Testimony for Hearing on
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

Subcommittee on Environment and the Economy
Committee on Energy and Commerce
Friday, May 17, 2013
by
Carolyn Hanson, Deputy Director
Environmental Council of the States

Main Points

1. ECOS supports the concepts found in the bills addressing RCRA and CERCLA issues.
2. In particular, ECOS supports the expansion of "consultation with states" as described in the bills.
3. ECOS especially acknowledges that the bills directly address concerns expressed by the states in two ECOS Resolutions on federal facilities operations under RCRA and CERCLA.

Testimony

Thank you for inviting me here today to talk about our organization's views on RCRA and CERCLA regarding the matters currently before the Committee. I am representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies. I am the Deputy Director of ECOS.

Unlike some of the other major environmental statutes such as RCRA, the states' role in implementing CERCLA is less than that of the U.S. Environmental Protection Agency's role. However, there are several important places within CERCLA implementation where the states' role is important. I will be discussing the RCRA and CERCLA impacts as ECOS sees them today.

We are pleased that the committee has taken an interest in addressing CERCLA and RCRA in a manner that focuses on implementation issues that states and EPA regularly face. We are in an era where funds to implement our nation's environmental statutes are tight, but the sites needing remediation these days are more complex than when the program started. We are in need of flexibility and efficiency more than ever, both at the state and federal level. Overall, we support the changes that these bills seek, and we believe they will improve the implementation of CERCLA and RCRA and help achieve the goals of those statutes more quickly, with more input to EPA, and with an improved partnership with the states.

I will be presenting our organization's views on three of the bills before the committee. ECOS agrees that Section 2 of "Reducing Excessive Deadline Obligations Act of 2013" will codify a long-standing practice of EPA and will empower the Administrator to focus on the issues that it deems are of greatest concern. We have no comment at this time on Section 3 of the bill.

Second, I will address the bill entitled "The Federal and State Partnership for Environmental Protection Act of 2013."

The first part of the bill addresses consultation with the states. ECOS strongly approves this section, which addresses issues outlined in several ECOS resolutions, including the one entitled "Environmental Federalism" (see Appendix). This bill will help states in their conversation with EPA on National Priority List (NPL) or "superfund" sites. Under the current system, the Agency is not obligated to listen to state input into decisions made about NPL sites. While states find our working relationship with EPA is usually positive, it is also true sometimes that it is not. The steps listed in the bill will help assure a mutually beneficial partnership between states and EPA on superfund sites.

The second part of this bill addresses "State Credit for Other Contributions." It is our understanding that this bill does not expand the states' cost share for removal actions beyond what is currently required, and our comments are made with this understanding.

This change will allow States to get credit towards the 10% cost share under CERCLA section 104(c)(3) for expenditures made for a removal action and also allows credit for in-kind contributions such as contributions of real property, equipment, goods, services that are provided for the removal or remedial action at the facility or amounts derived from materials recycled, recovered, reclaimed from the facility that are used to fund or offset all or a portion of the cost of a removal or remedial action. These changes will give credit to the states for their contributions and will greatly assist during this time of tight budgets.

Furthermore, assuming the legislation does not intend to create an additional cost share in Removal Actions, ECOS would support the legislation because if the State performed an action such as site stabilization that EPA later classified as a Removal Action, then there may be an opportunity to get credit for those expenditures.

Section 4 of this bill addresses a long-standing shortcoming of CERCLA – concurrence on NPL actions. Placing a site on the National Priority List is important to a state – as this action must go all the way up to the Governor's office. Requiring EPA to respond to a State explaining why a site proposed by the State is not included will help the State understand how to further address the site and support the impacted community. To our knowledge, there is not a current mechanism that allows States to designate a facility to the NPL that meets the criteria. That potential would make certain parties more willing to negotiate with the State in addressing their issues, and might result in clean-up that did not have to be funded by the Superfund.

ECOS believes that EPA's policy has been to seek state concurrence when listing a site for the NPL. However, this is a policy, and we believe the nation would be better served if it were a requirement.

The third bill I will discuss is "The Federal Facility Accountability Act of 2013." ECOS is especially pleased to see the Committee address this long-standing issue. This bill directly addresses the concerns ECOS described in our resolutions entitled "Clarification of CERCLA Sovereign Immunity Waiver for Federal Facilities" and "DSMOA and Federal-State Collaboration." (See Appendix). ECOS believes this legislation will help states assure environmental compliance on federal facilities and former federal facilities. For example, a State currently has little authority to cause action at formerly used defense sites that pose or may pose a threat to human health until the federal government (Department of Defense) is ready unless (1) the site is listed to the NPL, (2) the site can be addressed under RCRA, or (3) the State pursues another party that sues the federal government for contribution.

The most important aspect of this legislation is that it sends a strong and appropriate message to all federal agencies: you must follow the nation's environmental rules the same as everyone else. The legislation amends CERCLA 120(a)(4) to eliminate most, if not all, of the barriers that states have experienced in dealing with federal agency compliance with the Act. It is especially useful to states to see the "Compliance" and "Costs" sections changed to conform with the experiences that non-federal entities face every day.

Finally, we support the ability for a state to request a review by EPA to ensure consistency of some federal action with the guidelines, rules, regulations, or criteria established by EPA under Title I of CERCLA. This section closes a potential loop-hole in advance.

In summary, ECOS sees that these bills will assist in many ways, including holding federal facilities to the same standards as other regulated entities, clarifying regulations and procedures, improving state-federal communications, improving clean-up financing, and implementing state-EPA concurrence on how to treat superfund sites to name a few.

I am happy to take questions.

Appendix

Resolutions of the Environmental Council of the States

Pertaining to the Bills in Discussion at this Hearing

Resolution 00 - 1
Approved April 12, 2000
Philadelphia, Pennsylvania
Revised June 13, 2000
By mail vote
Revised April 4, 2003
Bymail vote
Revised April 11, 2005
Washington, DC
Revised September 8, 2005
Kennebunkport, Maine
Revised September 22, 2008
Branson, Missouri
Renewed September 26, 2011
Indianapolis, Indiana
Revised March 20, 2012
Austin, Texas

ON ENVIRONMENTAL FEDERALISM

WHEREAS, the states are co-regulators with the federal government in a federal system; and
WHEREAS, the meaningful and substantial involvement of the state environmental agencies as partners with the U.S. Environmental Protection Agency (U.S. EPA) is critical to both the development and implementation of environmental programs; and
WHEREAS, the U.S. Congress has provided by statute for delegation, authorization, or primacy (hereinafter referred to collectively as "delegation") of certain federal program responsibilities to states which, among other things, enables states to establish state programs that go beyond the minimum federal program requirements; and
WHEREAS, States that have received delegation have demonstrated to the U.S. EPA that they have the independent authority to adopt and they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies; and
WHEREAS, states have further demonstrated their commitment to environmental protection by taking responsibility for 96% of the primary environmental programs which can be delegated to states; and
WHEREAS, because of this delegation, the state environmental agencies have a unique position as co-regulators and co-funders of these programs; and
WHEREAS, the delegation of new federal environmental rules (issued as final and completed actions and published by the U.S. EPA) to the states to implement continues at a steady pace of about 28 per year since spring 2007, for a total of approximately 143 new final rules and completed actions to implement through fall 2011; and
WHEREAS, federal financial support to implement environmental programs delegated to the states has declined since 2005; and
WHEREAS, cuts in federal and state support adversely affects the states' ability to implement federal programs in a timely manner and to adequately protect human health and the environment; and
WHEREAS, states currently perform the vast majority of environmental protection tasks in America, including 96% of the enforcement and compliance actions; and collection of more than 94% of the environmental quality data currently held by the U.S. EPA; and
WHEREAS, these accomplishments represent a success by the U.S. EPA and the states working together in ways the U.S. Congress originally envisioned to move environmental responsibility to the states, not an indictment of the U.S. EPA's performance; and

WHEREAS, the U.S. EPA provides great value in achieving protection of human health and the environment by fulfilling numerous important functions, including; establishing minimum national standards; ensuring state-to-state consistency in the implementation of those national standards; supporting research and providing information; and providing standardized pollution control activities across jurisdictions; and

WHEREAS, with respect to program operation, when a program has been delegated to a state and the state is meeting the minimum delegated program requirements, the role of the U.S. EPA is oversight and funding support rather than state-level implementation of programs; and

WHEREAS, under some federal programs the U.S. EPA grants to states the flexibility to adjust one-size-fits-all programs to local conditions and to try new procedures and techniques to accomplish agreed-upon environmental program requirements, thereby assuring an effective and efficient expenditure of the taxpayers' money.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Affirms its continuing support for the protection of human health and the environment by providing for clean air, clean water, and proper handling of waste materials;

Affirms that states are co-regulators, co-funders and partners with appropriate federal agencies, including the U.S. EPA, and with each other in a federal environmental protection system;

Affirms the need for adequate funding for both state environmental programs and the U.S. EPA, given the vitally important role of both levels of government;

Affirms that expansion of environmental authority to the states is to be supported, while preemption of state authority, including preemption that limits the state's ability to establish environmental programs more stringent than federal programs, is to be opposed;

Supports the authorization or delegation of programs to the states and believes that when a program has been authorized or delegated, the appropriate federal focus should be on program reviews, and, further, believes that the federal government should intervene in such state programs where required by court order or where a state fails to enforce federal rules particularly involving spillovers of harm from one state to another;

Supports early, meaningful, and substantial state involvement in the development and implementation of environmental statutes, policies, rules, programs, reviews, joint priority setting, budget proposals, budget processes, and strategic planning, and calls upon the U.S. Congress and appropriate federal agencies to provide expanded opportunities for such involvement;

Specifically calls on U.S. EPA to consult in a meaningful, timely, and concurrent manner with the states' environmental agencies in the priority setting, planning, and budgeting of offices of the U.S. EPA **as** these offices conduct these efforts;

Further specifically calls on U.S. EPA to consult in a meaningful and timely manner with the states' environmental agencies regarding the U.S. EPA interpretation of federal regulations, and to ensure that the U.S. EPA has fully articulated its interpretation of federal regulations prior to the U.S. EPA intervention in state programs;

Believes that such integrated consultation will increase mutual understanding, improve state-federal relations, remove barriers, reduce costs, and more quickly improve the nation's environmental quality;

Noting the extensive contributions states have made to a clean environment, affirms its belief that where the federal government requires that environmental actions be taken, the federal government ought to fund those actions, and not at the expense of other state programs;

Affirms that the federal government should be subject to the same environmental rules and requirements, including the susceptibility to enforcement that it imposes on states and other parties;

Affirms its support for the concept of flexibility and that the function of the federal environmental agency is, working with the states, largely to set goals for environmental accomplishment and that, to the maximum extent possible, the means of achieving those goals should be left primarily to the states; especially as relates to the use of different methods to implement core programs, such as risk-based

inspections or multi-media environmental programs, and particularly in the development of new programs which will impact both states and the U.S. EPA; and

Directs ECOS staff to provide a copy of this resolution to the U.S. EPA Administrator.

Resolution Number 00-9
Approved April 12, 2000
Philadelphia, Pennsylvania
Retained April 4, 2003
By mail vote
Retained March 17, 2006
By mail vote
Revised March 23, 2009
Alexandria, Virginia
Revised March 20, 2012
Austin, Texas

CLARIFICATION OF CERCLA SOVEREIGN IMMUNITY WAIVER FOR FEDERAL FACILITIES

WHEREAS, current and former federal facilities have some of the most pressing environmental problems, such as hazardous substances, unexploded ordnance, radioactive materials, and abandoned mines; and

WHEREAS, problems associated with some of these federal facilities pose substantial threats to public health, safety, and the environment; and

WHEREAS, ECOS believes the States' regulatory role at federal facilities should be recognized and that federal agency environmental cleanup activities are subject to and should receive the same regulatory oversight as private entities; and

WHEREAS, for many contamination actions the federal agencies assert Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) lead agency authority under Executive Order 12580; and

WHEREAS, state experience for many contamination actions has shown that assertions of sovereign immunity and CERCLA lead agency authority have led to inappropriate and/or inconsistent interpretation of state law and have not supported cleanup to the same standards as private parties; and

WHEREAS, assertions of sovereign immunity and CERCLA lead agency authority hamper consistent state regulatory oversight and responsibility to its citizens; and

WHEREAS, a clarification of Executive Order 12580 and/or federal legislation would aid states in implementing regulations which have been duly enacted by the states; and

WHEREAS, this resolution fully supports Policy NR-03i (specifically Section 3.5 on "Natural Resources") executed by the National Governors' Association.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES (ECOS):

Requests the Administration revise Executive Order 12580 to clarify that federal facilities are subject to appropriate state regulations and are not unduly shielded by sovereign immunity and lead agency authority;

Encourages the U.S. Congress act to support the States by the implementation of specific legislation which will without equivocation acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities; and

Authorizes the transmittal of this resolution to the Administration, appropriate congressional committees, federal agencies, and other interested organizations and individuals.

Resolution Number 07-6
Approved March 21, 2007
Alexandria, Virginia
Revised March 24, 2010
Sausalito, California
Revised March 6, 2013
Scottsdale, Arizona

DSMOA AND FEDERAL-STATE COLLABORATION

WHEREAS, the Defense State Memorandum of Agreement (DSMOA) program was originally established to fund State oversight of cleanup activities at U.S. Department of Defense (DoD) sites; and
WHEREAS, DSMOA has been a successful program promoting cooperation between States and DoD on both environmental cleanup actions and development of policy and technology; and
WHEREAS, DSMOA has enabled States to prioritize resources to expedite implementation of remedies; and
WHEREAS, DSMOA has also supported the ability of States and DoD to promote streamlined investigative techniques and implement protective remedies, which has saved DoD hundreds of millions of dollars through mutual cooperation between States and DoD and has also helped reduce State enforcement by cooperation and coordination; and
WHEREAS, in the past, shifting DoD positions on managing the DSMOA program had created a strained relationship between DoD and States; and
WHEREAS, these shifting policy issues caused great concern to States prompting ECOS to approve the March 21, 2007 resolution requesting DOD change their policies to ensure the following:

- DoD does not condition DSMOA funding based on the manner in which a State exercises its enforcement authority, or its willingness to enter into dispute resolution prior to exercising that enforcement authority,
- DSMOA funding may be used for State staff costs to participate in national workgroups and other venues related to DoD environmental restoration program, and
- DERA funds may be used for any state association including the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) supporting State involvement in their collaborative work with DoD on activities related to DoD environmental cleanup activities, policy, and technology; and

WHEREAS, in response to ECOS and State concerns DoD has initiated the DSMOA Steering Committee composed of eight State representatives, Army, Navy, Air Force, Office of the Secretary of Defense, and Formerly Used Defense Program Headquarters environmental managers, and the Corps of Engineers DSMOA Grants Manager to evaluate these policy issues and work towards solutions mutually acceptable to all parties; and
WHEREAS, DoD has shown a new commitment to work with States to resolve the many concerns States have expressed with DSMOA and the initial DSMOA Steering Committee meetings are showing progress towards resolving States concerns.
WHEREAS, the DSMOA Steering Committee has made significant improvements to the DSMOA process by implementing the following actions:

- Streamlining the Joint Execution Plans (JEPs) and DMSOA performance reports,
- Improving open, transparent communication between DSMOA grant staff, States, and Service representatives by creating the DMSOA Webpage information center,
- Establishing clear reasonable eligibility criteria for funding DSMOA activities,
- Establishing policy criteria where States may use DSMOA funding to participate in national work groups working on DoD environmental restoration program issues; and

WHEREAS, currently unresolved are States concerns regarding the DoD policy requiring that dispute resolution must be used prior to a State exercising its enforcement authority or the State would trigger the withholding of DSMOA funding. The DSMOA Steering Committee established a Dispute Resolution

Work Group to evaluate the issue and propose solutions which at this time has had much constructive discussion but limited concrete progress; and

NOW, THEREFORE BE IT RESOLVED THAT:

ECOS applauds DoD for their commitment to improving State-DoD relationship by establishing the DSMOA Steering Committee and supporting the Committee's efforts to improve processes and resolve issues identified by the States.
ECOS supports continued State involvement in resolving DSMOA policy issues and will continue to track resolution of DSMOA policy issues.
ECOS requests that the DSMOA Steering Committee work towards a permanent solution on the DoD policy requiring dispute resolution prior to a State exercising its enforcement authority that does not condition DSMOA funding based on the manner in which a State exercises its enforcement authority, and does not impinge or create the appearance of impingement on the legitimate use of its enforcement authorities. The Steering Committee should work towards a more streamlined dispute resolution process that resolves disputes as soon as practical so cleanup progress is not delayed.
ECOS requests that DoD continue to work with States and the DSMOA Steering Committee to ensure that DSMOA and DERA funds may be used for any state association, including ASTSWMO, supporting State involvement in their collaborative work with DoD on activities related to DoD environmental cleanup activities, policy, and technology.
ECOS requests that as solutions are developed, DoD and States determine how to memorialize those policies in a permanent manner. Such solutions may include requesting U.S. Congress to make amendments to 10 USC 2701, if necessary