THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

May 14, 2013

To: Members of the Subcommittee on Environment and the Economy

From: Majority Committee Staff

Re: Hearing on three legislative proposals entitled the "Federal and State Partnership for Environmental Protection Act of 2013;" the "Reducing Excessive Deadline Obligations Act of 2013;" and the "Federal Facility Accountability Act of 2013."

On Friday, May 17, 2013, at 9:30 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Environment and the Economy will hold a hearing on three legislative proposals entitled the "Federal and State Partnership for Environmental Protection Act of 2013;" the "Reducing Excessive Deadline Obligations Act of 2013;" and the "Federal Facility Accountability Act of 2013." Witnesses are by invitation only.

I. WITNESSES

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 Section
Colorado Department of Law

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
Environmental Protection Agency
(Will submit written testimony for the record.)

Additional witnesses may be announced prior to the hearing.

II. THE REDUCING EXCESSIVE DEADLINE OBLIGATIONS (REDO) ACT OF 2013

Section 2002(b) of the Solid Waste Disposal Act (also referred to as the Resource Conservation and Recovery Act, or RCRA) requires the Administrator of the U.S. Environmental Protection Agency (EPA) to review and, where necessary, revise each regulation promulgated under RCRA not less frequently than once every three years. The three year deadline has proven to be impracticable. The process of reviewing and revising RCRA regulations can take significantly longer than three years and missing the statutory deadline will lead to litigation in which the EPA may be forced to establish unworkable deadlines for the completion of the review/revision process. This hearing will explore whether section 2002(b) should be adjusted to provide the Administrator more flexibility in reviewing and revising regulations.

The Reducing Excessive Deadline Obligations (REDO) Act would permit EPA to review and revise regulations as the Administrator determines to be appropriate.

The REDO Act also would amend section 108(b)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by striking the out-of-date requirement that, not later than December 11, 1983, the President identify classes of facilities to develop financial assurance regulations. For more than 25 years, EPA failed to meet the three year requirement and was sued in order to establish a deadline, which EPA has since met pursuant to a court order. In the meantime, States promulgated their own financial assurance laws and regulations. The REDO Act would protect from Federal preemption these State financial assurance laws that are in effect if and when such an EPA regulation is promulgated.

III. THE FEDERAL AND STATE PARTNERSHIP FOR ENVIRONMENTAL PROTECTION ACT OF 2013

The Federal and State Partnership for Environmental Protection Act of 2013 would amend CERCLA to increase the States' role in the CERCLA process. CERCLA already provides some measure of State involvement and, in practice, EPA may include the States in some manner. The Federal and State Partnership for Environmental Protection Act, however, amends the statute in several ways to clarify and confirm the roll of the States in the CERCLA cleanup process. Section 2 of the bill amends sections 104(a)(2), 104(c)(2), 104(c)(4), and 120(f) of CERCLA to make it clear that EPA will consult with States in undertaking a removal action and during the process of selecting a remedial action.

CERCLA currently allows States to receive credit for certain monetary expenditures towards their 10 percent cost share requirement under CERCLA section 104(c)(3). Section 3 of the bill amends section 104(c)(5) to allow States to get credit for in-kind contributions, such as contributions of real property, equipment, goods, and services that are provided for the removal or remedial action at the facility. It also allows amounts derived from materials recycled,

recovered, or reclaimed from the facility to fund or offset all or a portion of the cost of a removal or remedial action.

CERCLA currently provides States a roll in listing sites on the National Priorities List (NPL). Section 4 of the bill enhances the States' role in listing sites on the NPL and seeks to provide States with transparency regarding listing decisions made by EPA. Section 4 (a) would amend section 105(a)(8)(B) of CERCLA to (1) provide 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 to the State the basis for not including the site. It also strikes the concept of the "highest priority facilities" and the "top priority among known response targets"; and (2) allow States, not more than once every 5 years, to designate to the NPL a facility that meets the listing criteria.

Section 4(b) would amend section 121(f)(1)(C) of CERCLA by allowing for State concurrence when adding or deleting sites from the NPL.

Section 5 of the bill would add a provision to CERCLA section 113(h) allowing for judicial review of the selection of a remedy under section 104(c)(4) over the written objection of the State.

IV. THE FEDERAL FACILITY ACCOUNTABILITY ACT OF 2013

Subsection (b) of the Federal Facility Accountability Act of 2013 would amend section 120(a)(2) of CERCLA by making the guidelines, rules, regulations, and criteria applicable to response actions for facilities where 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.

Subsection (c) would amend section 120(a)(4) of CERCLA. Paragraph (A) would require that Federal facilities must comply with State substantive and procedural requirements regarding response, containment, and remediation relating to hazardous substances in the same manner as any nongovernmental entity.

Paragraph (B) contains an express waiver of U.S. immunity otherwise applicable with respect to State substantive or procedural requirements, and provides that neither the United States nor any agent, employee, or officer of the U.S. shall be immune or exempt from injunctive relief. However, paragraph (B) also provides that no agent, employee, or officer of the U.S. 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 his or her official duties. While this paragraph makes agents, employees, or officers of the U.S. subject to criminal sanctions under State substantive or procedural requirements or CERCLA, it provides that no department, agency, or instrumentality of the executive, legislative, or judicial branch shall be subject to such sanction.

Paragraph (C) specifies that the State substantive and procedural requirements to which the United States would be subject includes administrative orders, injunctive relief, civil fines and penalties, and reasonable service charges or oversight costs.

Paragraph (D) specifies that reasonable service charges or oversight costs includes 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.

Section 3 of the Federal Facility Accountability Act would amend section 115 of CERCLA to allow EPA to review (or a State to request review by EPA of) 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 CERCLA.

V. ISSUES

CERCLA has been implemented for more than 30 years. Some areas of CERCLA work well and further the goal of getting contaminated sites cleaned up. However, there are areas of the law that could be improved upon. The purpose of this legislative hearing is to explore potential areas of revision, including discussion of:

- removing outdated statutory deadlines and exploring the issue of preemption under CERCLA;
- the State role in remedy selection and what can be done to enhance that role;
- the NPL listing process and what can be done to improve it;
- State credit towards cost-share requirements under CERCLA; and,
- the waiver of sovereign immunity under CERCLA and in particular whether certain aspects of State law should be applied to Federal facilities or agencies.

VI. STAFF CONTACTS

For additional information on the hearing, please contact Tina Richards or David McCarthy at (202) 225-2927.