costlier remedies, and recovering attorneys' fees, the result will be delays or postponements of needed cleanups in other states.

COST SHARING

Under Superfund, there is a cost-share in place between states and the federal government for response actions. The federal government pays 90% of the costs and the state pays just 10%. For short-term removal actions, the law is even more generous to the states. When the federal government carries out a removal action, it is paid for completely with federal funds.

This bill would allow states to get credit towards their 10% share of response costs for in-kind contributions and funds spent on removal actions if the state undertakes those actions.[7] This allowance amounts to a shift in the cost-share between the state and the federal government, because EPA is not allowed the same credit for the same expenditures. The result is likely to be less funding available for cleanups.

STATE PARTICIPATION UNDER CURRENT LAW

Even though Superfund is a federal program, paid for out of the general fund, 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.[8]

Under that provision, states are already involved in suggesting sites for cleanup under Superfund. EPA already seeks concurrence from states before slating a site for clean up on the National Priority List. And states can already block EPA from carrying out a selected response action, by not agreeing to pay the cost-share for that response action.

If a state wants to take more of a leadership role at a Superfund site, under current law, they already have the ability to assume the lead under cooperative agreements with EPA.

This bill would allow states to override potential concerns of the federal government, forcing or vetoing the placement of a site on the National Priorities List. Because sites on the NPL are eligible for funding from public coffers, the result of this could be less funding available for cleanups that are national priorities in terms of the risk posed to public health and the environment.

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[6] *Id.*

[7] H.R. 2226, the "Federal and State Partnership for Environmental Protection Act of 2013" § 3.

[8] Comprehensive Environmental Response, Compensation, and Liability Act § 121, 42 U.S.C. § 9 621; Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act,* at 11 (Jun. 14, 2012)(R41039).

CLEANUP STANDARDS

As amended during the full Committee markup, this bill now says that state engineering and land use control requirements should be mandatory cleanup standards under subsection (d) of section 121 of Superfund. But those requirements already apply under subsection (f), with clear and well-understood processes. It is unclear how this new language would interact with the existing language, whether it is necessary, or what it is trying to achieve.

Response actions are chosen under Superfund in keeping with statutory requirements and the National Contingency Plan (NCP). Among other things, the NCP provides that, in situations where two response actions provide the same level of protection to public health and the environment, the less costly response action should be implemented (although the statute and the NCP express a preference for permanent removal response actions over capping contamination in place). Section 121(f) of Superfund therefore provides a waiver process, whereby the federal government can decide that a state requirement does not provide greater protection to public health and the environment and therefore not apply that requirement. It appears that this bill would eliminate that waiver, allowing states to force more expensive response actions without a greater benefit to public health or the environment. The result is likely to be less funding available for other cleanups.

DELAYS IN REMOVAL ACTIONS

At the May 17, 2013, hearing on this bill, the Subcommittee heard that removal actions are generally short-term actions taken to address immediate threats.[9] These actions are often taken at the request of state government officials. When Superfund was adopted, removal actions were distinguished from the longer-term response actions and given a more streamlined process, so that they could be carried out in a timely manner. This bill would change that approach, requiring consultation before removal actions can occur. The result will likely be greater exposure to contamination as necessary actions are delayed.

CONCLUSION

Superfund is an essential public health program, and one that is intended to protect people nationwide. The National Priority List and National Contingency Plan have been carefully crafted to balance needs across the country and ensure that funds go to clean up the most contaminated sites first. This bill would undermine that national priority scheme, allowing states to withdraw more federal taxpayer funds than their need supports. This bill does not reflect the deliberate and careful approach that should be taken in amending a very successful and important public health program.

[9] *Id.*

For the reasons stated above, we dissent from the views expressed in the Committee's report.

HENRY A. WAXMAN.
PAUL D. TONKO.

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