UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable John Shimkus
Chairman, Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your June 12, 2013, letter requesting responses to Questions for the Record following the May 17, 2013, House Energy and Commerce Committee, Subcommittee on Environment and the Economy hearing on legislative proposals entitled the "Federal and State Partnership for Environmental Protection Act of 2013"; the "Reducing Excessive Deadline Obligations Act of 2013"; and the "Federal Facility Accountability Act of 2013".

The responses to the questions are provided as an enclosure to this letter. If you have any further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

Laura Vaught
Associate Administrator

Enclosure

cc: The Honorable Paul Tonko, Ranking Member
Subcommittee on Environment and the Economy

Enclosure

U.S. EPA Responses to Questions for the Record
House Energy and Commerce Committee
Subcommittee on Environment and the Economy
May 17, 2013 Hearing on Legislative Proposals Entitled the "Federal and State Partnership for Environmental Protection Act of 2013"; the "Reducing Excessive Deadline Obligations Act of 2013"; and the "Federal Facility Accountability Act of 2013"

The Honorable John Shimkus

Q1. Does EPA routinely accept State institutional control laws as legally applicable or relevant and appropriate requirements under CERCLA 121? Does that vary from Region to Region?

Answer: All or portions of state institutional control (IC) laws may potentially constitute applicable, or relevant and appropriate requirements (ARARs) on a site-specific basis, depending on the specifics of the state law and site-specific circumstances. All ARARs decisions are made on a site-specific basis and are documented in the appropriate site decision document (e.g., Record of Decision, ROD Amendment).

In 2012, the EPA issued guidance titled: "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites" (OSWER 9355.0-89, Dec. 2012) (2012 IC guidance) that provides overarching direction on the use of ICs. The EPA regions are cognizant of the guidance and are making ARARs decisions given the specifics of the situation. The 2012 IC guidance states the following:

As with other statutory or regulatory provisions, the EPA may evaluate a state IC law or regulation to determine whether all or a portion of the IC law or regulation is a potential ARAR, consistent with CERCLA, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and existing agency guidance and policies. Such ARAR determinations typically are made on a site-specific basis considering the circumstances of the release, an analysis of the specific statutory and regulatory provisions, and a number of other factors [See footnote 13 --For additional guidance on ARARs under CERCLA, see 40 C.F.R. §300.5 and 40 C.F.R. §300.400(g) of the NCP and *CERCLA Compliance with Other Laws Manual*, EPA 540/G-89/006, August 1988, pages 1-10 through 1-12].

In general, any substantive portion of a state IC law or regulation that meets the requirements of CERCLA §121(d) and is consistent with the NCP (e.g., 40 C.F.R. §300.400(g)(4)) may be considered as a potential ARAR. Substantive standards typically establish a level or standard of control, and may include a narrative requirement. In the context of ICs, a substantive requirement could be one that, for example, is designed to protect human health and the environment by requiring land use or activity use restrictions on property with residual contamination where that residual contamination makes the property unsuitable for specific land uses.

As a policy matter, a portion of a state IC law or regulation that requires particular mechanisms or procedures (e.g., state-approved recordation) to implement the IC may be considered part of the substantive requirement if it provides for enforceability of the IC. Procedural requirements tied to discretionary state processes that could result in inconsistent applications of a state IC law or regulation generally would be considered administrative in nature (and not ARARs). For example, a provision in a

state IC law or regulation that allows or requires state approval of a proprietary control, or grants authority to the state to modify or terminate a proprietary control without specified objective factors and meaningful opportunity for public participation generally would not constitute a standard that represents an ARAR.

In some cases, a portion of a state IC law or regulation that is determined not to be an ARAR may be identified by the region in a CERCLA decision document as a to-be-considered (TBC) criteria [See 40 C.F.R. Section 300.400(g)(3)]. In appropriate circumstances, TBCs are used to help ensure the long-term protectiveness of the response action.

Q2. Do other federal agencies routinely accept State institutional control laws as legally applicable or relevant and appropriate requirements under CERCLA? Please provide details responding to this question for each separate federal agency for which you have information.

Answer: All or portions of state institutional control (IC) laws may potentially constitute applicable, or relevant and appropriate requirements (ARARs) on a site-specific basis, depending on the specifics of the law and site-specific circumstances. ARARs decisions are made on a site-specific basis and are documented in the appropriate site decision document (e.g., Record of Decision, ROD Amendment). The Department of Defense, the Department of Energy, and other federal agencies can speak to their particular agency practices.

Q3. Does EPA require compliance with State institutional control laws and regulations when CERCLA remedies do not achieve unrestricted use standards? Does that vary across the Regions?

Answer: If action is determined to be needed at a site under CERCLA, an IC may be appropriate to evaluate as part of the response action to ensure the protectiveness of the remedy, especially in cases where the remedy will not achieve unrestricted site use. Where action is needed and where the state has existing IC laws and regulations, the EPA will consider whether these are "applicable or relevant and appropriate requirements" (ARAR) in selecting a response action. If they are an ARAR, these requirements must be met or waived. The NCP permits six types of ARAR waivers. State IC laws or regulations that are not considered an ARAR, may still be considered by the EPA in developing, proposing, and selecting appropriate response strategies for a site. However, it is not required for the EPA to comply with these laws and regulations in selecting a site remedy. This guidance applies to all regions.

Q4. Please provide documentation regarding EPA's policy of seeking State concurrence before proposing a site to the National Priorities List – including: regulations (if applicable), guidance, memoranda, and any correspondence with or among the Regions.

Answer: In 1996 and 1997, the EPA issued two guidance memoranda describing the process by which the agency would seek state support prior to proposing a site to the National Priorities List (NPL). These two guidance memoranda remain in effect and can be found at http://www.epa.gov/superfund/sites/npl/hrsres/policy/govlet.pdf.

Recently, the EPA initiated a more structured approach for the process by which state and tribal input on NPL listing decisions is solicited. A model letter has been developed for use when requesting state and tribal support for NPL listing. The model letter 1) explains the concerns at the site and the EPA's

rationale for proceeding; 2) requests an explanation of how the state intends to address the site if placement on the NPL is not favored; and 3) emphasizes the transparent nature of the process by informing states that information on their responses will be publicly available. This model letter is available at: http://www.epa.gov/superfund/sites/npl/hrsres/policy/modellet.pdf.

This model letter was prepared after discussions with regions and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). Additional state correspondence with the EPA related to specific site proposal requests can be found at: http://www.epa.gov/superfund/sites/query/queryhtm/nplstcor.htm

Q5. Please describe in detail EPA's current policy and practice regarding proposing a site to the National Priorities List – including all the steps for listing a site to the NPL and identify the State role, if any, in each step.

Answer: Listing a site on the National Priorities List (NPL) begins, generally, with a site assessment, which is often performed by a state program. The EPA works with the state (or tribe, if the site is located entirely on tribal lands) to assess whether a CERCLA eligible release has occurred. This is the Preliminary Assessment (PA) and Site Inspection (SI) part of the process. Once assessment is complete, the EPA, in consultation with the state, makes a decision regarding the need for further action. Factors that determine whether listing on the NPL is warranted include whether the site scored higher than the 28.5 Hazard Ranking System (HRS) screening threshold; whether site cleanup would be more appropriate under a state cleanup program, or whether the site would be best addressed using a Superfund Alternative Approach. If a decision is made by the EPA and the state to proceed with the NPL listing option, the EPA will seek formal concurrence from the state and will begin preparation of a HRS scoring package.

The EPA is responsible for preparing the HRS documentation record supporting the score. To assist in the preparation of HRS documentation, the EPA may use contractors or states under cooperative agreements. Once a site's HRS package has been prepared, the EPA will include it in the next scheduled NPL proposed rule. The EPA generally issues NPL rules twice a year. If we receive comments, the EPA will address those comments prior to placing the site on the NPL. States often provide additional information to the EPA to support in addressing the comments received.

Under Section 105(h), the EPA generally will defer final listing if a state requests deferral to a state voluntary cleanup and certain conditions related to progress toward cleanup and cleanup agreements are met. The EPA may decline to defer, or elect to discontinue a deferral if the state, as an owner or operator or a significant contributor of hazardous substances is a potentially responsible party; the criteria under the NCP for issuance of health advisory have been met; or conditions related to progress toward cleanup and cleanup agreements are no longer being met.

a. Please also describe EPA's practice, if any, of providing information to a State that proposes a site for listing regarding the decision to list/not list a site.

Answer: If a state recommends a site for listing, the EPA works in close coordination with the state. The EPA and the state will examine various alternatives and jointly determine the best approach. If listing is preferred, the EPA will either develop the HRS package or assist the state in doing so. The EPA will inform the state if more information is needed to support the site score or if the site does not score high enough to be eligible for the NPL. Listing correspondence is placed on the EPA's state

correspondence website. Materials may not be placed on the web site where the site is considered a federal facility and negotiations are occurring between the EPA and another federal agency. Internal correspondence between the agencies or between the EPA and private PRPs is deliberative in nature and may not be made publicly available.

b. Is the documentation regarding the listing decision – including correspondence with the Office of Management and Budget – available to the State that proposed the site for listing?

Answer: NPL listing does not constitute "significant" rulemaking under Executive Order 12866 for purposes of OMB review. Documentation supporting the NPL rulemaking, including all of the Hazard Ranking System scoring material, is available to the state once the site is proposed for NPL addition. The state is an active participant in the listing process as it is the EPA's policy to formally request in writing the position of the states (and tribes where applicable) on sites that the EPA is considering for listing. Please see http://www.epa.gov/superfund/sites/query/queryhtm/nplstcor.htm for more information on the state concurrence policy.

Q6. Is it EPA's policy to automatically list a site that a State proposes to the NPL under Section 105(a)(8)(B)? Why or why not?

Answer: The EPA's practice is to consider for listing any site recommended by a state that meets the listing criteria.

a. What is EPA's policy and practice for deciding whether sites that are proposed by States will be listed on the NPL?

Answer: Other than two exceptions discussed below, the site would have to score 28.5 on the Hazard Ranking System (HRS) or above to be eligible. In addition, the EPA would want to determine whether other policy or statutory constraints (such as deferral to RCRA policy, petroleum exclusion statutory exemption, etc) were applicable. The EPA would need to work with other federal agencies if the site was considered a federal facility site to determine whether particular statutory authorities under which those agencies operate would provide a more appropriate avenue for addressing the contamination at the particular site than NPL listing.

There are two circumstances under which the EPA would list a site regardless of the HRS score. The first is where the state deems the site its "highest priority facility," as provided under CERCLA Section 105(a)(8)(B). This is commonly known as the "silver bullet" or "state pick." The second is when the site meets the Agency for Toxic Substances and Disease Registry (ASTDR) health advisory listing criteria, as provided under 40 CFR 300.425(c)(3).

b. Does the policy and practice for listing sites proposed by States vary from Region to Region?

Answer: While the EPA regions may recommend sites for listing, the authority to list sites resides with the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) in the EPA headquarters (HQ). While the policy applies equally to each state, variation does occur among state programs, as some states more strongly pursue listing of sites, while others may prefer to use state authorities whenever possible, seeking federal assistance as needed.

Q7. Please describe in detail EPA's current policy and practice regarding consultation with States in selecting a remedial action and also respond to the following:

Answer: CERCLA outlines specific requirements with regard to consultation with states through the remedy selection and implementation process. As a general matter, the region (together with the lead agency, if it is a federal facility site) involves the state in discussions related to the site early in the process and continues this relationship throughout. This involvement meets the standards established by CERCLA, but generally provides more frequent involvement and consultation with the state than required. The frequency and nature of the dialogue is determined by the state, the nature of the site and the state's desires for involvement on a site-specific basis.

a. Does interpretation or implementation of the Agency's policy regarding consultation with states in selecting a remedial action vary among Regions?

Answer: All the EPA regions follow the NCP requirements for state involvement in selection of remedy. This includes seeking concurrence from the state on proposed plans. While the degree of consultation may vary among sites, this is based on site-specific circumstances and interest rather than regional differences.

b. Please describe EPA's interpretation of Section 104(c)(2) that requires that the Agency consult with affected States *before* determining an appropriate remedial action. Identify the specific points(s) in the remedy selection process that EPA consults with an affected state and describe, in detail, the consultation process.

Answer: CERCLA 121(f)(1) required the EPA to promulgate regulations for substantial and meaningful involvement by each state in initiation, development, and selection of remedial response actions to be taken in that state. The requirement regarding consultation with states in selecting a remedial action is outlined in the NCP in section 300.500 and 300.515.

One document that provides supporting guidance is titled: "A Guide to Preparing Superfund Proposed Plans, Records, of Decision, and Other Remedy Selection Decisions" (OSWER 9200.1-23.P, July 1999). Section 1.2.2 provides a discussion of lead and support agency roles in the remedial response process.

A state may function as the lead-agency for fund-financed remedial action or as a support-agency. In either case, the requirement for interaction between the EPA and the state must meet the standards set forth in the NCP. Section 300.515(d) relating to the remedial investigation/feasibility study leading up to the decision document includes providing states with the opportunity to provide timely identification of regulations that may constitute applicable, or relevant and appropriate requirements (ARARs). Section 300.515(e) relating to the state involvement in the decision requires the following:

"(e) <u>State involvement in selection of remedy</u>. (1) Both EPA and the state shall be involved in preliminary discussions of the alternatives addressed in the FS prior to preparation of the proposed plan and ROD. At the conclusion of the RI/FS, the lead agency, in conjunction with the support agency, shall develop a proposed plan. The support agency shall have an opportunity to comment on the plan. The lead agency shall publish a notice of availability of the RI/FS report and a brief analysis of the proposed plan pursuant to [Section] 300.430(e) and (f). Included in the proposed plan shall be a statement that the lead and support agencies have reached agreement or, where this is not the case, a statement explaining the concerns of the support agency with the lead agency's proposed plan..."

"(2)(i) EPA and the state shall identify, at least annually, sites for which RODs will be prepared during the next fiscal year, in accordance with [Section] 300.515(h)(1). For all EPA-lead sites, EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy. For Fund-financed state-lead sites, EPA and the state shall designate sites, in a site-specific agreement, for which the state shall prepare the ROD and seek EPA's concurrence and adoption of the remedy specified therein, and sites for which EPA shall prepare the ROD and seek the state's concurrence. EPA and the state may designate sites for which the state shall prepare the ROD for non-Fund-financed state-lead enforcement response actions (i.e., actions taken under state law) at an NPL site. The state may seek EPA's concurrence in the remedy specified therein. Either EPA or the state may choose not to designate a site as state-lead."

Further, Section 300.515(h) relating to remedy selection requires the following:
"(1) Annual consultations. EPA shall conduct consultations with states at least annually to establish priorities and identify and document in writing the lead for remedial and enforcement response for each NPL site within the state for the upcoming fiscal year. States shall be given the opportunity to participate in long-term planning efforts for remedial and enforcement response during these annual consultations.

(2) Identification of ARARs and TBCs. The lead and support agencies shall discuss potential ARARs during the scoping of the RI/FS. The lead agency shall request potential ARARs from the support agency no later than the time that the site characterization data are available. The support agency shall communicate in writing those potential ARARs to the lead agency within 30 working days of receipt of the lead agency request for these ARARs. The lead and support agencies may also discuss and communicate other pertinent advisories, criteria, or guidance to be considered (TBCs). After the initial screening of alternatives has been completed but prior to initiation of the comparative analysis conducted during the detailed analysis phase of the FS, the lead agency shall request that the support agency communicate any additional requirements that are applicable or relevant and appropriate to the alternatives contemplated within 30 working days of receipt of this request. The lead agency shall thereafter consult the support agency to ensure that identified ARARs and TBCs are updated as appropriate.

(3) Support agency review of lead agency documents. The lead agency shall provide the support agency an opportunity to review and comment on the RI/FS, proposed plan, ROD, and remedial design, and any proposed determinations on potential ARARs and TBCs. The support agency shall have a minimum of 10 working days and a maximum of 15 working days to provide comments to the lead agency on the RI/FS, ROD, ARAR/TBC determinations, and remedial design. The support agency shall have a minimum of five working days and a maximum of 10 working days to comment on the proposed plan."

In practice, the EPA meets and exceeds the NCP requirements related to state coordination and consultation. The specifics are determined on a site-specific basis in coordination with the state.

c. Your written testimony states that shifting the statutory timeframe for EPA-State consultation could "potentially generate uncertainty and delays" – please explain what the potential uncertainty and/or delays that may result and explain why it is the Agency's position that uncertainty/delays may result.

Answer: The current statutory and regulatory process affords states meaningful involvement and provides avenues for the states to pursue if they disagree with the resolution of a remedy issue. (See response to Question 7d).

d. Describe the State role in the selection of the remedial action.

Answer: Under CERCLA, the President selects the remedial alternative (See CERCLA 104 (c)(4)). However, the lead agency (for example, the EPA) shall provide the support agency (e.g., the state) an opportunity to review and comment on the RI/FS, proposed plan, ROD, and remedial design, and any proposed determinations on potential ARARs and TBCs. State acceptance is one of nine criteria for the evaluation of remedial alternatives and in the selection of a remedy as described by the NCP in Section 300.430.

In accordance with 40 CFR 300.515(e)(2)(i), "(f)or all EPA-lead sites, the EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy." However, "State concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, i.e., signing a ROD, nor is the EPA's concurrence a prerequisite to a state's selecting a remedy at a non-Fund financed state-lead enforcement site under state law (See the NCP section 300.515(e)(2)(ii))."

For Superfund lead response actions, states have the discretion of not to enter into the state superfund contract or cooperative agreement and thereby preventing implementing of the remedy. Under CERCLA Section 104 (c):
"(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; ..."

e. How are the long-term operation and maintenance costs which will be borne by the States calculated? for what duration of time? and how is this information communicated to the States for their consideration during the remedy selection process? to what extent and how is the long-term financial burden to the State taken into account as a part of the remedy selection? Does the State have the authority to reject a remedial alternative from consideration due to long-term operation and maintenance costs?

Answer: In the Superfund program, the remedial investigation/feasibility study (RI/FS) is used to characterize the nature and extent of the risks at hazardous waste sites and to evaluate remedial alternatives. During the FS, cost estimates for capital (construction), operation and maintenance (O&M) and total present worth for each remedial alternative are developed as noted in EPA guidance titled: "Guidance for Conducting Remedial Investigations and Feasibility Studies (RI/FS) under CERCLA, Interim Final" (OSWER Directive 9355.3-01, 1988). In accordance with CERCLA, see 40 CFR §300.430(e)(9)(iii)(G), costs including annual and net present value of O&M costs are considered as one of the nine criteria used in the FS to evaluate Superfund remedial alternatives.

The EPA's cost estimating guidance titled: "A Guide to Developing and Documenting Cost Estimates" (OSWER Directive 93355.0.75, 2000) provides extensive information on the development of O&M cost estimates. The goal of this guidance is to improve the consistency, completeness and accuracy of Superfund cost estimates during the remedy selection process.

Pursuant to the 2000 EPA guidance cited above, O&M costs are those post-construction costs necessary to ensure or verify the continued effectiveness of a remedial action. O&M costs are typically estimated

on an annual basis and include all labor, equipment, and material costs, including overhead and profit, associated with activities such as monitoring; operating and maintaining extraction, containment, or treatment systems; and disposal.

Remedial actions typically involve construction costs in the early phases of a project and O&M costs in later years to implement and maintain the remedy. Present value analysis is a standard technique often used to compare expenditures which may occur over different time periods and may have varying O&M costs. This allows for comparison of different alternatives on the basis of a single cost figure. The 2000 EPA guidance cited above provides specific information on implementing this process for Superfund sites.

A key aspect of the present value analysis is the discount rate, which is similar to an interest rate and is used to account for the time value of money. Per the 2000 EPA cost estimating guidance: EPA policy on the use of discount rates for RI/FS cost analyses is stated in the preamble to the NCP (55 FR 8722) and in the OSWER Directive 9355.3-20 entitled '*Revisions to OMB Circular A-94 on Guidelines and Discount Rates for Benefit-Cost Analysis*' (OSWER Directive 9355.3-20, 1993). Based on the NCP and this directive, a discount rate of 7% should be used in developing present value cost estimates for remedial alternatives during the FS.

The duration of O&M varies with the specific operating conditions and requirements associated with a given cleanup. In addition, the O&M requirements may vary over the full duration of the cleanup. Communication between the federal and state agencies begins early in the remedial action process and helps lay the foundation for successful remedy implementation. In accordance with CERCLA §121, the state participates "in the long-term planning process for all remedial sites within the State." The lead regional office typically works closely with their counterparts at the state (and tribe, as appropriate) during scoping and development of remedial alternatives. This cooperation typically extends to reviewing drafts of remedy documents for the site, discussing and/or concurring with the site's decision document, and receiving and/or reviewing drafts of remedial design documents, remedial action, monitoring and operations and maintenance documents.

Before the EPA can undertake a fund-financed remedial action, CERCLA Section 104(c)(3) requires the agency to enter into a Superfund State Contract (SSC) or Cooperative Agreement with the state. The SSC is a contract used to document assurances including state payment assurance for its remedial action cost share. In the SSC, the state assures that it will assume all future operation and maintenance of the remedy.

The financial burden to the state is one of many factors considered during the remedy selection process. In accordance with the EPA guidance titled: "A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents" OSWER Directive 9200.1-23P, 1999), the FS uses a nine criteria analysis to evaluate the alternatives and compare them to one another. Cost, including capital, O&M and present worth, is one of the nine criteria. Selection of the preferred alternative is presented in the site's decision document with an explanation of the balance of trade-offs among the remedial alternatives.

The state has the authority to not concur with a selected remedy due to O&M costs or other reasons. In accordance with 40 CFR §300.515(e)(2)(i), "(f)or all EPA-lead sites, EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy." However, "State concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, i.e., signing a ROD, nor is

EPA's concurrence a prerequisite to a state's selecting a remedy at a non-Fund financed state-lead enforcement site under state law (40 CFR § 300.515(e)(2)(ii))."

f. During the hearing, the ASTSWMO witness provided an example of a remedy component (a corroded pipe) that was in poor operational condition at the time the State became responsible for the operation and maintenance, which resulted in the State incurring unanticipated maintenance costs at the outset of the operation and maintenance period. Does EPA ensure that all remedy components are in proper working order and condition before turning the remedy over to the responsibility of the State to prevent such occurrences? If so, please describe in detail how.

Answer: The EPA wants an effective transfer of a Superfund site's remedy to a state, ensuring that all remedy components are in proper working order and in good condition for the state to assume O&M of the site remedy in accordance with the NCP and associated guidance. There are multiple opportunities for the state and the EPA to work together as the site's remedy is determined, through the design and construction of the remedy, and into the operation of the remedy.

The process requires joint inspection of the treatment system at various stages and allows the EPA and the state to determine whether the remedy has been constructed in accordance with the site decision document and remedial design documents, and to develop a list of repairs, replacements, or adjustments that might be necessary before operation and maintenance responsibility is transferred to the state.

The EPA recognizes that, in some cases, treatment system components may need to be repaired or replaced before transfer to the state. During the Remedial Action (RA) and Long Term Response Action (LTRA) stages, major considerations should include updating the O&M Plan and encouraging state officials to visit the site during construction and remedy operation. The EPA guidance entitled "Transfer of Long-Term Response Action Projects to States" (OSWER Directive 9355.0-81FS, July 2003) includes a checklist of considerations that the region and state can follow over the life of a project to minimize issues for O&M transfer.

In certain site-specific circumstances, the EPA may determine that it is appropriate to pay or partially pay for certain repairs or modifications to operating remedies even though a state has assumed responsibility for O&M. The EPA guidance titled: "Directive on Paying for Remedy Repairs or Modifications during the State-Funded Period of Operation and Maintenance" (OSWER Directive 9375.2-12, April 2007) includes considerations for determining whether it is appropriate for the Agency to pay some or all of the costs to repair or modify a remedy after a state has assumed responsibility for O&M. These may include such things as a new, previously not identified contaminant of concern which requires a fundamental remedy change, an Applicable or Relevant and Appropriate Requirement (ARAR) change that requires a more stringent clean up level than that established in the ROD or a construction defect that affects protectiveness.

Q8. Please describe in detail EPA's current policy and practice regarding consultation with States in selecting a removal action.

a. Does interpretation or implementation of the Agency's policy vary among Regions?

Answer: The NCP states that the "basic framework for the response management structure is a system (e.g., a unified command system) that brings together the functions of the Federal Government, the state government, and the responsible party to achieve an effective and efficient response" (NCP 300.105(d)).

The EPA consults with a state on removal actions conducted in that state and also considers state concerns when conducting removal actions. In practice, the EPA region engages the state so that it is a cooperative partner in the removal action. This can be accomplished by using the structure of the Unified Command/Incident Command System (UC/ICS) in emergency situations or for larger incidents, but also occurs through a less formal process such as periodic meetings and consulting with state counterparts via email and phone. As part of the consultation process, the region typically obtains that state's input about cleanup levels, may formally ask the state to identify state applicable, relevant and appropriate standards or requirements, and discusses operational methods to address the site. The state may also be able to provide relevant expertise. The region makes an effort to understand the history of the site and often determines in advance of initiating removal activities whether the state welcomes the EPA involvement. For emergency response situations, when practicable and considering the immediacy of the threat, the EPA notifies the appropriate state agency before beginning a removal action. For time-critical removal actions, states are kept informed of negotiations concerning site assessment activities and early actions.

Non-time critical removal actions generally allow sufficient time for coordination and consultation with the states as well as stakeholders since it is expected that six months will be available before on-site activities must begin when using this authority. Generally, the EPA works with the state throughout the non-time critical removal actions process. The EPA consults with the state prior to issuance of the engineering evaluation/cost analysis and prior to signature of the Removal Action Memorandum.

Specific to effective communication and coordination, the EPA and the state typically exchange lists of appropriate contacts for a particular site or type of response. All parties should be notified of anticipated, initial, and ongoing site activities and the region may wish to suggest that the state designate a person to be the primary coordinator or contact person with the On-Scene-Coordinator (OSC) for federal-lead removal actions. OSCs are encouraged to meet with states on a periodic basis to discuss ongoing site activities. The region may also utilize the Regional Response Team (RRT) as an opportunity to coordinate and consult with states on priority removal actions.
Implementation and interpretation of removal policy regarding consultation with states on removal actions is consistent across states. State response capabilities vary depending on the type and scope of the response action. Communication and coordination between the EPA and the state is documented in the Removal Action Memorandum and other key site documents such as removal response pollution reports and situation reports.

Q9. To what extent do individual Regions consistently apply EPA Headquarters' policies and interpretations regarding: (1) listing sites on the National Priorities List; (2) consulting with affected States in selecting the appropriate remedy; (3) consulting with affected States in selecting a removal action; and (4) providing credit toward 10% cost share under section 104(c)(5) for State in-kind contributions. Please provide detailed examples and explanations for each of the items listed in (1) through (4) for each Region.

Answer: Generally, it is the EPA's policy and practice to consult with states early and often from the time of site discovery throughout the remedial process including any post-construction long-term operation and maintenance of the remedy. While implementation of this policy generally reflects pre-established expectations for relationships between a region and a specific state as defined in the NCP, it is tailored to site-specific circumstances and the urgency of the response, often in a cooperative agreement, a site-specific Superfund state contract, or a Superfund memorandum of agreement.

In accordance with the NCP, the state is given the opportunity to work with the EPA to establish the rules of engagement to ensure that the states are provided a meaningful role in developing removal and remedial response plans. Every effort is made to involve the state during site assessment, removal, the remedial investigation and feasibility study, in selecting and implementing a response plan and in considering reimbursement of cleanup costs. The EPA generally tailors the frequency and scope of consultations with the states at any stage of a cleanup based on the exigency of the situation, the interests of the state and the nature of the site and response operations. Generally, the EPA regions are fully aware of EPA policies, and apply them when developing state-specific MOAs and Cooperative Agreements.

(1) Listing sites on the National Priorities List.

Answer: With respect to listing sites on the NPL, the EPA requests state concurrence prior to listing. This process is consistently applied. If the EPA region recommends proposal to or listing on the NPL when the state is opposed, an issue resolution process is employed per the 1997 EPA policy (http://www.epa.gov/superfund/sites/npl/hrsres/policy/stcorr97.pdf). To ensure national consistency in this process, the EPA has developed a model letter that regions use to request state concurrence.

(2) Consulting with affected States in selecting the appropriate remedy.

Answer: All EPA regions follow the NCP requirements for state involvement in selection of remedy. This includes seeking concurrence from the state on proposed plans.

The following link provides regional examples of remedy selection documents that include state concurrence letters:
http://cumulis.epa.gov/superrods/index.cfm?fuseaction=main.search

(3) Consulting with affected States in selecting a removal action.

Answer: Please see the response to Question 8.

The following link provides regional examples of action memoranda that include state information:
http://www.epaosc.org/site/regionmap.aspx

(4) Providing credit toward 10% cost share under section 104(c)(5) for State in-kind contributions.

Answer: A state may meet its statutory obligation to provide 10% cost share toward the fund-financed remedial action costs incurred by the EPA using one or more of the following methods: 1) cash payment; 2) credit; or 3) in-kind services.[1] The state may choose to satisfy part or all of its 10% cost share for remedial action with in-kind services, provided the State has entered into a cooperative agreement with the EPA. Where the EPA has the lead for the remedial action, but the state would like to provide in-kind services to satisfy part, or all, of its cost share, EPA may enter into a support agency cooperative agreement with the state. In that case, the use of the support agency cooperative agreement as a vehicle for providing cost share must be documented in the state superfund contract.

[1] 40 CFR § 35.6285

"In-kind services" are different from "credits." The granting of "credit" towards a state's cost share is specifically authorized under CERCLA 104(c)(5). Credits are direct, out of pocket expenditures of non-federal funds by states for remedial action. Credits are generally considered items like labor costs (FTE), items purchased by the state, or other tangible items for which the state has documentation of cost (e.g., a bill). "In-kind services" are generally items that are donated by third parties, e.g., services, whereby the value of the item is estimated and in-kind contributions are only provided to satisfy cost shares under the terms of a cooperative agreement. In-kind contributions are authorized under OMB common rules applicable to grants and were adopted by the EPA under the EPA grant regulations at 40 CFR Part 31 and Part 25, Subpart O and may only be applied to satisfy a state's cost share where the in-kind contributions are allowable costs under the terms of a cooperative agreement.

States rarely request the use of "in-kind" services to be applied toward satisfying the state cost share, whereas "credit" is used much more frequently. In EPA Region 8, the state of Colorado requested that the donated use of land be considered an "in-kind" service to be applied as its cost share for the Russell Gulch Sediment Control Dam at the Central City/Clear Creek Superfund site. A third party donated a perpetual easement to allow Colorado to access, construct, operate, and maintain a sediment control dam. In EPA Region 10, the state of Idaho requested that costs borne by developers who install barriers to contamination be considered in-kind services that would be applied to the state's cost share at the Coeur d' Alene Superfund Site.

Applicable Regulations:

40 CFR Part 31 are general grant regulations that apply to grants and cooperative agreements to States, Local Governments, or Federally-recognized Indian tribal governments, and 40 CFR Part 35, Subpart O are the cooperative agreement and state superfund contract requirements that supplement the requirements contained in Part 31. Subpart O also cross references Part 31. (See 40 CFR 35.6005.)

Q10. If a State conducts a removal-type action (at State expense) or provides assistance to EPA in conducting a removal action (when under no obligation to do so) such that EPA either does not need to do a removal action and/or the State action ultimately reduces the long-term remedial cost, following EPA's current policy and practice would it be possible for States to get credit for these actions (under 104(c)(3)) towards the State's *10% cost share for the remedial action*?

Answer: CERCLA permits states to receive credit for "amounts expended for remedial action."[2] CERCLA only permits a state to get credit for removal actions if those actions were taken between January 1, 1978 and December 11, 1980.[3] While CERCLA does allow states to receive credit for work conducted prior to listing, the language limits those credits to "expenses for remedial action." [4] The EPA

[2] CERCLA sec. 104(c)(5)(A) provides that a state shall receive a credit for amounts expended *for remedial action*, provided they are direct, out-of-pocket expenditures of non-federal funds.

[3] Sec. 104(c)(5)(C) provides that a state shall be granted a credit against the share of the costs for which it is responsible provided they are direct out-of-pocket non-federal funds expended for cost-eligible *response action between January 1, 1978 and before the enactment of CERCLA*. Response includes removal, remedial planning, and remedial actions.

[4] For work performed prior to listing, 104(c)(5)(B) provides that a state shall receive credit for *expenses for remedial action* at a facility incurred before the listing of the facility on the National Priorities List or before a contract or cooperative agreement is entered into IF: (i) after such [remedial] expenses are incurred the facility is listed on the NPL and a contract or cooperative agreement is entered into for the facility; and (ii) the President determines that such expenses would have been credited to the state under 104(c)(5)(A) had the expenditures been made after listing of the facility on such list.

only approves credit for expenditures legally eligible for credit.

Q11. Does the Agency anticipate changes to the role of State/State participation in the CERCLA process in FY 14 and beyond due to economic and budgetary pressures?
Answer:

Answer: The EPA does not anticipate changing the role provided for state/state participation in the CERCLA process. CERCLA and the NCP currently provide an important and meaningful role for states.

Q12. Of the three bills –what would EPA anticipate would need to be changed in the National Contingency (NCP) to implement the changes? A. Could EPA implement the changes in the legislation without changing the NCP – please be specific regarding the specific provisions of the Federal –State Partnership for Environmental Protection Act and the Federal Facilities Accountability Act. B. Would EPA implement the changes in the Federal –State Partnership for Environmental Protection Act and the Federal Facilities Accountability Act without changing the NCP?

Answer: The EPA has not identified what, if any, changes to the NCP would be needed. The agency has not reached any conclusions as to whether it could implement the draft legislation without changes to the NCP, nor has it reached any conclusions as to whether it would implement the draft legislation without changes to the NCP.

Q13. In the late 1990's/early 2000's, EPA Office of Solid Waste and Emergency Response and States reformed the RCRA Corrective Action process to address lessons learned, to streamline the administrative process, and to improve the remedy effectiveness and efficiency. What similar reforms to the CERCLA remedial process and the NCP have been made to address these same issues?

Answer: Since the inception of Superfund in 1980, the EPA has sought to improve the program by incorporating lessons learned through its experience cleaning up hazardous waste sites. A significant number of program reforms were undertaken beginning as early as 1989. These early efforts included several broad-based studies and three rounds of "administrative reforms" that focused on concerns such as improving enforcement, expediting cleanup response, encouraging community participation, environmental justice, using innovative technologies, and state and tribal empowerment. For additional information please see the EPA web page at:
http://www.epa.gov/superfund/programs/reforms/index.htm.

More recently, OSWER's three-year (FY 2010- FY 2012) Integrated Cleanup Initiative (ICI) sought to use the EPA's assessment and cleanup authorities in a more integrated, transparent, and accountable fashion, to address a greater number of contaminated sites, to accelerate cleanups where ever possible, and put sites back into productive use. The ICI identified opportunities for improvements across all of EPA's land cleanup programs, including the Superfund, Brownfields, Federal Facilities, Resource Conservation and Recovery Act, and Underground Storage Tanks programs. (See the EPA ICI web page for more information on the ICI at http://www.epa.gov/oswer/integratedcleanup.htm)

For example, the EPA worked with the Department of the Navy to develop the "Toolkit for Preparing CERCLA Record of Decisions" (Sept. 2011). This document is designed to help improve the public transparency and understanding of Superfund Records of Decision (RODs) for remedy decisions

through use of advanced data visualization technology. In another instance, the EPA issued a directive in February 2013, that highlights lessons learned from three project management pilot studies designed to explore non-traditional approaches to remedial design and action (See OSWER Directive 9200.2-129, "Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned").

a. What changes *are needed* to the CERCLA Remedial process and the NCP to modernize and streamline the process to implement the similar efficiencies and process improvements that were made to the RCRA CA [corrective action] processes?

Answer: The EPA has a long-standing commitment to the principle of comparability between the RCRA corrective action and CERCLA programs and to the idea that the programs should yield similar remedies in similar circumstances. To further this goal, many guidance documents apply to both program and lessons learned, and remedy effectiveness information is applicable to both programs.

The EPA is committed to the continuous improvement of its operations by taking greater advantage of its site remediation experience as illustrated in the examples above; therefore, changes to the remedial process in the NCP are not needed to maintain the parity between the two programs.

In November 2012, the Superfund remedial program initiated a comprehensive review of its operations to identify options to maintain its effectiveness in achieving its core mission of protecting human health and the environment in the face of diminishing funding availability. The review builds on previous recommendations from the ICI, incorporates actions from ongoing efforts, and includes unique actions developed under the program review. Several areas are being considered in this Program Review to capture important technical developments in the cleanup process, as well as innovations in remedial project management. The final action plan is expected to be completed by December 2013.

Q14. Your written testimony states that "since the inception of the Superfund program, EPA has continually evaluated program implementation and sought ways to improve the effectiveness of the cleanup program. Working with our state and tribal partners, we have instituted a variety of program changes and reforms over the years." Please list the program changes and reforms referred to in this statement and provide specific years(s) that the changes were made.

Answer: Since the inception of Superfund in 1980, the EPA has sought to improve the program by incorporating lessons learned through its extensive experience cleaning up hazardous waste sites.

The EPA began efforts to address administrative changes to improve the Superfund program in 1989 by publishing a "90-Day Study" that focused on concerns such as enforcement, expediting cleanup response, and encouraging community participation. In June 1991, the EPA convened a 30-day task force whose work culminated in initiatives to:

- Set aggressive cleanup targets;
- Streamline the Superfund process;
- Elevate site specific issues that cause delay;
- Accelerate private party cleanups;
- Refocus the debate on Superfund progress; and
- Review risk assessment/risk management policies.

Both the "90-Day Study" and the "30-Day Study" provided the framework for the first set of Superfund administrative improvements. The EPA announced a first round of administrative reforms in June 1993 that established nine new initiatives to:

- Increase enforcement fairness and reduce transaction costs;
- Improve cleanup effectiveness and consistency;
- Expand meaningful public involvement; and
- Enhance the State role in the Superfund program.

The EPA announced a second round of reforms in February 1995. The second round of reforms sought to administratively test or implement many of the proposal's innovations through both pilot projects and new or revised Agency guidance. This round strengthened and improved the program through initiatives in enforcement, public involvement and environmental justice, innovative technology, and state and tribal empowerment.

The EPA introduced the third and final round of "Superfund Reforms" in October 1995. Through a group of 20 initiatives, this round took a "common sense" approach to reform and targeted the concerns of diverse stakeholders. Several reforms in this final round focused on making cleanup decisions more cost-effective and protective of human health and the environment. Other initiatives aimed to reduce litigation and transaction costs, and to keep states and communities more informed and involved in cleanup decisions. For additional information please see the EPA web page at: http://www.epa.gov/superfund/programs/reforms/index.htm.

More recently, OSWER's three-year (FY 2010- FY 2012) Integrated Cleanup Initiative (ICI) sought to use the EPA's assessment and cleanup authorities in a more integrated, transparent, and accountable fashion, to address a greater number of contaminated sites, to accelerate cleanups where ever possible, and put sites back into productive use. The ICI identified opportunities for improvements across all of the EPA's land cleanup programs, including the Superfund, Brownfields, Federal Facilities, Resource Conservation and Recovery Act, and Underground Storage Tanks programs. (See the EPA ICI web page for more information on the ICI: http://www.epa.gov/oswer/integratedcleanup.htm)

For example, the EPA worked with the Department of the Navy to develop the "Toolkit for Preparing CERCLA Record of Decisions" (Sept. 2011). This document is designed to help improve the public transparency and understanding of remedy decisions through use of advanced data visualization technology. In another instance, the EPA issued a directive in February 2013 that highlights lessons learned from three project management pilot studies designed to explore non-traditional approaches to remedial design and action (See OSWER Directive 9200.2-129, "Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned").

a. Please also indicate whether the changes referred to involved revisions of the NCP and provide details regarding the timeframe (date of the proposed rule, date of the final rule, and any other details regarding timing) for the regulatory change.

Answer: The EPA has made a recent change in the NCP to recognize important technological advances. A final rule was issued in the Federal Register on March 18, 2013 entitled "*National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File* (77 FR 66729)."

This revision to the NCP was done in accordance with the EPA's Action Development Process Guidance for EPA Staff on Developing Quality Actions (ADP), beginning in March, 2012, with submission to the EPA's Rule and Policy Information and Development System. Appropriate reviews were conducted by the Agency and the National Response Team, in accordance with Executive Order 12580, as described in the ADP.

On November 7, 2012, the EPA published in the Federal Register a direct final rule entitled *National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File* (77 FR 66729) (hereafter the Direct Final rule). This direct final rule added language to 40 CFR 300.805(c) of the NCP to make the administrative record file more broadly available to the public with computer telecommunications or other electronic means. Concurrently, the EPA published a parallel proposed rule (77 FR 66783) that requested comment on the same change to the NCP. The EPA stated in that direct final rule that if adverse comment was received on the amendment by December 7, 2012, the affected amendment would not take effect and the EPA would publish a timely withdrawal in the Federal Register of the amendment. The EPA received one comment and as a result withdrew the amendment on January 22, 2013 (78 FR 4333). The EPA published the final rule to address the comment received on the amendment and to finalize the NCP revision.

b. For program changes that did not involve regulatory changes to the NCP, please describe in detail the degree to which individual project managers and Regional Offices have implemented these changes and in accordance with Headquarters' guidance and intent. Where there has been inconsistency in the application of the EPA Headquarters guidance and intent, what steps has EPA Headquarters taken to identify and correct such inconsistencies?

Answer: Generally, site managers apply concepts outlined by CERCLA, the NCP, and associated guidance consistently from site to site. However, this does not mean that remediation strategies and outcomes are expected to be the same from site to site. CERCLA, the NCP and associated guidances build an implementation framework that relies upon site-specific data collection, decision making and response action. As a result, Superfund is a program that is applied on a site-by-site basis. This permits the EPA to address the wide variety of contaminant releases (and site conditions) found throughout the country in a cost-effective manner.

Nevertheless, the EPA HQ provides ongoing support for all ten EPA regional offices as they address these sites to ensure that cleanups are conducted consistent with the statute, regulations and relevant guidance. HQ supports Superfund regional offices in a number of ways. For example, HQ regional coordinators provide day-to-day assistance to regional staff and management in reviewing draft documents and strategies, including draft and final decision documents, Five-Year Reviews, and NPL deletion documents. In addition, HQ technical and policy expertise supports required regional consultations, ensures that program polices are given due consideration and that the best science is used to support decisions. Further, a subset of sediment remediation strategies and high cost proposed remedies are reviewed formally by the Contaminated Sediments Technical Advisory Group (CSTAG) and/or the National Remedy Review Board (NRRB). In certain cases, regional managers must brief HQ managers prior to finalizing key site decisions or response strategies in order to ensure appropriate national consistency.

c. For changes that did not involve regulatory changes to the NCP, please describe in detail the degree to which other federal agencies (by agency) have implemented these changes consistently and in accordance with EPA Headquarters guidance and intent. Where there has been

inconsistency in the application of EPA Headquarters guidance and intent, what steps has EPA Headquarters taken to identify and correct such inconsistencies?

Answer: CERCLA Section 120(a)(2) requires federal agencies to comply with the same guidelines, rules, regulations and criteria as those that apply at non-federal facilities, and prohibits federal agencies from adopting or using guidelines, rules, regulations or criteria that are inconsistent with those established by the EPA. As noted in the answer to question 14b, remediation strategies and outcomes are not expected to be the same from site to site, In those instances where the federal facility is on the NPL, CERCLA Section 120(e)(2), requires the responsible federal agency to enter into an interagency agreement, known as federal facility agreements (FFAs), with the EPA. It is through the FFAs that the EPA can help ensure that CERCLA requirements are met for remedial actions at federal facility NPL sites. See responses to Questions 14 d and e below regarding FFAs. In contrast, FFAs are not required for federal facility non-NPL sites. Federal agencies are responsible for ensuring that CERCLA compliance is met at non-NPL sites.

d. What authority does EPA currently (a) have and (b) utilize, to ensure that other federal agencies (by agency) rules, regulations, policies, interpretations and application to sites concerning the implementation of the CERCLA Removal and Remedial Program are consistent with EPA Headquarters rules, regulations, policies, interpretations, and application to sites including:

i. State involvement in decision-making?
ii. Identification of cleanup standards?
iii. Application of NCP requirements?
iv. Application of EPA Headquarters policies and procedures at NPL Sites?
v. Application of EPA Headquarters policies and procedures at non-NPL Sites?

Answer: CERCLA Section 120(a)(2) requires federal agencies to comply with the same guidelines, rules, regulations and criteria for remedial actions at federal facilities as those that apply at non-federal facilities, and prohibits federal agencies from adopting or using guidelines, rules, regulations or criteria that are inconsistent with those established by the EPA.

The EPA cannot prohibit another federal agency from issuing policy or guidance that is inconsistent with EPA rules, regulations, policy, or guidance. This does not however, alter the statutory requirement that agencies comply with CERCLA section 120(a)(2) requirements. EPA has general authority to enforce the substance of CERCLA requirements in Section 120(e)(2), which requires the responsible federal agency, together with the EPA, to enter into interagency agreements known as Federal Facility Agreements (FFAs), at federal facility sites on the National Priorities List (NPL). FFAs require the federal agency to comply with CERCLA, the National Contingency Plan (NCP), and EPA guidance.

Generally, it the EPA's practice to consult with states frequently during the remedial process and development of an FFA. Most states have chosen to participate in the FFAs. Certain states have chosen not to enter into these agreements, but often participate through other means and help influence cleanup decisions. FFAs provide a formal process for state involvement in decision making, identification of cleanup standards, and the application of NCP requirements.

e. To what extent has EPA utilized the authority described in question 14(d)? What difficulties has EPA encountered in exercising these authorities? Please provide specific examples by federal agency.

Answer: A primary EPA authority, whenever federal facility sites are added to the National Priority List (NPL), is the CERCLA Section 120 interagency agreement, known as a Federal Facility Agreement (FFA). To date, there are 171 Federal Facility Agreements for the 174 federal facility sites on the NPL. Under the direction of an FFA, federal site cleanup is carried out as required consistent with requirements in CERCLA, the National Contingency Plan (NCP), and EPA guidance. There are however, some challenges in exercising the EPA's authority in FFAs. Differences in opinions between agencies or the state may arise in the interpretation and implementation of the regulations and guidance documents with respect to site specific conditions. Both Congressional Research Service (CRS) and General Accountability Office (GAO) testimonies before the House Energy and Commerce Committee on May 22, 2013, identified challenges faced by the EPA.

Q15. In your written testimony regarding the Reducing Excessive Deadline Obligation Act you noted that the current statutory provision in 2002(b) of the Solid Waste Disposal Act could pose a "significant resource burden on EPA given the complexity and volume of EPA's RCRA regulations." Please explain why the current statutory provision would cause a "significant resource burden" on the Agency.

Answer: Section 2002(b) requires the agency to both review all regulations promulgated under the Solid Waste Disposal Act, and to complete any revisions the EPA determines to be necessary within a single three year time frame. Given the various analyses required to support any rulemaking, including for example, the analyses required under Executive Order and the Regulatory Flexibility Act, including convening a small business panel, where required, completing even a single rulemaking in a three-year period can be challenging. When coupled with the requirement to complete a review of all regulations within that same time frame, this represents a significant resource burden. The body of regulations promulgated under the Solid Waste Disposal Act is wide ranging and technically complex; for example, these regulations cover municipal solid waste, hazardous waste identification (including hazardous waste listings and characteristics), requirements for generators, transporters, and treatment, storage and disposal facilities, and requirements for state programs.

Q16. If EPA had to review and, if necessary, revise *each regulation promulgated under the Solid Waste Disposal Act,* would the Agency be able to accomplish such a review? Why or why not?

a. If revision of *each regulation promulgated under the Solid Waste Disposal Act* were necessary, would the Agency be able to accomplish such a revision? Why or why not?

Answer: First, we would note that RCRA section 2002(b) requires that "Each regulation promulgated under this Chapter shall be reviewed and, where necessary, revised not less frequently than every three years." Thus, we would not expect that each regulation would need to be revised every three years. However, for those regulations that the EPA determined would need to be revised, whether the agency would be able accomplish such a revision would likely depend on the technical complexity of the regulation. In certain instances, e.g., for highly complex and technical revisions, the EPA believes it may need a longer time frame to complete the rulemaking.

b. What resources (fiscal and personnel) are or would be required to conduct such a review every three years? Does EPA have such resources at its disposal?

Answer: The EPA has not estimated the resources required to conduct such a review every three years.

The Honorable Henry A. Waxman

Q1. Please describe the review that EPA currently carries out under section 2002(b) of RCRA?

Answer: Again, we would note that RCRA section 2002(b) requires that "Each regulation promulgated under this Chapter shall be reviewed and, where necessary, revised not less frequently than every three years." Thus, we would not expect that each regulation would need to be revised every three years. In implementing the EPA programs, the agency determines which program regulations may need revision. How long it would take to accomplish such a revision would likely depend on the technical complexity of the regulation. The EPA does not currently have a formal process in place to implement the requirement under 2002(b) to review and revise, as necessary, all regulations under section 2002(b) of RCRA.

Q2. How many FTE's are currently used to carry out this requirement?

Answer: The EPA does not have an FTE estimate. The Agency does not have a formal process in place to carry out this requirement.

Q3. How many lawsuits have been filed, since 1976, to enforce the deadline in section 2002(b)?

Answer: Three lawsuits have been filed since 1976, but they all relate to agency decisions whether to modify its current regulation of coal combustion residuals. No other lawsuits have been filed.

Q4. EPA currently has in place a policy on seeking State concurrence before proposing a site to the NPL. Please list all the exceptions included in that policy.

Answer: The EPA policy states that the agency will, with limited exceptions, only list a site on the National Priorities List (NPL) after receiving state concurrence. Examples of exceptions are: 1) sites that meet the listing criteria included in the NCP at 40 CFR Section 300.425(c)(3) (the ATSDR public health advisory listing criteria); 2) sites where the State could be a major responsible party; or 3) sites with community-identified conditions that warrant listing. Since the inception of this policy in 1996, the Agency has proposed adding only one site to the NPL over state objection. This proposal listing took place in 1998. The site remains "proposed" but not final. The EPA and the state, in lieu of final listing, are working collaboratively on the cleanup of this site.

When a site is located on the land of a federally- recognized tribe, the concurrence request would go to the tribe rather than the state.

Q5. What, if any, sites have been added to the NPL since adoption of that policy without State concurrence?

Answer: The EPA has not added any sites to the final National Priorities List (NPL) without state concurrence. Since adoption of the 1996 state concurrence policy, only one site, Fox River NRDA/PCB Releases (Wisconsin), has been proposed to the NPL without the concurrence of the state. The site remains "proposed" but not final. The EPA and the state, in lieu of final listing, are working collaboratively on the cleanup of this site.

Q6. What is the current cost-share between states and the federal government for removal actions?

Answer: States only pay cost share for removal actions when the state, or political subdivision, was an operator of the facility at the time of the disposal of the hazardous substance. In these instances, CERCLA requires the state to pay "50% or more" of the fund-financed *response costs,* which include removal, remedial planning, and remedial costs.

Q7. What is the current cost-share between states and the federal government for response actions?

Answer: CERCLA established two categories for cost-share between the states and federal government. The first category of cost share involves a 90/10 split of costs in which the federal government pays 90% of the fund-financed *remedial action* costs and the state pays 10% of the fund-financed *remedial action* costs.

The second category of cost share involves the state paying "50% or more" of the fund-financed *response costs*. This category is only applied when the state, or political subdivision, was an operator of the facility at the time of the disposal of the hazardous substance. "Response costs" include removal, remedial planning, and remedial action costs.

Q8. Where the federal government carries out a removal action, does it apply the costs incurred in carrying out that action towards its cost share for the eventual response action at that site?

Answer: CERCLA only authorizes the federal government to collect cost share from a state for those costs incurred for removal actions if the site is listed on the NPL and the state, or political subdivision, was an operator of the facility at the time of disposal of the hazardous substance. The federal government is not authorized to collect cost share from a state for removal action costs independent of this provision.

Q9. Under section 121 of Superfund, are federal agencies including EPA currently required to evaluate the cost effectiveness of potential response actions?

Answer: Yes, the EPA and other federal agencies currently are required in the remedy selection process to evaluate the cost effectiveness of potential response actions. In addition, the EPA has established the National Remedy Review Board that reviews proposed interim and final Superfund response decisions at both NPL and non-NPL sites for which the proposed remedies cost more than $25 million to help control remedy costs and to promote both consistent and cost-effective decisions.

The remedies that are subject to review include federal facility sites (except for Department of Energy sites – see below), including Formerly Utilized Sites Remedial Action Program (FUSRAP), follow the same review criteria with the exception of non-time-critical removal actions (NTCRAs); federal facility NTCRAs do not undergo Board review unless requested by the federal facility. Decisions at Base Realignment and Closure (BRAC) sites do not undergo Board review. Generally, DOE sites where the primary contaminant is radioactive waste and the proposed remedial action costs more than $75 million will be reviewed. The Board also reviews DOE NPL site NTCRAs where the response action exceeds $30M and involves radioactive waste in soil and groundwater.

Q10. Does section 121 require that analysis to look at the total short- and long-term costs, including operation and maintenance cost for the entire period during which those activities will be required?

Answer: CERCLA Section 121(a) requires that the analysis of alternatives consider both total short-term and long-term cost including O&M for the entire period of operation. The provision requires that in evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

Q11. Under section 121 of Superfund, are response actions which permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substances preferred over other response actions?

Answer: CERCLA 121 (b) establishes a preference for alternatives that permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances. CERCLA 121(b) notes the following:

(b) GENERAL RULES.—(1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment.

EPA primarily focuses consideration of treatment of source materials on those materials that are determined to constitute a principal threat waste. The National Contingency Plan (NCP) preamble further clarified the following:

EPA expects that treatment will be the preferred means by which to address the principal threats posed by a site, wherever practicable. Principal threats are characterized as waste that cannot be reliably controlled in place, such as liquids, highly mobile materials (e.g., solvents), and high concentrations of toxic compounds (e.g., several orders of magnitude above levels that allow for unrestricted use and unlimited exposure). Treatment is less likely to be practicable when sites have large volumes of low concentrations of material, or when the waste is very difficult to handle and treat (e.g., mixed waste of widely varying composition). Specific situations that may limit the use of treatment include sites where: (1) treatment technologies are not technically feasible or are not available within a reasonable timeframe; (2) the extraordinary size or complexity of a site makes implementation of treatment technologies impracticable; (3) implementation of a treatment-based remedy would result in greater overall risk to human health and the environment due to risks posed to workers or the surrounding community during implementation; or (4) severe effects across environmental media resulting from implementation would occur. (See 55 FR 8703, March 8, 1990.)

The remedy decision as to whether treatment is practicable takes into account the NCP nine remedy evaluation criteria plus other EPA Superfund guidance. As noted in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) preamble: CERCLA section 121 states Congress' preference for treatment and permanent remedies, as opposed to simply prevention of exposure through legal controls. The evaluation of the nine criteria (' 300.430(f)(1)(ii)), including cost and other factors, determines the practicability of active measures (i.e., treatment and engineering controls) and the degree to which institutional controls will be included as part of the remedy. (See 55 FR 8707, March 8, 1990).

Q12. What are the least preferred response actions under that section?

Answer: CERCLA 121(b) clarifies that off-site transport and disposal without treatment are the least preferred alternatives. Disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available.

As discussed in the response to question 11 above, consideration of site-specific factors as part of the CERCLA criteria evaluation may result in a decision to not treat hazardous substances and to dispose of the material off-site. This is discussed in the National Contingency Plan (NCP) preamble as follows: EPA agrees with the commenter that off-site disposal without treatment may be selected as the remedy in appropriate circumstances, such as where the site has high volumes of low toxicity waste. However, the statute clearly indicates that this is the least preferred alternative.

Q13. Please describe EPA's track record in meeting the requirements for evaluation of cost-effectiveness and selection of preferred remedies under section 121.

Answer: In accordance with CERCLA and the NCP, all selected remedies must be cost-effective and protective of human health and the environment. In addition, select remedies are required to meet eight other criteria as specified in the NCP. The EPA has consistently met this standard for its decisions under section 121.

CERCLA 121(a) notes the following:

(a) The President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 or secured under section 106 which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective, response.

The NCP preamble notes the following:

Cost-effectiveness is determined in the remedy selection phase, considering the long-term effectiveness and permanence afforded by the alternative, the extent to which the alternative reduces the toxicity, mobility, or volume of the hazardous substances through treatment, the short-term effectiveness of the alternative, and the alternative's cost. (See 55 FR 8722, March 8, 1990.)

CERCLA, at section 121(a), states that "the President shall select appropriate remedial actions ... which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response." Thus, cost-effectiveness is established as a condition for remedy selection, not merely as a consideration during remedial design and implementation. Further in the statute, at section 121(b)(1), Congress again repeats the requirement that only cost-effective remedies are to be selected, as follows: "The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment ... to the maximum extent practicable." Again, cost-effectiveness is cited along with protectiveness as a key factor to consider in selecting the remedy. The EPA believes that the statutory language supports the use of concepts of "cost" and "effectiveness" in this rule's nine evaluation criteria that provide the basis for the remedy selection decision, rather than as factors to be applied after the remedy has been selected. (See 55 FR 8726, March 8, 1990.)

As noted in response to question 11, CERCLA established a preference for use of treatment to the maximum extent practicable. The NCP preamble clarified that treatment for source material is focused on principal threat materials; however, there may be situations where treatment is not practicable. The

determination of the extent to which treatment is practicable takes into account the NCP nine criteria alternatives analysis, plus other EPA Superfund guidance.

Since the inception of the CERCLA program in 1981 through 2011, treatment has been used at 78% of the almost 1,400 NPL sites for which a decision document has been signed for remediation. This statistic does not include sites where a CERCLA response was determined not to be warranted. Based on an analysis of decision documents from FY 2009 through 2011, treatment has been a component of 48% of source control decision documents for those four years. For remedy decision documents that do not involve treatment, the nature of the waste may be such that treatment is not practicable or the waste does not constitute a principal threat. In addition, these three years represent a subset of decision documents for many of these sites; previous decisions or future decisions may address contamination that could warrant consideration of treatment. Generally, the selection of treatment to address source materials has remained relatively constant since FY 1998.

Q14. Can state institutional control laws qualify as legally applicable or relevant and appropriate standards, requirements, criteria, or limitation?

Answer: All or portions of state institutional control (IC) laws may potentially constitute applicable, or relevant and appropriate requirements (ARARs) on a site-specific basis, depending on the specifics of the law and site-specific circumstances. All ARARs decisions are made on a site-specific basis and are documented in the appropriate site decision document (e.g., Record of Decision, ROD Amendment).

In 2012, the EPA issued guidance titled: "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites" (OSWER 9355.0-89, Dec. 2012) (2012 IC guidance) that provides overarching direction on the use of ICs. The EPA Regions are aware of the guidance and are making ARARs decisions based upon site specific situations.

As with other statutory or regulatory provisions, the EPA may evaluate a state IC law or regulation to determine whether all or a portion of the IC law or regulation is a potential ARAR, consistent with CERCLA, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and existing Agency guidance and policies. Such ARAR determinations typically are made on a site-specific basis considering the circumstances of the release, an analysis of the specific statutory and regulatory provisions, and a number of other factors. [See footnote 13 --For additional guidance on ARARs under CERCLA, see 40 C.F.R. §300.5 and 40 C.F.R. §300.400(g) of the NCP and *CERCLA Compliance with Other Laws Manual*, EPA 540/G-89/006, August 1988, pages 1-10 through 1-12]

In general, any substantive portion of a state IC law or regulation that meets the requirements of CERCLA §121(d) and is consistent with the NCP (e.g., 40 C.F.R. §300.400(g)(4)) may be considered as a potential ARAR. Substantive standards typically establish a level or standard of control, and may include a narrative requirement; in the context of ICs, a substantive requirement could be one that, for example, is designed to protect human health and the environment by requiring land use or activity use restrictions on property with residual contamination where that residual contamination makes the property unsuitable for specific land uses.

As a policy matter, a portion of a state IC law or regulation that requires particular mechanisms or procedures (e.g., state-approved recordation) to implement the IC may be considered part of the substantive requirement if it provides for enforceability of the IC. Procedural requirements tied to discretionary state processes that could result in inconsistent applications of a state IC law or regulation

generally would be considered administrative in nature (and not ARARs). For example, a provision in a state IC law or regulation that allows or requires state approval of a proprietary control, or grants authority to the state to modify or terminate a proprietary control without specified objective factors and meaningful opportunity for public participation generally would not constitute a standard that represents an ARAR.

In some cases, a portion of a state IC law or regulation that is determined not to be an ARAR may be identified by the Region in a CERCLA decision document as a to-be-considered (TBC) criteria [See 40 C.F.R. Section 300.400(g)(3)]. In appropriate circumstances, TBCs are used to help ensure the long-term protectiveness of the response action.

Q15. Please describe the rights granted to states under section 121 to require compliance with legally applicable or relevant and appropriate standards, requirements, criteria, and limitations.

Answer: CERCLA section 121 (f) (1) mandates that the state has the opportunity for "substantial and meaningful" involvement in initiation, development and selection of remedial actions. This mandate is codified in the NCP in section 300.500 and 300.515. Section 300.515(d) relating to the remedial investigation/feasibility study leading up to the decision document includes providing states with the opportunity to provide timely identification of regulations that may constitute applicable, or relevant and appropriate requirements.

Section 121(f)(2)((B) grants rights to states to intervene in EPA enforcement actions against potentially responsible parties as follows:
'. . . At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, . . . the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree."

". . . If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action . . . before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree:

Section 121(f)(3) also grants rights to states to intervene in the remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States as follows:

" (A). . . At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation . . . the President shall provide an opportunity

for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.
(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:
(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.
(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.
(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation."
For fund lead response actions, states have the discretion of not signing the state superfund contract or cooperative agreement and thereby preventing implementing of the remedy. CERCLA 104 (c):

"(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; ..."

In addition, states may require compliance with state regulation subsequent to the CERCLA cleanup.

Q16. When was the National Contingency Plan (NCP) last revised?

Answer: The EPA published a final rule in the Federal Register on March 18, 2013, that revised the NCP to include computer communications or other electronic means to make the administrative record file available to the public. Prior revisions of the NCP include a September 15, 1994 final rulemaking to implement provisions of the 1990 Oil Pollution Act (OPA), and a March 8, 1990 final rulemaking to implement provisions of the 1986 Superfund Amendments and Reauthorization Act (SARA).

Q17. Please describe the revision process for the NCP, including the duration of the process.

Answer: The EPA revises the NCP through formal rulemaking. A federal regulation is generally an authoritative requirement issued by a federal department or agency that implements a statute and has the force of law. The EPA's rulemaking process generally consists of a proposed rule stage and a final rule stage. In general, the EPA provides notice of a proposed regulation and any person or organization may review the document and submit comments on it in writing. The period during which public comments are accepted varies, but is usually 30, 60, or 90 days.

As part of the EPA rulemaking process, the agency is required to consider the public comments received on the proposed regulation. When the EPA publishes the text of a final regulation in the Federal Register, it generally incorporates a response to the significant issues raised by those who submitted comments and discusses any changes made to the regulation as a result.

Regarding the most recent NCP revision, the EPA revised the NCP to acknowledge advancements in electronic technologies used to manage and convey information to the public. This revision to the NCP was done in accordance with the EPA's Action Development Process Guidance for EPA Staff on Developing Quality Actions (ADP), beginning in March, 2012, with submission to EPA's Rule and Policy Information and Development System (RAPIDS). This action was given a Tier 3 designation. Appropriate reviews were conducted by the Agency and the National Response Team, in accordance with Executive Order 12580, as described in the ADP.
On November 7, 2012, the EPA published in the Federal Register a Direct Final rule entitled *National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File* (77 FR 66729) (hereafter the Direct Final rule). This Direct Final rule added language to 40 CFR 300.805(c) of the NCP to broaden the technology, to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public. Concurrently, the EPA published a parallel Proposed rule (77 FR 66783) that requested comment on the same change to the NCP. The EPA stated in that Direct Final rule that if we received adverse comment on the amendment by December 7, 2012, the affected amendment would not take effect and we would publish a timely withdrawal in the Federal Register of the amendment. The EPA received a comment that identified some questions about the proposed rule change. The Agency withdrew the amendment on January 22, 2013 (78 FR 4333). The EPA published the Final rule on April 17, 2013, which provided additional explanatory language to address the issues raised and finalized this amendment.

Regarding major revisions to the NCP by the EPA in the past, such as rulemakings to implement provisions of the 1990 OPA, and the 1986 Superfund Amendments and Reauthorization Act (SARA), these rulemakings took three or more years to complete.

The Honorable Ralph M. Hall

Q1. I am aware of a very promising initiative involving the Superfund program of EPA and the Civil Works program of the Corps of Engineers that is focused on restoring contaminated urban rivers, which pose some of the most difficult challenges of all Superfund sites across the nation. That initiative, referred to as the Urban Rivers Restoration Initiative, gives States a much greater role in proposing and managing restoration at Superfund sites on urban rivers due to the Federal-State partnership relationship inherent in the Water Resource Development Authorities of the Corps. The proposal has been examined with positive results and recommendations for expansion by the EPA IG.

Might you provide what steps you might take in this Administration to provide greater support and more enthusiastic backing for this proposal?

Answer: The EPA and the Corps of Engineers (USACE) signed a Memoranda of Understanding in 2002, 2005, and 2006 establishing a partnership referred to as the Urban Rivers Restoration Initiative.

USACE receives funding under the Water Resources Development Act (WRDA) to dredge navigational channels in the same rivers where Superfund is responsible for cleanup. As part of these agreements, the EPA and USACE selected pilot projects that would demonstrate how coordinated federal, state and local governments and private sector efforts can not only restore contaminated rivers but also revitalize urban environments. The EPA strongly supports the collaborative and watershed-based concepts piloted in Urban Rivers Restoration Initiative and continues to promote the use of these concepts.

Superfund program guidance, "Integrating Water and Waste Programs to Restore Watersheds: A Guide for Federal and State Project Managers," was developed specifically to enhance coordination across federal, state, and local waste and water programs to streamline requirements, satisfy multiple objectives, tap into a variety of funding sources (including the Water Resource Development Act), and implement restoration activities more efficiently, with a goal of showing measurable results. The guidance provides a road map to conducting cross-programmatic watershed assessments and cleanups in watersheds with both water and waste program issues and presents innovative tools to enhance program integration.

The EPA continues to coordinate environmental studies at sites where there is ongoing CERCLA and WRDA work by promoting the early identification and exchange of information between the EPA, states, and USACE at NPL sites.