Hearing
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
May 17, 2013

Testimony of
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Main Points:

- States value their relationship with US EPA and together through several types of cooperative agreements, both as individual States and ASTSWMO as a whole, continue to make great strides in addressing some of the most contaminated land in the United States.
- ASTSWMO supports the Reducing Deadline Obligations Act of 2013 and views this as a legislative win that ensures individual State financial assurance requirements already in place are not preempted by Federal actions.
- ASTSWMO supports the provisions proposed in the Federal and State Partnership for Environmental Protection Act of 2013. Especially with respect to fund-lead sites placed on the National Priorities List (NPL), our members continue to be challenged with the skyrocketing financial obligations incurred. Modernizing some of the aspects of CERCLA to recognize the sophisticated nature of the States' programs makes sense. EPA must

continue to actively recognize our role in the listing process and selecting a remedy to address contaminated property. Allowing States to offset these obligations with greater use of in-kind contributions where appropriate must be acknowledged and allowed for under Federal law.

- ASTSWMO strongly supports the Federal Facility Accountability Act of 2013. No entity, whether privately or publicly owned, should be given special treatment when it comes to protecting human health and the environment. Federal agencies playing the “sovereign immunity card” only serves to delay cleanup and put citizens in harm’s way.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an association representing the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State program experts with individual responsibility for the regulation or management of wastes and hazardous substances, including remediation, tanks, materials management and environmental sustainability programs.

ASTSWMO appreciates the opportunity to provide testimony on the three bills under consideration. While States do not assume primary CERCLA authority, we do play a role in its implementation. The decisions made by Congress and those made by the United States Environmental Protection Agency (EPA) can have a profound impact on State resources. States share a common goal with the Federal government in ensuring that risks to human health and the environment are mitigated and appropriately addressed. Our Association is committed to ensuring that this is done in an efficient, cost-effective manner.

ASTSWMO recently provided testimony to this Subcommittee on the role States play in protecting the environment. We support any legislation that encourages greater State collaboration with our Federal partners while ensuring that our voice and opinions are not diminished. As mentioned in our previous testimony, ASTSWMO enjoys a positive working relationship with EPA and does not wish to discount these collaborative efforts. ASTSWMO offers the following comments on each specific bill.

Reducing Excessive Deadline Obligations Act of 2013

Due to the lengthy delay which has occurred in the establishment of CERCLA Financial Responsibility Requirements required by CERCLA 108(b), many States already have substantial rules and regulations governing various classes of facilities. It would be a very undesirable situation for these established protections to be pre-empted by yet-to-be-determined Federal requirements that may or may not be as robust as the State provisions already in place. Therefore, revisions to 108(b) are needed to ensure that existing programs are not automatically disrupted by the future establishment of Federal requirements. This would then provide the individual States which have such laws and requirements the opportunity to evaluate the new Federal requirements as they are established, and to work with their stakeholders to subsequently determine the fate of the existing State requirements in an informed and strategic manner.

Federal and State Partnership for Environmental Protection Act of 2013

Clarification of the importance of State concurrence in listing sites on the NPL, and the ability of States to periodically propose sites for expedited listing will serve to ensure appropriate State involvement in the process, and will enable States to more effectively and expeditiously address environmental concerns within their borders. EPA generally does a good job of coordinating with States, though our members do report inconsistencies from State-to-State and region-to-region. These changes would also ensure other Federal agencies must closely coordinate with the applicable States.

As State budgets continue to be challenged, closer consultation with EPA on all facets of listings and activities is becoming more imperative than ever before. Our members have numerous examples of skyrocketing costs associated with fund-lead cleanups, whereby individual States are assuming 10% cost share for the remedy implementation with operation and maintenance costs being assumed in perpetuity. EPA offers the opportunity for States to comment on both proposed listings and remedy selection. Oftentimes, however, our concerns or input are not fully utilized in a consistent manner across the country.

Regarding the NPL listing process, States are under significant pressure to “concur” with individual listing decisions. There are many occasions when States are asked for “Governor’s concurrence” without even having the benefit of seeing the full Hazard Ranking Scoring (HRS) package. The HRS, while an enforcement sensitive document, helps to provide States a more complete understanding of the risks associated with a site. It should be noted that sharing this information is inconsistent across EPA regions. This issue serves as an example of the need for a transparent process of collaboration between the State and Federal governments.

There are many tools in the toolbox to address contaminated properties. While, there is no one size fits all approach, exerting CERCLA authority is one tool. As States evaluate proposals for listing on the NPL, we look for economic redevelopment opportunities to drive cleanups. Oftentimes there is a prospective purchaser willing to adequately mitigate the environmental and human health risks on a contaminated property. State voluntary programs can, in many circumstances, serve as a substitute for the long and costly CERCLA /Superfund process. States should not be pressured into accepting at face value a listing on the NPL, especially where the fund is being used resulting in the use of significant State resources.

States are best suited in understanding their environmental conditions and should therefore be able to offer priority sites for inclusion on the NPL. Most States have proven and sophisticated Superfund programs and have used their knowledge of local site conditions to assess and prioritize sites in need of remediation. While there may be a perceived notion that there are dozens of State priorities that would be suggested for addition to the NPL, this is simply not the case. States recognize the limited resources and understand the complexities and best opportunities to get the most bang for the buck.

The ability for States to offset its obligations for in-kind services should continue to be expanded into all facets of the CERCLA cleanup process. Some examples reported by our members include such things as residential water line installations and hookups, construction oversight to directly assist EPA oversight at NPL mining sites (with specific cooperative agreements in place) and EPA-approved yard removals at lead sites (with specific cooperative agreements). EPA has started to work with one State on considering in-kind costs for

Institutional Controls (IC); the requirement for an IC is commonly part of the Record of Decision (ROD), and as such should be part of in-kind contributions.

EPA has made it difficult to allow in-kind credit for work performed by States, so we commonly do not offer much assistance. One example cited by a State involved an existing recovery well being pumped at a former electroplating site. The well was installed by the owner of the site before he filed for bankruptcy. The State took over the pumping under an agreement with the city. This was being performed without the State getting credit. Once the well experienced operational problems, it was shut down due to the cost and lack of a cooperative agreement. It would be very helpful if EPA could make it easier to allow the States to get credit for time to inspect, track, and for operation of interim systems (which may likely be part of the final remedy). It is often very difficult to negotiate a cooperative agreement to get credit for in-kind work.

We frequently hear from our members that the requirement for the State to commit to paying 10% of the cost of the remedial action, and 100% of the cost of long term operation and maintenance (O&M), is increasingly preventing States from concurring with listing potential "fund-lead" sites on the NPL. This is a most undesirable and unfortunate situation since often it is the potentially fund-lead sites which are the most environmentally critical to be addressed using CERCLA NPL authorities; however, States must also be realistic about their fiscal solvency. Thus, it is imperative that States be able to get credit for whatever resources they are able to bring to bear.

Federal Facility Accountability Act of 2013

ASTSWMO has had a long-standing position of being in support of an updated standard of federal facility accountability under State and Federal environmental laws similar to the RCRA Federal Facilities Compliance Act. States continue to believe that the Federal government should be accountable to adherence with CERCLA, similar to what is required under the Clean Air Act, Clean Water Act and RCRA. The universe of sites subject to CERCLA includes properties owned by Federal, State and Local Governmental entities as well as private parties. The protection of our citizens should not be seen through the color of ownership. Many States and localities also are limited with the resources that can be used to meet their CERCLA obligations. It is inherently wrong for the Federal government to shirk its responsibilities due to cost considerations. It is important that federal facilities and agencies be accountable to the same requirements as all other regulated entities, including to State-specific requirements, to ensure equal treatment and protection.

As the result of existing delegations of authority, federal facilities under CERCLA are often self-regulating, which presents substantial opportunities for conflicts-of-interest, and inconsistent guidance, application and interpretation of program requirements. Experience with RCRA and other programs with more modern sovereign-immunity waivers show a higher degree of compliance and consistency between Federal agencies, and in comparison with private entity compliance.

Federal facilities are often home to some of the largest, most complex, and most challenging environmental issues in our nation, therefore it is critical that they live up to the same standard as other facilities. Though CERCLA currently provides (in section 120(a)(2)) that

other Federal agencies may not have policies, guidance, or rules which conflict with those established by EPA, there is no current provision for EPA or any other entity to conduct external reviews to ensure this is the case – the proposed change to Section 115 would correct this.

States have numerous examples where long drawn out legal debates have occurred with federal facilities over States' Applicable or Relevant and Appropriate Requirements (ARARs) that should be included during the development and implementation of a remedy or long term care. These debates only lead to prolonged cleanups, kicking the can down the road as it were, that simply allow the public to be potentially exposed to unacceptable human health or environmental risk. The time value of money should also not be discounted; the longer a Federal agency takes to invest in a cleanup, the more expensive it will become.

At the encouragement of EPA and other Federal agencies, many States have adopted laws and regulations based on the Uniform Environmental Covenants Act. However, as States have established those laws and regulations, which serve to enable and ensure the long-term protectiveness of risk-based remedial actions, they have found that, although the Federal agencies want these tools available to use for their advantage when addressing off-site contamination, the same Federal agencies often claim exemption or simply refuse compliance with these requirements when addressing contamination on Federal property. This application of such a double-standard is unacceptable.

Federal agencies use of sovereign immunity may delay cleanup at sites posing a significant threat to human health. Several years ago, a Formerly Used Defense Site (FUD) was the home to a school setting with documented human health issues. A claim of sovereign immunity on portions of school property and other neighboring properties subject to the

CERCLA process had the potential to delay decisions relative to the selection of a remedy and the implementation of long term monitoring and the use of institutional controls.

Summary

In summary, ASTSWMO supports the proposed bills, as we believe these provisions help to modernize an often archaic process aimed at cleaning up some of this country's most contaminated sites while ensuring that States' authorities are not usurped.