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OF THE U.S. HOUSE ENERGY AND COMMERCE COMMITTEE
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SUBMITTED ON BEHALF OF
HAZARDOUS MATERIALS AND WASTE MANAGEMENT DIVISION
COLORADO DEPARTMENT OF PUBLIC HEALTH AND THE ENVIRONMENT

The Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment is the state agency that works with EPA in implementing the federal Superfund program It also administers the Colorado Hazardous Waste Act, the state equivalent of RCRA. Our testimony will touch on the subjects addressed by each of the draft bills: sovereign immunity and federal facility cleanups; state role in remedy selection; and financial assurance requirements.

Colorado has long been a state in the forefront of efforts to get federal agencies to comply with state environmental laws, and to clean up contamination at federal facilities to the same standards to which we hold private industry. We were strong advocates for passage of the Federal Facility Compliance Act in 1992. That law was passed a few months after a Supreme Court decision (*U.S. Department of Energy v. Ohio*, 503 U.S. 607) holding that neither the Clean Water Act nor RCRA had waived the federal government's sovereign immunity from civil and administrative fines and penalties.

The Federal Facility Compliance Act amended the RCRA waiver of sovereign immunity so states may now assess penalties against federal agencies for violating state hazardous waste requirements. However, the Clean Water Act was never amended, so states still cannot penalize federal agencies for violating state water quality rules. EPA enforcement data for the decade since 1992 shows that since the RCRA waiver was broadened, federal agencies steadily improved their compliance with hazardous waste requirements, while compliance with water quality requirements has decreased. The gap has since narrowed somewhat, but federal agencies' compliance with hazardous waste requirements remains well above their compliance with water quality requirements.

The lesson is clear: strong independent state enforcement authority improves the environmental performance of federal agencies.

The Federal Facility Accountability Act of 2013 would broaden Section 120(a)(4) of CERCLA, the CERCLA sovereign immunity waiver. States, including Colorado, have supported broadening this waiver. In the past, the federal government has argued that the wording of section 120(a)(4) means the federal government does not have to comply with state cleanup laws at federal facilities that are listed on the CERCLA National Priorities List. The bill appears to address this particular issue. It also appears to address the

argument the Defense Department has sometimes made that the CERCLA waiver does not apply to "formerly used defense sites." However, sovereign immunity is a highly complex area of the law. We would welcome the opportunity to work with the Committee to be sure the proposed bill addresses the issues that states commonly face in cleaning up federal facilities.

One of these issues is a widespread reluctance to comply with state laws requiring the use of "institutional controls" – legal mechanisms, such as statutory environmental covenants, that impose binding land use restrictions on remediated sites to prevent unsafe exposure to residual contamination, or to protect engineered aspects of a remedy, such as a landfill cap. Properly designed and implemented, institutional controls help improve the protectiveness of cleanups, limit cleanup costs, and make property more marketable. Most private responsible parties at contaminated sites welcome the use of institutional controls for these reasons. However, federal agencies have frequently resisted the imposition of these controls, particularly if they perceive them to be an interest in property. In Colorado, we've had good responses from the Departments of Energy and Defense, but the land management agencies – the Department of Interior, and the Department of Agriculture's Forest Service – have refused to comply with our law. Additional Congressional oversight in this area, and potentially legislation, could be helpful in eliminating federal agencies' reluctance to comply with these requirements.

Turning to the state role in CERCLA remedy selection, Colorado generally has a good relationship with EPA Region 8. Nonetheless, we do see areas for improvement. One issue that causes us great concern is that, while the statute expresses a preference for permanent remedies, the cost-sharing structure creates incentives for EPA to choose remedies that may have a lower up-front cost, but that have substantial operation and maintenance costs. Current budgetary pressures can only exacerbate these incentives. At historic mining sites, for example, EPA remedies often rely on water treatment plants that must essentially be operated in perpetuity. The cost of operating these plants runs into millions of dollars per year. Once ten years have passed following remedy completion, all of the O&M costs are borne by the State. Over decades, these O&M costs will eventually overwhelm the amount of money originally spent on the remedy, and change the fundamental balance of the state-federal cost-share from a predominantly federally-funded program to a predominantly state-funded program.

A second concern we have is that EPA sometimes resists Colorado's efforts to have its state laws considered and applied as "applicable or relevant and appropriate requirements," – "ARARs" – CERCLA's term for cleanup standards or requirements that a particular cleanup should meet. Once again, a common area of dispute is the state's environmental covenant law. This particular requirement has often been ignored in removal actions, and sometimes in remedial actions – though we recently have made substantial progress in resolving this disagreement with Region 8 in the area of remedial actions.

Part of the problem is that EPA does not consider "procedural" requirements to be ARARs, and some people in EPA view environmental covenants as procedural

requirements. It is true that an environmental covenant is basically a piece of paper with words written on it. But without it, there is no legally effective restriction on the use of the remediated property. That's why states have been adopting environmental covenant laws – to create legally binding mechanisms to use in conjunction with treatment and containment strategies to protect human health and the environment at contaminated sites. The NCP recognizes the importance of institutional controls such as environmental covenants. *See, e.g.*, 40 C.F.R. §300.430(a)(1)(iii)(D). It's simply bizarre that EPA would not consider institutional controls to be ARARs at CERCLA sites.

With these concerns in mind, let's consider the proposed amendments. Section 2 of the ''Federal and State Partnership for Environmental Protection Act of 2013'' appears to emphasize CERCLA's existing mandate that EPA consult with affected states in the remedy selection process. While we agree that EPA's obligation to consult with the states deserves more emphasis, we are concerned, based on our understanding of the Congressional legislative process, that because the bill proposes amending sections 104 and 120 of the statute, it could open the door to other, more controversial amendments. This seems like an area where management oversight within EPA, and perhaps additional Congressional oversight of EPA's implementation of these obligations, could be another effective means of achieving the desired outcome that would not risk creating a lot of legislative controversy.

Section 5 of the bill creates a new exception to CERCLA section 113(h) – the statutory bar on pre-enforcement judicial review of remedies. This is one of the key provisions of the statute. By limiting the ability to challenge a remedy before it has been implemented, this section prevents litigation from delaying needed actions to address releases of hazardous substances that threaten human health and the environment. The proposed amendment undermines this fundamental protection by allowing any person – a responsible party, an environmental group – to challenge a remedy before implementation whenever a state has simply objected in writing to the proposed remedy.

We do not think this is the proper response to address the concerns we have cited above. Instead, we would advise directly addressing the concern that Colorado and other states have with shouldering the financial burden that exists at sites with substantial, long-term operation and maintenance costs by revisiting the cost-sharing allocation in the statute and regulations. We also think that Section 5 of the bill is far more heavy-handed than needed to address the concern that EPA does not consistently recognize state institutional controls laws and other standards as ARARS. If enhanced management attention from EPA headquarters – perhaps stimulated by Congressional inquiry – is not adequate to resolve the issue, it should be possible to craft a narrow legislative solution that does not undermine the bar on pre-enforcement judicial review.

The "Reducing Excessive Deadline Obligations Act of 2013" states that financial assurance regulations promulgated under CERCLA section 108 will not preempt pre-existing state financial assurance regulations. This provision appears to conflict with section 114(d) of the statute, which provides limited preemption.

Colorado has participated in discussions with EPA regarding the proposed rulemakings under CERCLA 108. It's our view that EPA has the flexibility under the existing statute to draft rules that accomplish the purpose of section 108 – ensuring that firms in selected industry sectors have financial assurance mechanisms sufficient to address the possible costs associated with releases of hazardous substances – without preempting those existing state financial assurance requirements that adequately address regulatory compliance with state hazardous waste, mining, and other natural resource and environmental protection laws. Properly constructed, CERCLA financial assurance mechanisms should not impose excessive burdens on industry. Attached is a letter from the Colorado Department of Law on behalf of the Division of Reclamation Mining and Safety that provides additional detail on this issue. We believe in this instance that if additional legislation is necessary, it should provide EPA more specific guidance to chart the rulemaking waters as described above and in the attached letter.