

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

May 17, 2013

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

CERCLA SUPERFUND PROGRAM

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

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

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

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

LEGISLATIVE PROPOSALS

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

Federal and State Partnership for Environmental Protection Act of 2013

Consultation with States

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

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

State Credit for Other Contributions

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

State Concurrence with Listing on the National Priorities List

The proposal amends CERCLA Section 105 by adding a statutory requirement that EPA cannot list a site on the NPL if a state objects to listing. EPA's current policy and practice¹ is to not list a site without state concurrence, therefore, this legislative proposal is unnecessary. In addition, there are important policy caveats to EPA's policy that are not addressed in the legislative proposal. Under current policy, EPA reserves its right to exercise its statutory listing authority when a state is a liable party under CERCLA, when a release of hazardous substances or pollutants and contaminants have crossed state lines, or where the Agency for Toxic Substances and Disease Registry has issued a public health advisory.

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

Review of Remedy Selection

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

FEDERAL FACILITY ACCOUNTABILITY ACT of 2013

Federal Facilities

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

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

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

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

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

The legislative proposal amends Section 108 of CERCLA to delete the requirement for the President (authority delegated to EPA) to identify, within 3 years of enactment of CERCLA, classes of facilities for which financial responsibility shall first be developed. EPA has complied with the identification and notice requirements which would be amended by this provision in a federal Register Notices published in July 2009² and December 2009. The legislative proposal also amends Section 108 by stating that financial responsibility requirements promulgated by the President (authority delegated to EPA), shall not preempt any state financial responsibility requirements existing at the time of EPA promulgated requirements. EPA has been evaluating the state preemption issue under CERCLA Section 108(b) and is committed to working with the states as we evaluate approaches for addressing financial responsibility.

Review of Regulations Under the Solid Waste Disposal Act

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

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

CONCLUSION

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