113TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 113–180
Part 1

FEDERAL FACILITY ACCOUNTABILITY 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. 2318]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2318) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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29–006

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 Facility Accountability Act of 2013".

SEC. 2. FEDERAL FACILITIES.

(a) APPLICATION TO FEDERAL GOVERNMENT.—Section 120(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(a)) is amended in the heading by striking "OF ACT".

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

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

(2) by inserting "or" after "National Contingency Plan,";

(3) by striking ", or applicable to remedial actions at such facilities"; and

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

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

"(4) APPLICABILITY OF LAWS.—

"(A) IN GENERAL.—Each department, agency, and instrumentality of the United States shall be subject to, and comply with, at facilities that are or have been owned or operated by any such department, agency, or instrumentality, State substantive and procedural requirements regarding response relating to hazardous substances or pollutants or contaminants, including State hazardous waste requirements, in the same manner and to the same extent as any nongovernmental entity.

"(B) COMPLIANCE.—

"(i) IN GENERAL.—The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any State substantive or procedural requirement referred to in subparagraph (A).

"(ii) INJUNCTIVE RELIEF.—Neither the United States, nor any agent, employee, nor officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any injunctive relief under subparagraph (C)(ii).

"(iii) CIVIL PENALTIES.—No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any State substantive or procedural requirement referred to in subparagraph (A), or this Act, with respect to any act or omission within the scope of the official duties of the agent, employee, or officer.

"(C) SUBSTANTIVE AND PROCEDURAL REQUIREMENTS.—The State substantive and procedural requirements referred to in subparagraph (A) include—

"(i) administrative orders;

"(ii) injunctive relief;

"(iii) civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations;

"(iv) reasonable service charges or oversight costs; and

"(v) laws or regulations requiring the imposition and maintenance of engineering or land use controls.

"(D) REASONABLE SERVICE CHARGES OR OVERSIGHT COSTS.—The reasonable service charges or oversight costs referred to in subparagraph (C) include fees or charges assessed in connection with—

"(i) the processing, issuance, renewal, or modification of permits;

"(ii) the review of plans, reports, studies, and other documents;

"(iii) attorney's fees;

"(iv) inspection and monitoring of facilities or vessels; and

"(v) any other nondiscriminatory charges that are assessed in connection with a State requirement regarding response relating to hazardous substances or pollutants or contaminants.".

SEC. 3. AUTHORITY TO DELEGATE, ISSUE REGULATIONS.

Section 115 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9615) is amended by adding at the end the following new sentence: "If the President delegates or assigns any duties or powers under this section to a department, agency, or instrumentality of the United States other than

the Administrator, the Administrator may review, as the Administrator determines necessary or upon request of any State, actions taken, or regulations promulgated, pursuant to such delegation or assignment, for purposes of ensuring consistency with the guidelines, rules, regulations, or criteria established by the Administrator under this title.".

PURPOSE AND SUMMARY

This legislation is intended to ensure greater compliance by Federal facilities with requirements of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) for addressing releases of hazardous substances. The bill accomplishes this by reaffirming the original intent of CERCLA that: (1) each department, agency, and instrumentality of the United States shall be subject to and comply with the Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, and (2) that State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal or remedial action at facilities owned or operated by a department, agency, instrumentality of the United States. To further reaffirm the original intent of CERCLA, which applies to current and former private owners and operators, the legislation explicitly provides that *all* Federal facilities, currently or formerly owned by the United States, are subject to all the same substantive and procedural requirements, including enforcement requirements and sanctions, as any private entity. The legislation also provides for review of the response policies, guidance, and procedures established by Federal agencies that are operating pursuant to the Presidential delegation of response authority under CERCLA.

BACKGROUND AND NEED FOR LEGISLATION

Federal facilities should be held to the same environmental standards that apply to non-Federal facilities. Federal Government facilities comprise a significant number of the sites being cleaned up under CERCLA and include some of the most contaminated sites in the country.

Legal responsibility for cleanup of Federal facilities stems from a variety of sources, including section 120 of CERCLA. Section 120 of CERCLA requires that Federal agencies be subject to, and comply with, CERCLA in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. Section 120 further specifies that State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States. It is clear that Congress intended Federal facilities conducting response actions under CERCLA to be on an equal footing with non-Federal entities. However, waivers of sovereign immunity are strictly construed by Courts, and ambiguities are resolved in favor of the sovereign. The Federal Government has asserted that it should not be subject to administrative and civil fines and penalties under solid and hazardous waste law because of the doctrine of "sovereign immunity." In several district court cases, the Justice Department, representing Federal agencies, successfully opposed State hazardous waste enforcement actions seeking civil penalties

against Federal facilities because section 6001 did not clearly and unambiguously waive United States' sovereign immunity.[1] The State of Ohio challenged the Federal Government's claim of sovereign immunity in *Ohio* v. *The Department of Energy* (DOE). In this case, the U.S. Circuit Court of Appeals found in favor of the State of Ohio (June 11, 1990), stating that the Federal Government's sovereign immunity was waived under both the Clean Water Act's (CWA's) sovereign immunity provision and the Resource Conservation and Recovery Act's (RCRA's) citizen suit provision (although not RCRA's sovereign immunity provision). The Circuit Court's decision was overturned by the U.S. Supreme Court on April 21, 1992. The Supreme Court held that the waiver of sovereign immunity in RCRA and CWA was not clear enough to allow states to impose civil penalties directly. After the Supreme Court's decision, the consensus among lawmakers was that there was a double standard in the United States by which the same government that developed laws to protect human health and the environment, and required compliance in the private sector, was itself not assuming the burden of compliance. In response, Congress passed the Federal Facilities Compliance Act in 1992, which amended the waiver of sovereign immunity in the Solid Waste Disposal Act to specifically identify the State substantive and procedural requirements applicable to Federal facilities.

Similarly, the waiver of sovereign immunity in section 120 of CERCLA has been narrowly interpreted by Courts. Specifically, courts have found that the waiver only applies to facilities *currently owned* by the Federal Government.[2] The Committee recognizes that there is no such limitation on liability for non-Federal parties and that such a distinction is contrary to Congress' intent that requirements under CERCLA and State law apply to the Federal government in the same manner as non-Federal facilities. H.R. 2318 is necessary to clarify the existing statutory language and to reaffirm the original intent of Congress that CERCLA waived the sovereign immunity of the United States with respect to State substantive and procedural requirements relating to hazardous substances, pollutants, or contaminants, including State hazardous waste requirements.

The principle laws governing hazardous waste cleanup at Federal facilities are RCRA and CERCLA. RCRA regulates the day-to-day management of hazardous wastes, as well as the cleanup of contamination at facilities where such wastes are or were treated, stored, or disposed of. CERCLA also requires cleanup of hazardous substances at contaminated facilities. The language of H.R. 2318 is almost identical to that of the Federal Facilities Compliance Act of 1992, which amended RCRA, because the Committee acknowledges

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[1] *See M.E.S.S.* v. *Navy*, 655 F. Supp. 601 (E.D. Cal. 1986); *Myer* v. *Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986); *United States* v. *State of Washington*, (E.D. Wash. Jan 22, 1988), *aff'd* 872 F.2d 874 (9th Cir. 1989); *California* v. *United States*, Civ. No. S–86–190 (E.D. Cal. April 18m 1988); *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984).

[2] *See Miami-Dade County* v. *United States*, 345 F.Supp. 2d 1319 (S.D. Fla. 2004) (holding that under section 120(a) the United States is not a current owner or operator of the facility and therefore, the United States has not waived sovereign immunity to suit under state law or the County Code); *State of Maine* v. *Department of Navy*, 973 F.2d 1007 (1st Cir. 1992) (holding that the waiver of sovereign immunity under CERCLA, in particular the phrase "state laws regarding enforcement," was ambiguous so sovereign immunity was not waived with respect to civil penalties); *Redland Soccer Club, Inc.* v. *Army*, 801 F.Supp. 1432 (M.D. Pa. 1992) (finding that CERCLA section 120(a)(4) is written in the present tense signifying that facilities must be currently owned or operated for the waiver to apply).

the similarity between the two cleanup programs and intends to ensure legislative consistency in addressing similar issues related to the waiver of sovereign immunity. The Committee believes that the authority to properly enforce Federal facility compliance with State substantive and procedural requirements regarding response relating to hazardous substances or pollutants or contaminants, including State hazardous waste requirements, is essential to the CERCLA cleanup process. State program officials in all areas of the country have underscored the need for this legislation.

HEARINGS

The Subcommittee on Environment and the Economy held a hearing entitled "Discussion Draft, the Federal Facility Accountability Act of 2013" on May 17 and 22, 2013. The Subcommittee received testimony from:

- Carolyn Hanson, Deputy Executive Director, Environmental Council of 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. 2318 for full Committee for consideration, without amendment, by voice vote.

On June 18 and 19, 2013, the full Committee on Energy and Commerce met in open markup session and considered H.R. 2318. During the markup, one amendment was offered by Mr. Latta and was adopted by voice vote. On June 19, 2013, the Committee ordered H.R. 2318 favorably reported to the House, as amended, by a record vote of 26 ayes and 18 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. 2318 reported. A motion made by Mr. Upton to order H.R. 2318 reported to the House, as amended, was agreed to by a record vote of 26 ayes and 18 nays. The following reflects the recorded votes taken during the Committee consideration.

COMMITTEE ON ENERGY AND COMMERCE -- 113TH CONGRESS
ROLL CALL VOTE # 24

BILL: H.R. 2318, the "Federal Facility Accountability Act of 2013"

AMENDMENT: A motion by Mr. Upton to order H.R. 2318 favorably reported to the House, as amended. (Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 26 yeas and 18 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Hall	X			Mr. Dingell			
Mr. Barton	X			Mr. Markey			
Mr. Whitfield				Mr. Pallone			
Mr. Shimkus	X			Mr. Rush			
Mr. Pitts				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	X			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. 2318 are to clarify that the waiver of sovereign immunity in CERCLA applies to both current and formerly owned Federal facilities and that Federal facilities must comply with substantive and procedural requirements of State law relating to hazardous substances or pollutants or contaminants, including State hazardous waste requirements.

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. 2318, the Federal Facilities Accountability Act, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARKS, 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. 2318, the Federal Facilities Accountability Act, 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.

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. 2318, the Federal Facility Accountability Act of 2013.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2318—Federal Facility Accountability Act of 2013

Summary: H.R. 2318 would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as it relates to federal facilities. Under the bill, federal agencies would be required to comply with state requirements when conducting response actions under CERCLA at federal facilities or facilities formerly owned by the federal government. H.R. 2318 also would explicitly waive the federal government's sovereign immunity from administrative orders, injunctive relief, and civil and administrative penalties issued by states under CERCLA. In addition, the bill would permit states to charge federal agencies for costs associated with permitting, document review, inspections, and other activities related to a state's response actions at hazardous sites. Finally, H.R. 2318 would authorize the Environmental Protection Agency (EPA) to review actions taken by other federal agencies under CERCLA.

CBO estimates that enacting this legislation could increase the pace of discretionary spending to the extent that federal agencies accelerate spending related to cleanup activities or pay additional fines and penalties imposed by states. However, CBO expects that aggregate, long-term costs to fulfill federal responsibilities under CERCLA would be little changed under the legislation.

In addition, H.R. 2318 could increase direct spending to the extent that fines and penalties were paid from the Treasury's Judgment Fund. However, CBO expects that any incremental spending from that fund would probably be insignificant. Because the bill would affect direct spending, pay-as-you-go procedures apply; however, CBO estimates that any additional direct spending over the 2014–2023 period would be insignificant.

H.R. 2318 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: For this estimate, CBO assumes that the legislation will be enacted near the end of 2013.

Direct spending

According to information from federal agencies and state representatives, federal agencies are not usually assessed penalties and fines by states under CERCLA. Enacting this legislation would explicitly waive any federal immunity from administrative orders or civil or administrative penalties assessed by states under that act. This waiver also would include former federal facilities and federal facilities that are on the National Priorities List (NPL). (The NPL is the list of hazardous waste sites eligible for cleanup under CERCLA.) Thus, CBO anticipates that states could use this new authority to prompt more rapid federal action at certain sites, and federal agencies could increase the pace of compliance spending to avoid fines and penalties.

It is also possible that fines and penalties would be paid from the government's Judgment Fund if payment was not otherwise provided for in appropriated funds. This fund has a permanent, open-ended appropriation that may be used under certain conditions without further appropriation. Historically, though, most fines related to environmental violations for which the federal agency agrees to pay the fine or penalty as an administrative matter have

been paid from appropriated funds. CBO estimates that any incremental spending from the Judgment Fund resulting from enactment of H.R. 2318 would be insignificant.

Spending subject to appropriation

Enacting this legislation would not fundamentally change the federal government's responsibility to comply with CERCLA. According to the latest Financial Report of the United States, the federal government's current environmental remediation and waste disposal liabilities exceed $300 billion (under all environmental laws). Under current law, federal agencies, in particular the Departments of Defense and Energy, currently spend billions of dollars each year conducting cleanup activities under CERCLA, including reimbursements to state agencies for related services they provide. Based on information from federal agencies and industry representatives, CBO expects that enacting this legislation could induce federal agencies to accelerate their compliance activities at some facilities possibly changing the timing of funding requests for certain projects. As a result, H.R. 2318 might lead to greater compliance costs for federal facilities for the years immediately following enactment (if the necessary appropriations were provided for those years), but the total long-term cost of compliance would not change substantially.

CBO estimates that any additional penalties and fines imposed on federal agencies under H.R. 2318 would not be significant. Limited historical data suggest that such penalties are small. For example, according to a recent report from the Department of Defense (DoD), over the 2006–2010 period, DoD paid an average of $1 million a year in penalties and fines assessed by states under several federal environmental laws.

Enacting this legislation also would clarify that federal facilities are subject to reasonable service charges assessed in connection with state programs. Because most federal agencies already pay administrative service charges and fees to states, CBO does not expect that this provision would significantly increase costs. Based on information from EPA, CBO estimates that EPA would spend less than $500,000 annually over the 2014–2018 period to review additional actions taken by other federal agencies under CERCLA.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. CBO estimates that this legislation would not have a significant impact on direct spending and would have no effect on revenues.

Intergovernmental and private-sector impact: H.R. 2318 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal spending: Susanne S. Mehlman; Impact on state, local, and tribal governments: J'nell Blanco; Impact on the private sector: Amy Petz.

Estimate 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. 2318 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. 2318 does not specifically direct to be completed any 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 were 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 Facility Accountability Act of 2013."

Section 2—Federal facilities

This section amends section 120(a) of CERCLA to strike "the Act" and indicate that requirements other than those in CERCLA apply to the Federal government.

This section also amends section 120(a)(2) of CERCLA by making the guidelines, rules, regulations, and criteria applicable to response actions for facilities at which hazardous substances are located applicable to facilities currently or formerly owned or operated by the United States in the same manner and to the extent that they are applicable to other facilities. The Committee acknowledges that CERCLA applies to current and formerly owned or operated non-Federal facilities. The Committee intends that CERCLA apply to Federal facilities in the same manner and that formerly owned facilities also be subject to the waiver of sovereign immunity.

This section amends section 120(a)(4) of CERCLA by adding the requirement that Federal facilities comply with State substantive and procedural requirements regarding response, containment, and remediation relating to hazardous substances in the same manner

as any nongovernmental entity. This section also amends 120(a)(4) by adding an express waiver of sovereign immunity with respect to State substantive or procedural requirements and provides that neither the United States nor any agent, employee, or officer shall be immune or exempt from injunctive relief. This section specifies that no agent, employee, or officer of the United States shall be personally liable for any civil penalties under any State substantive or procedural requirements or CERCLA with respect to any act or omission within the scope of the official duties. This section also provides that Federal facilities are subject to State substantive and procedural requirements, including administrative orders, injunctive relief, civil fines and penalties, reasonable service charges or oversight costs, and laws or regulations requiring the imposition and maintenance of engineering or land use controls. Reasonable service charges or oversight costs are defined by this section to include fees or charges assessed in connection with (i) processing/issuing/renewing/modifying permits; (ii) review of plans, reports, studies, and other documents; (iii) attorney's fees; (iv) inspection and monitoring of facilities or vessels; and (v) any other nondiscriminatory charges that are assessed in connection with a State requirement regarding response, containment, and remediation related to hazardous substances. The Committee intends that Federal facilities comply with the specified list of State substantive and procedural requirements in the same manner as private entities engaged in a CERCLA cleanup. In providing for the payment by Federal facilities of "reasonable service charges" or "oversight costs," the Committee intends that Federal agencies pay the fees and charges that other persons are subject to under State law regarding response relating to hazardous substances, pollutants, or contaminants, including State hazardous waste requirements. By limiting fees and charges to those which are "nondiscriminatory," the Committee intends that Federal facilities not be singled out for payment on the basis of their status as Federal entities. The Committee does not, however, intend that each fee or assessment be scrutinized to determine whether the Federal government is treated in exactly the same manner as non-Federal entities. The Committee recognizes that unique features of Federal facilities may make a direct comparison inapplicable. The Committee intends that the Federal government pay the fees, charges, and oversight costs that are regularly assessed in connection with State law regarding response relating to hazardous substances or pollutants or contaminants, including State hazardous waste requirements.

Section 3—Authority to delegate, issue regulations

This section amends section 115 of CERCLA to allow EPA to review (or a State to request review by EPA) actions taken pursuant to any duties or powers delegated or assigned by the President to a department, agency, or instrumentality of the United States other than EPA, to ensure consistency of the action with the guidelines, rules, regulations, or criteria established by EPA under Title I of CERCLA. The Committee acknowledges that under section 115 of CERCLA, the President may delegate authority to carry out CERCLA and acknowledges that the President has done so through Executive Order 12580. The Committee intends that with respect to authority delegated to Federal entities under Executive Order

12580, that EPA be authorized to review such actions to ensure that they are consistent with EPA guidelines, rules, regulations, or criteria.

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

* * * * * * *

AUTHORITY TO DELEGATE, ISSUE REGULATIONS

SEC. 115. The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this title. *If the President delegates or assigns any duties or powers under this section to a department, agency, or instrumentality of the United States other than the Administrator, the Administrator may review, as the Administrator determines necessary or upon request of any State, actions taken, or regulations promulgated, pursuant to such delegation or assignment, for purposes of ensuring consistency with the guidelines, rules, regulations, or criteria established by the Administrator under this title.*

* * * * * * *

SEC. 120. FEDERAL FACILITIES.

(a) APPLICATION [OF ACT] TO FEDERAL GOVERNMENT.—

(1) * * *

(2) APPLICATION OF REQUIREMENTS TO FEDERAL FACILITIES.—All guidelines, rules, regulations, and criteria which are applicable to [preliminary assessments] *response actions* carried out under this Act for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, *or* applicable to inclusion on the National Priorities List[, or applicable to remedial actions at such facilities] shall also be applicable to facilities which are *or have been* owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this Act.

* * * * * * *

[(4) STATE LAWS.—State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.]

(4) APPLICABILITY OF LAWS.—

(A) IN GENERAL.—Each department, agency, and instrumentality of the United States shall be subject to, and comply with, at facilities that are or have been owned or operated by any such department, agency, or instrumentality, State substantive and procedural requirements regarding response relating to hazardous substances or pollutants or contaminants, including State hazardous waste requirements, in the same manner and to the same extent as any nongovernmental entity.

(B) COMPLIANCE.—

(i) IN GENERAL.—The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any State substantive or procedural requirement referred to in subparagraph (A).

(ii) INJUNCTIVE RELIEF.—Neither the United States, nor any agent, employee, nor officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any injunctive relief under subparagraph (C)(ii).

(iii) CIVIL PENALTIES.—No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any State substantive or procedural requirement referred to in subparagraph (A), or this Act, with respect to any act or omission within the scope of the official duties of the agent, employee, or officer.

(C) SUBSTANTIVE AND PROCEDURAL REQUIREMENTS.—The State substantive and procedural requirements referred to in subparagraph (A) include—

(i) administrative orders;

(ii) injunctive relief;

(iii) civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations;

(iv) reasonable service charges or oversight costs; and

(v) laws or regulations requiring the imposition and maintenance of engineering or land use controls.

(D) REASONABLE SERVICE CHARGES OR OVERSIGHT COSTS.—The reasonable service charges or oversight costs

referred to in subparagraph (C) include fees or charges assessed in connection with—

(i) the processing, issuance, renewal, or modification of permits;

(ii) the review of plans, reports, studies, and other documents;

(iii) attorney's fees;

(iv) inspection and monitoring of facilities or vessels; and

(v) any other nondiscriminatory charges that are assessed in connection with a State requirement regarding response relating to hazardous substances or pollutants or contaminants.

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DISSENTING VIEWS

A stated purpose of H.R. 2318 is to ensure that contaminated federal facilities are cleaned up to state standards that are more demanding than federal standards where such standards exist. Democratic members of the Committee were receptive to this concept. However, once a minimal amount of examination of this issue had occurred, it was obvious that the assumptions underlying the bill's stated purposes are flawed. Moreover, the legislative text of H.R. 2318 appears to have developed without any foundational understanding of the underlying law or facts. Additional information was readily available, but it appears that many obvious experts and affected stakeholders were neither contacted nor consulted during the drafting of this legislation. No organization or stakeholder has publicly endorsed H.R. 2318.

The majority of federal Superfund sites are owned or operated by the Department of Defense.[1] Therefore, H.R. 2318 would impose new obligations on any federal agency that owns or operates a Superfund site, but especially the Department of Defense. However, the majority did not consult them or the Department of Justice during the development of this legislation. This legislation would have benefited by being crafted with an understanding of the current application of Superfund requirements at federal facilities, and the cleanup needs at those facilities. As a result, several arguments made in the majority's Committee report about the need for this legislation are unsupported, or contradicted, by the limited record before the Committee.

Since 1986, the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, the Superfund statute) have applied to contaminated federal facilities. That change was adopted through a careful and lengthy legislative process.

Contamination at federal facilities is significant and complex. As the Subcommittee on Environment and the Economy heard during the May 22, 2013, hearing on this bill, the Government Accountability Office (GAO) has estimated significant cleanup costs at federal facilities, and found some difficulties in tracking and completing federal facility cleanups.[2]

Although the majority's Committee report suggests that federal facilities have not complied with the requirements of Superfund, GAO has found that the Department of Defense is currently work-

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[1] Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act,* at 5 (Jun. 14, 2012)(R41039).

[2] House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, Testimony of David Trimble, Director, Natural Resources and the Environment, U.S. Government Accountability Office, *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).

ing to clean up 129 sites on the National Priority List (NPL) and spent almost $30 billion on cleanups between 1986 and 2008. Additionally, although GAO noted difficulty establishing interagency agreements between the Department of Defense and the Environmental Protection Agency (EPA) in 2009, at the hearing on H.R. 2318 the Committee heard that significant progress has been made to address that issue.[3]

EQUAL TREATMENT FOR FEDERAL FACILITIES UNDER CURRENT LAW

The majority's Committee report says that "Federal facilities should be held to the same environmental standards that apply to non-Federal facilities" and that "Congress intended Federal facilities conducting response actions under CERCLA to be on equal footing with non-Federal entities." However, it does not appear that in a general sense, federal facilities are held to a lesser standard than non-federal facilities. In fact, the language of the existing statute subjects federal facilities to greater requirements under Superfund than non-federal facilities.[4]

In response to questions for the record from the May 22, 2013, hearing, GAO confirmed that the requirements placed on federal facilities under Superfund go above and beyond those placed on non-federal facilities. According to the GAO, section 120 places reporting requirements and specific procedural requirements on federal facilities that apply in addition to the requirements that apply to non-federal facilities. These requirements lead to agency-led cleanups, wherein agencies take responsibility for the execution of a cleanup, not just its funding.[5] In contrast, private parties are only responsible for cleanup funding.

While there may be areas where federal facilities should be doing more, the majority has failed to identify these areas with sufficient specificity to understand the problem that this legislation is seeking to address.

FORMERLY OWNED SITES UNDER CURRENT LAW

The majority's report also suggests that federal agencies are not liable for the costs of cleanups at formerly owned sites, "contrary to Congress' intent that requirements under CERCLA and State law apply to the Federal government in the same manner as non-Federal facilities." However, testimony at the hearing on this bill made clear that federal agencies are liable for the costs of cleanup at former sites in the same way as non-federal entities.[6]

The Department of Defense is responsible for more formerly owned sites than any other agency. In response to questions for the record from the May 22, 2013, hearing, the Congressional Research Service (CRS) said that formerly owned defense sites are subject to specific cleanup requirements under the Defense Environmental Restoration Program adopted as part of the Superfund Amend-

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[3] *Id.*

[4] Comprehensive Environmental Response, Compensation, and Liability Act § 120.

[5] Letter from David Trimble, Director, Natural Resources and the Environment, U.S. Government Accountability Office, to Chairman John Shimkus (Jun. 26, 2013).

[6] 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).

ments and Reauthorization Act (SARA) of 1986.[7] The Defense Environmental Restoration Account for Formerly Used Defense Sites funds cleanups at the largest number of former federal facilities cleaned up by the federal government. The liability of other federal agencies for cleanup costs at formerly owned or operated sites is covered by the Department of Justice's settlement fund, not agency appropriations. The differences between how the law treats the Department of Defense and other agencies would be worthy of understanding before further action on this legislation.

The primary difference between federal responsibility at former and currently owned sites is the application of the additional section 120 procedural requirements described above that increase the responsibility of federal agencies beyond what private parties bear. The effect of this legislation with regard to formerly owned federal facilities would be to apply the additional procedural requirements to federal agencies at those sites, enhancing federal obligations over the obligations of non-federal parties.

The record before the Committee does not elucidate the myriad effects this change could have, or obstacles to its execution. However, a briefing with the Department of Defense and the Department of Justice have suggested that applying the additional procedural requirements discussed above to sites that the federal government no longer operates or owns could create significant conflict or perhaps be unworkable.[8] For example, in order to lead a cleanup effort, federal agencies could be required to enter and exercise control of land that they do not have the right to enter or exercise control of.

Another important example is the limits on the permissible use of funds from the Department of Justice settlement fund. This legislation would subject federal agencies to state court injunctions. However, according to the Department of Justice, federal agencies will not have the ability to comply with state court injunctions regarding formerly owned sites, because injunctive relief cannot be covered under the settlement fund. An amendment during Committee consideration eliminated criminal liability for federal employees caught in potential conflicts between state requirements and federal restrictions on use of funds, but did not address the conflict itself.

APPLICATION OF STATE PROCEDURAL REQUIREMENTS TO FEDERAL FACILITIES UNDER H.R. 2318

This bill will require federal facilities to comply with state substantive and procedural requirements, without exception or waiver, regardless of whether those requirements conflict with federal requirements. This change could allow states to impose costlier cleanup actions on federal facilities than are supported by the National Contingency Plan.

The effect of the bill, according to the Department of Defense, would be to disrupt the national priority scheme in which the most

[7] Letter from David Bearden, Specialist in Environmental Policy, Congressional Research Service, to Chairman John Shimkus (Jun. 26, 2013); the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499.

[8] Briefing by the Department of Defense and the Department of Justice Staff, to House Committee on Energy and Commerce Majority and Minority Staff (Jun. 17, 2013).

contaminated federal sites are cleaned up first, increase litigation, delay cleanups and waste limited resources. The majority has not rebutted these concerns.

CONCLUSION

Both the Department of Defense and the Department of Justice have offered to assist the Committee in the development of legislation in order to ensure that any legislation passed by the House is workable and on sound public policy grounds. It is unfortunate that the majority has not accepted this offer. However, without a clear articulation of the legislation's policy goals and a concentrated effort to address real issues in achieving those goals, this legislation is not ready for serious consideration. Should the majority decide to devote adequate effort to this issue, we'd be happy to work with them.

For the reasons stated above, we dissent from the views expressed in the Committee's report, and urge the majority to undertake serious bipartisan oversight of the Superfund program and federal facility cleanup in place of this legislation.

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