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4 LEGISLATIVE HEARING ON ``FEDERAL AND STATE PARTNERSHIP FOR
5 ENVIRONMENTAL PROTECTION ACT OF 2013''; THE ``REDUCING
6 EXCESSIVE DEADLINE OBLIGATIONS ACT OF 2013''; AND THE
7 ``FEDERAL FACILITY ACCOUNTABILITY ACT OF 2013''
8 TUESDAY, MAY 22, 2013
9 House of Representatives,
10 Subcommittee on Environment and the Economy
11 Committee on Energy and Commerce
12 Washington, D.C.

13 The Subcommittee met, pursuant to call, at 10:17 a.m.,
14 in Room 2322 of the Rayburn House Office Building, Hon. John
15 Shimkus [Chairman of the Subcommittee] presiding.

16 Members present: Representatives Shimkus, Gingrey,

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17 Pitts, Latta, McKinley, Johnson, Tonko, Green, Capps,
18 McNerney, Dingell and Waxman (ex officio).

19 Staff present: Nick Abraham, Legislative Clerk; David
20 McCarthy, Chief Counsel, Environment/Economy; Tina Richards,
21 Counsel; Environment; Chris Sarley, Policy Coordinator,
22 Environment and Economy; Jacqueline Cohen, Democratic Senior
23 Counsel; Greg Dotson, Democratic Staff Director, Energy and
24 the Environment; and Caitlin Haberman, Democratic Policy
25 Analyst.

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26 Mr. {Shimkus.} We are going to call the hearing back to
27 order. This is a continuation of the hearing that started
28 last week, and so on the second panel we have Mr. David
29 Bearden, who is a Specialist in Environmental Policy from the
30 Congressional Research Service, and also joined by Mr. David
31 Trimble, who is the Director of Natural Resources and
32 Environment from the Government Accountability Office.

33 Gentlemen, your full statements have already been
34 submitted for the record. You have 5 minutes. As you can
35 see, I don't think we are really pressed for anything
36 immediately, so we will be generous. It really gives us a
37 chance to understand this program and as follow-up questions,
38 so with that, I would like to recognize Mr. Bearden for 5
39 minutes. And let us make sure the microphone is on and it
40 gets pulled close to you.

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41 ^STATEMENTS OF DAVID M. BEARDEN, SPECIALIST IN ENVIRONMENTAL
42 POLICY FOR THE CONGRESSIONAL RESEARCH SERVICE; AND DAVID
43 TRIMBLE, DIRECTOR OF NATURAL RESOURCES AND ENVIRONMENT,
44 GOVERNMENT ACCOUNTABILITY OFFICE

|
45 ^STATEMENT OF DAVID BEARDEN

46 } Mr. {Bearden.} Chairman Shimkus, Ranking Member Tonko
47 and members of the subcommittee, my name is David Bearden and
48 I am a Specialist in Environmental Policy for the
49 Congressional Research Service. Thank you for inviting me to
50 testify on behalf of CRS on legislation that would amend the
51 Comprehensive Environmental Response, Compensation and
52 Liability Act to address various aspects of the federal and
53 State roles in the cleanup of environmental contamination and
54 the applicability of State clean up requirements at both
55 current and former federal facilities. In brief, the primary
56 areas that the legislation would address include the
57 designation of sites, the National Priorities List; credits
58 toward state matching funds requirements at non-federal

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59 facilities; the selection of cleanup actions and
60 opportunities for judicial review of such actions; the
61 establishment of financial responsibility requirements; and
62 the waiver of sovereign immunity at both current and former
63 federal facilities.

64 In serving the U.S. Congress on a non-partisan and
65 objective basis, CRS takes no position on this legislation
66 but has been asked by the subcommittee to identify the
67 federal and State roles under CERCLA in existing law and the
68 aspects of these roles that the legislation would address.
69 The statements presented in this testimony are based on a
70 preliminary analysis of the legislation within the time
71 available. CRS remains available to assist the subcommittee
72 in its consideration of this legislation, related issues and
73 potential concerns among affected stakeholders.

74 I will now just provide a brief summary of the existing
75 framework of federal and State roles under CERCLA and then a
76 summary of the main provisions of all three bills.

77 Congress enacted CERCLA in 1980 and the 1996 Congress in
78 response to a growing desire for the federal government to
79 pursue the cleanup of the Nation's most hazardous sites, to

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80 protect human health and the environment. Under the
81 Superfund program, the Environmental Protection Agency, EPA,
82 may pursue cleanup and enforcement actions to respond to
83 actual or threatened releases of hazardous substances into
84 the environment. CERCLA established a broad liability scheme
85 that holds past and current owners and operators of
86 facilities, generators of wastes, and transporters of wastes
87 who selected a facility for disposal, liable for cleanup
88 costs, natural resource damages, and the costs of federal
89 public health studies that are conducted by the Agency for
90 Toxic Substances and Disease Registry. In conjunction with
91 this liability scheme, CERCLA directs EPA to establish
92 requirements for private entities to demonstrate their
93 financial capability to satisfy cleanup liability if
94 contamination were to occur, but EPA has not yet promulgated
95 such requirements.

96 The Superfund Amendments and Reauthorization Act of 1986
97 in the 99th Congress amended CERCLA to address the
98 applicability of the statute and state law to federal
99 facilities, and amended various cleanup, liability and
100 enforcement provisions of the statute. Several subsequent

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101 laws also have amended CERCLA for specific purposes. With
102 respect to federal and State roles, which is the primary area
103 of focus of the three bills, the Small Business Liability
104 Relief and Brownfields Revitalization Act of 2002, enacted in
105 the 107th Congress, amended CERCLA to authorize federal
106 grants to assist States and local governments for the cleanup
107 of brownfield sites that are not addressed under the
108 Superfund program, to give substantial deference to the
109 States in EPA's designation of sites on the National
110 Priorities List, and to limit the use of federal enforcement
111 authorities under CERCLA to pursue the cleanup of a site, if
112 a State already is pursuing the cleanup under its own law.

113 CERCLA directs EPA to maintain the National Priorities
114 List to prioritize sites for federal response actions. Under
115 CERCLA, federal response actions may include interim removal
116 actions, as they are called, to address more immediate risks,
117 and broader remedial actions to address long-term risks.
118 Remedial actions also differ in that the use of federal
119 Superfund appropriations is conditional the State agreeing to
120 share the costs with the federal government, whereas removal
121 actions may be fully federally funded with Superfund

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122 appropriations.

123 Under federal regulation, a site also must be on the
124 National Priorities List as an additional condition for EPA's
125 use of federal Superfund appropriations to finance the
126 remedial actions. The cleanup of Superfund sites that are
127 financed with private funds from the potentially responsible
128 parties are not subject to this condition, and therefore do
129 not necessarily require listing on the NPL to perform the
130 remedial actions that are not funded with federal tax
131 dollars. EPA may fund removal actions with federal Superfund
132 appropriations to address immediate hazards, regardless of
133 whether a site is on the National Priorities List.

134 The response authorities of CERCLA also are available to
135 federal agencies for the performance of the cleanup of
136 federal facilities that are funded with separate
137 appropriations apart from Superfund, and these separate
138 appropriations are allocated directly to the agencies that
139 administer those facilities. The Department of Defense and
140 the Department of Energy administer the vast majority of
141 federal facilities where cleanup is performed under the
142 authorities of CERCLA and other relevant statutes.

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143 EPA and the States still play a role, however, in
144 overseeing and enforcement the cleanup of federal facilities.
145 EPA leads the oversight of the cleanup of federal facilities
146 that are on the National Priorities List but still in
147 conjunction with the States, and the States primarily are
148 responsible for leading the oversight of the cleanup of
149 federal facilities that are not on the National Priorities
150 List where EPA does not have a similarly prominent role.

151 CERCLA authorizes various mechanisms for the States and
152 the public to participate in federal cleanup decisions.
153 However, EPA, or the lead federal agency at a federal
154 facility, generally is responsible for making the federal
155 decisions. Those decisions, though, still may involve the
156 application of State cleanup requirements if they may be more
157 stringent than the federal requirement.

158 CERCLA authorizes citizen suits, including suits by
159 States, to challenge federal decisions regarding response
160 actions, both remediation and removal, but limits the timing
161 of judicial review until after the action is taken. CERCLA
162 also specifically authorizes States to bring action in U.S.
163 district court to challenge the selection of remedial actions

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164 at a federal facility within its borders.

165 Conditions for the use of federal Superfund
166 appropriations also can be a factor in federal cleanup
167 decisions that are made in consultation with the States at
168 non-federal facilities. The use of federal Superfund
169 appropriations to finance remedial actions generally is
170 conditional upon the State agreeing to pay 10 percent of the
171 capital costs, with the federal government paying 90 percent,
172 and generally 100 percent of the costs of long-term operation
173 and maintenance in maintaining any institutional controls
174 that might be necessary over the long term. There is an
175 exception for the treatment of groundwater under which the
176 federal government may pay the full costs of operation and
177 maintenance for the first 10 years of the remedy after which
178 point the State would assume its responsibility for the 100
179 percent costs of the operation and maintenance. These State
180 matching funds requirements do not apply to the use of
181 federal Superfund appropriations for removal actions, nor to
182 either remedial or removal actions that are carried out at
183 federal facilities and funded fully by the federal government
184 separately with appropriations to those agencies that

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185 administer those facilities.

186 The legislation that is before the committee, the three
187 bills collectively, would expand the role of the States in
188 the cleanup of contaminated sites under CERCLA beyond the
189 scope of the most recent amendments I mentioned earlier that
190 were enacted in 2002 in the 107th Congress. The following
191 points that I have outlined briefly identify how each bill
192 would alter the State role in comparison to existing law.

193 The first bill, the Federal and State Partnership for
194 Environmental Protection Act of 2013, would make the
195 following changes to existing law. It would expand
196 consultation with affected States to include not only
197 remedial actions but also removal actions, including
198 consultation with State and local officials at federal
199 facilities. Another provision would expand the categories of
200 non-federal funds that States could apply as credits toward
201 meeting matching funds requirements to include State
202 oversight costs and in-kind expenditures. In-kind
203 expenditures essentially are non-monetary contributions that
204 may offset some of the costs. Another provision would codify
205 in statute EPA's general practice of obtaining the

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206 concurrence of the Governor of the State in which a site is
207 located in making a decision to list a site on the National
208 Priorities List and would give greater deference to State
209 priorities in the listing process overall. It would also
210 broaden the opportunity for judicial review of a remedial
211 action, if a State were to object to the selection of the
212 remedial action in writing.

213 The next bill, the Reducing Excessive Deadline
214 Obligations Act of 2013, has two primary provisions. The
215 first provision would bar federal financial responsibility
216 requirements that EPA may promulgate in the future from
217 preempting State financial responsibility requirements that
218 are in place on the effective date of any federal
219 requirements that EPA may promulgate. The other provision is
220 related to the Solid Waste Disposal Act and not CERCLA, and
221 it would amend the Solid Waste Disposal Act to require EPA to
222 review and revise regulations promulgated under that statute
223 as determined appropriate by the agency, rather than under
224 existing law requiring review and revision as necessary every
225 3 years.

226 The last bill, the Federal Facility Accountability Act

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227 of 2013, as its title suggests, would focus on federal
228 facilities, and in two respects would expand the waiver of
229 sovereign immunity at federal facilities to include not only
230 current but also former federal facilities, to encompass the
231 entire phase of the cleanup process for both remedial and
232 removal actions, and to clarify the extent to which
233 substantive and procedural requirements of State law apply to
234 federal facilities regardless of whether a federal facility
235 is on the NPL, the National Priorities List. The other
236 respect of the bill would authorize EPA to review the actions
237 taken by other federal departments and agencies under CERCLA
238 at federal facilities regardless of whether a facility is on
239 the National Priorities List, and also would allow States to
240 request such a review by EPA to ensure consistency with EPA
241 guidelines, rules, regulations or criteria.

242 That concludes the remarks of my prepared statement, and
243 thank you for the opportunity to appear before the
244 subcommittee today, and I would be happy to address any
245 questions you may have.

246 [The prepared statement of Mr. Bearden follows:]

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247 ***** INSERT 1 *****

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|
248 Mr. {Shimkus.} Thank you, Mr. Bearden.

249 And now I would like to recognize Mr. David Trimble, who
250 is from the Government Accountability Office. Sir, welcome.
251 Same thing, your full statement is in the record. You have 5
252 minutes. Obviously, I was very generous because we are here
253 to get a good background on these policies and pieces of
254 legislation, so you are recognized.

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|
255 ^STATEMENT OF DAVID TRIMBLE

256 } Mr. {Trimble.} Thank you. Chairman Shimkus, Ranking
257 Member Tonko and members of the subcommittee, my testimony
258 today focuses on GAO's work on four key issues: the role of
259 the States in cleaning up hazardous waste sites, federal
260 liabilities in management of sites listed on the NPL, the
261 National Priorities List, commonly referred to as Superfund
262 sites, the challenges and liabilities associated with
263 contaminated hardrock mining operations, and litigation under
264 environmental statutes including CERCLA, the statute
265 governing the Superfund program.

266 First, States play a critical role in cleaning up sites
267 listed on the NPL and severely contaminated sites that are
268 listed on the NPL. After a hazardous site is identified, EPA
269 often working with a State will evaluate the risks to the
270 environment and to human health and assign a hazard ranking
271 score. Sites posing hazards above a certain threshold are
272 eligible for listing on the NPL. Not all sites with serious
273 contamination and a high score are placed on the NPL, and the

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274 EPA policy is to not list such sites without approval from
275 the relevant State. Additionally, EPA cannot use money from
276 Superfund for long-term remediation activities unless the
277 State has also agreed to pay at least 10 percent of these
278 costs. The cleanup of sites not on the NPL can be managed by
279 EPA as a Superfund alternative site or by the States and
280 other entities under other cleanup authorities. In April, we
281 reported that 42 percent of sites assessed with contamination
282 severe enough to be eligible for listing on the NPL were
283 being managed as Superfund sites or Superfund alternative
284 sites. The remaining 58 percent were managed by other
285 cleanup programs. Notably, States managed the cleanup of
286 more Superfund-caliber waste sites outside of the Superfund
287 program than EPA oversees in the Superfund program.

288 Second, federal agencies, primarily DOD, have
289 substantial cleanup and financial liabilities at NPL sites.
290 Specifically, DOD is responsible for 80 percent of the 156
291 federal Superfund sites. The cost to clean up these sites
292 represents a significant financial liability for the
293 government. In addition, in 2010, we found that DOD's
294 refusal to sign a required interagency agreement with EPA on

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295 how these cleanups should proceed had complicated cleanup at
296 11 DOD NPL sites. As a result of work, DOD has decreased
297 this number to two sites. Let me note, however, that these
298 sites are at bases with large military and civilian
299 populations. That report also recommended that EPA seek to
300 increase its authority to hasten cleanups by other federal
301 agencies, but no changes have been made to the relevant
302 Executive Order.

303 Third, the federal government faces significant
304 financial challenges and liabilities associated with hardrock
305 mining operations. From 1997 to 2008, the federal government
306 spent over \$2.6 billion to reclaim abandoned hardrock mines
307 on federal, private and Indian lands with the EPA paying \$2.2
308 billion of this amount. In 2008, GAO estimated that there
309 were at least 33,000 abandoned hardrock mine sites with
310 environmental problems. One factor that contributes to
311 reclamation costs on federal lands disturbed by mining
312 operations is inadequate financial assurances required by the
313 Bureau of Land Management. These assurances are imposed on
314 new mining operations and are used to reclaim a site if the
315 operator fails to adequately do so. In 2012, BLM reported

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316 implementing our recommendation to improve the sufficiency of
317 these assurances.

318 Finally, EPA often faces litigation over its regulations
319 and other actions. Companies, interest groups, States and
320 citizens can sue EPA under CERCLA and other environmental
321 statutes, and these suits can be costly and time-consuming.
322 Such litigation includes citizen suits to compel to take
323 action when it does not meet deadlines, challenges to
324 regulations and permitting decisions, or lawsuits by
325 potentially responsible parties at hazardous waste sites. In
326 2011, we reviewed litigation associated with 10 environmental
327 statutes and found such cases averaged about 155 per year,
328 the majority of this litigation related to the Clean Air Act.
329 Overall, trade associations and private companies comprised
330 48 percent of the litigants filed by environmental groups at
331 30 percent, and non-federal and other parties made up the
332 remainder. Superfund cases represented about 2 percent of
333 the total cases in our study. This is consistent with our
334 2009 report on Superfund litigation, which found that
335 litigation had decreased by almost half from fiscal years
336 1994 through 2007. Regarding the cost of this litigation, we

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337 found that the Department of Justice spent about \$3.3 million
338 per year defending EPA. Additionally, payments made to the
339 prevailing parties in these cases to cover attorney fees and
340 court costs averaged about \$2.1 million per year, without
341 about three-quarters of these payments going to environmental
342 and citizen groups.

343 This completes my statement, and I would be pleased to
344 respond to any questions.

345 [The prepared statement of Mr. Trimble follows:]

346 ***** INSERT 2 *****

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|
347 Mr. {Shimkus.} Thank you, and now I would like to
348 recognize myself for 5 minutes for initial questions.

349 Before I go on to the prepared questions, Mr. Bearden, I
350 was involved with the, I think you called it the Small
351 Business Liability Relief Act mentioned in the opening
352 statement. That was one of the pieces of legislation that I
353 helped originally cosponsor to get to small businesses, the
354 Main Street stores, out of this litigation trap from the
355 potential responsible parties who then would go after, and
356 these folks were de minimis parties to the suit, and it was a
357 great victory, and I think it helped keep the small actors
358 out of the litigation. So thanks for mentioning that. I did
359 mention it last week but I didn't remember the name, couldn't
360 remember the year it passed and all that other stuff.

361 Mr. Bearden, can you explain the preference in CERCLA
362 and environmental law generally for non-preemption of State
363 laws, and then tell us if the REDO Act would further that
364 objective.

365 Mr. {Bearden.} Well, in general, there is a provision
366 in existing law and CERCLA that doesn't allow or prevent

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367 preemption of State laws, and States are free, of course, to
368 enact their own cleanup laws, and many have, sort of a
369 general premise with respect to the bill that would
370 specifically add preemption in the circumstance of a
371 financial responsibility requirement. So in that case, when
372 EPA promulgates financial responsibility requirements in
373 applying those, it would not be allowed to preempt a State
374 requirement that is in place on the effective date.

375 Mr. {Shimkus.} Would the Federal Facilities
376 Accountability Act also further that objective?

377 Mr. {Bearden.} Could you restate the question, please?

378 Mr. {Shimkus.} Would the Federal Facilities
379 Accountability Act also further that objective?

380 Mr. {Bearden.} Oh, the objective of preemption?

381 Mr. {Shimkus.} Correct.

382 Mr. {Bearden.} It expands the waiver of sovereign
383 immunity to apply State substantive and procedural
384 requirements to federal facilities, so it is similar to that
385 objective in terms of allowing State law to apply.

386 Mr. {Shimkus.} Thank you. In your opinion, are there
387 aspects of CERCLA that could be improved or ``modernized'',

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388 in particularly the waiver of sovereign immunity, and do the
389 bills the subcommittee is considering today take steps toward
390 making some improvements to the existing statute?

391 Mr. {Bearden.} Well, CRS takes no position or opinion
392 about the legislation, but what I could say in response to
393 your question is that what the bills would do are similar in
394 the overall policy vein of the 2002 amendments that would
395 amend the law in ways to be consistent with a greater number
396 of State laws that are in place and to address some
397 longstanding issues about whether waiver of sovereign
398 immunity applies to both current and former federal
399 facilities, and those issues have lingered for a number of
400 years.

401 Mr. {Shimkus.} So those are possible positive
402 provisions. Is there anything in the legislation that could
403 be positive that we may have left out that could do the same
404 thing and move us forward?

405 Mr. {Bearden.} Well, in terms of positive, that of
406 course would be a judgment call, and again, CRS would make no
407 position on it, but the types of issues that are addressed in
408 the bills are numerous longstanding issues that have been

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409 concerns of the States and other stakeholders about the
410 federal and State role, so they are not new issues; they are
411 continuing issues that have been addressed by Congress
412 previously in different ways.

413 Mr. {Shimkus.} Thank you. Mr. Trimble, your testimony
414 said as a matter of policy, EPA seeks concurrence from State
415 governors or environmental agency heads before proposing a
416 site on the National Priorities List. If it is a matter of
417 established EPA policy, do you see a problem with codifying
418 the policy in the statute?

419 Mr. {Trimble.} We have not done specific work on that.
420 I think the questions that would have to be looked at whether
421 there are specific cases where EPA might still need the
422 authority to list a site over State objection, and I am
423 thinking off the top of my head, I am thinking key issues may
424 be on sites that sort of cross borders between States so
425 there could be a dispute between States or could be perhaps a
426 situation where the State is somehow responsible for the
427 pollution, but I am just--

428 Mr. {Shimkus.} But you don't know of any particular
429 example that we could site right now? I understand that

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430 concern, but I am just wondering if there is an actual case.

431 Mr. {Trimble.} I don't know, sir.

432 Mr. {Shimkus.} CERCLA and the regulations implementing
433 CERCLA already provides the States with limited consulting
434 role before remedy selection. Do you see a problem with
435 amending the statute to codify the regulations and assure
436 that States are consulted during selection of the remedy?

437 Mr. {Trimble.} Again, we are not taking a position on
438 the legislation. We have not done any work on this issue of
439 how effective the State consultation mechanisms are within
440 the Superfund program. I think it is an interesting
441 question, but that is not something that we have delved into
442 in our past body of work.

443 Mr. {Shimkus.} In testimony last week, it was
444 interesting, the point being, there was some desire to ensure
445 that they have consultation early in the remedy because their
446 complaint was, we have the costs at the end, we have the
447 operational and maintenance costs at the end, and so maybe we
448 should have some role in saying how the remedy or at least
449 give our opinion because we are going to be on the hook for
450 the longevity of the program.

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451 Mr. {Trimble.} Yes, and I think again, because of the
452 financial requirements for the State to kick in 10 percent on
453 the remedial costs and also to sign up for the lifetime costs
454 of the operation and maintenance, there is a hook for the
455 State, again, but we have not looked at whether that gives
456 them enough leverage in the process to protect their
457 interests. I think one of the questions that came up last
458 week, and it is to your point, is, you know, how effective is
459 the cost-benefit analysis EPA is doing when they are choosing
460 their path forward and does that bias toward short upfront
461 costs and higher long-term costs or not, but that is a good
462 question but it is not something we have looked at.

463 Mr. {Shimkus.} Great. Thank you. The chair now
464 recognizes the ranking member of the subcommittee, Mr. Tonko,
465 for 5 minutes.

466 Mr. {Tonko.} Thank you. Thank you very much. I thank
467 the chair for reconvening our hearing today. We may not
468 cover every issue, but as our additional witnesses appear,
469 they help broaden and improve the record, so thank you very
470 much.

471 The hearing last week gave me reservations about the

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472 bills under consideration. Not a single witness gave
473 unqualified support to the bills we are examining today. In
474 fact, we heard testimony that one of the bills we are
475 considering would increase litigation and delay the cleanup
476 of contaminated sites. One of the majority's witnesses
477 explained that Superfund now contains a bar on pre-
478 enforcement judicial review. This provision is important
479 because it prevents litigation from delaying needed actions
480 to address releases of hazardous substances that threaten
481 human health and the environment.

482 So Mr. Bearden, one of the bills we are considering
483 today would reverse this longstanding policy, would it not?

484 Mr. {Bearden.} Yes, with respect to States filing
485 objections to the selection of a remedy.

486 Mr. {Tonko.} If enacted, a responsible party or anyone
487 else, for that matter, could go to court and sue EPA before a
488 cleanup even begins. Is that correct?

489 Mr. {Bearden.} If a State were to file a written
490 objection and someone were to have standing under that
491 provision, yes.

492 Mr. {Tonko.} And that would be before the cleanup

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493 begins?

494 Mr. {Bearden.} The way the provision is worded, the
495 trigger of the timing is when the State files its written
496 objection.

497 Mr. {Tonko.} Okay. That leg could delay then the
498 cleanup of contaminated sites, could it not?

499 Mr. {Bearden.} That would have to be demonstrated over
500 time. Whether it would delay it would depend on the nature
501 of the individual suit.

502 Mr. {Tonko.} We also received testimony last week that
503 a responsible party could have a financial incentive to go to
504 court to delay cleanup and argue for a less protective
505 cleanup remedy. Do you agree with that assessment?

506 Mr. {Bearden.} That would involve speculation, and what
507 a party may be motivated by, CRS cannot comment on that, but
508 again, anyone who may have standing under that provision once
509 the State files its objection could at least pursue the
510 matter.

511 Mr. {Tonko.} Which would affect the time element. The
512 end result could be that judges decide how to clean up
513 Superfund sites, and none of the witnesses last week seemed

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514 to think that that would be a good scenario.

515 Mr. Trimble, we have seen the problems with litigation,
516 haven't we? Has litigation been a problem under Superfund in
517 the past?

518 Mr. {Trimble.} As we have reported, I think initially
519 there was a heavy amount of litigation over time as the court
520 settled some legal issues and the number of sites being added
521 slowed down, and the EPA increased its reliance on sort of
522 agreements out of court. The number of those cases has
523 dramatically gone down. Right now, I believe it's 2 to 5
524 percent of all litigation cases that we looked at in our
525 list, not as large as you would think it would be, given the
526 universe.

527 Mr. {Tonko.} And can you give us a sense of the costs
528 of those litigations?

529 Mr. {Trimble.} Yes. There is a couple of costs. One
530 is the Department of Justice costs to defend EPA, and the
531 numbers we have are for about 10 environmental statutes, and
532 I think their costs were about \$3 million per year, if I am
533 remembering correctly, and that payments were about \$2
534 million per year.

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535 Mr. {Tonko.} And what have the recent trends been in
536 Superfund litigation over the recent years?

537 Mr. {Trimble.} Well, in our report from a couple years
538 ago, we found that it had decreased, I believe, by over half.

539 Mr. {Tonko.} And that is in duration and in cost?

540 Mr. {Trimble.} That was just number of cases.

541 Mr. {Tonko.} Okay. And can you speak to the complexity
542 of those cases?

543 Mr. {Trimble.} No, I don't have any information on the
544 complexity in terms of the trends of those.

545 Mr. {Tonko.} Well, that certainly is a positive trend,
546 but I am concerned that it could be reversed by lifting the
547 bar on pre-enforcement judicial review. Is that a legitimate
548 concern, in your opinion?

549 Mr. {Trimble.} Well, again, we don't opine on the
550 pending bills, but clearly as sort of the rules of the road
551 have settled, the litigation has declined over time in the
552 program.

553 Mr. {Tonko.} Mr. Chair, I hope we can give this the
554 bipartisan attention it deserves. No one, in my opinion,
555 would be well served if we end up moving legislation that

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556 increases litigation and therefore would cause delays in the
557 cleanup of contaminated sites, which would then really speak
558 to the overall mission statement and soulfulness of the
559 legislation. So with that, Mr. Chair, I yield back.

560 Mr. {Shimkus.} The gentleman yields back his time, and
561 I want to assure him that as conservative Republicans,
562 additional litigation is something that we are not interested
563 in. So I think there is some language that could be added to
564 ensure that that does not happen.

565 The chair now recognizes the gentleman from Ohio, Mr.
566 Latta, for 5 minutes.

567 Mr. {Latta.} Thank you, Mr. Chairman, and gentlemen,
568 thanks very much for your testimony today.

569 Mr. Trimble, if I could start my questions with you. In
570 the 1990s, GAO reported that within the EPA's cleanup budget
571 for CERCLA, less than 50 cents of the dollar was spent on
572 dirt-moving cleanup versus oversight and administrative
573 costs. Is that still the case?

574 Mr. {Trimble.} We have not done recent work on taking
575 apart their costs for the recent cleanup so I am not sure
576 what the ratio was. I know there is a lot of work, I am sure

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577 still even today, in terms of deciding investigation and
578 assessment a as opposed to sort of final construction.

579 Mr. {Latta.} Well, I guess when you say that you
580 haven't really been able to take it apart, is there a way
581 that you could get a current amount?

582 Mr. {Trimble.} It is not something we readily have. We
583 would have to do a review on that.

584 Mr. {Latta.} If you could provide that, I think the
585 Committee would like to know what that ratio is now because
586 if it is still at that 50/50--because I know of sites out
587 there that really needed cleaned up, and at 50 cents on the
588 dollar, that is not helping those sites.

589 If I could go on then, it seems also that many States
590 have developed constructive working relationships with the
591 Department of Defense, particularly utilizing the Defense-
592 State Memorandum of Agreement. Are you familiar with the
593 general working relationship between other federal land
594 managers and States on non-NPL sites?

595 Mr. {Trimble.} I think we have done some work. I am
596 personally not that familiar with it. I know we had done
597 work on the cleanup of mines, so the relationship with the

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598 EPA and BLM, for example, and we have done work in that area.

599 Mr. {Latta.} Let me ask this: is there a distinction
600 between the relationship between DOD and DOE may have with
601 the States versus the federal land managers, for example?

602 Mr. {Trimble.} I am not familiar with it. Again, we
603 have not looked into the relationship between States and DOD
604 or States and EPA, for that matter. Regarding DOD, we have
605 reported on difficulties where DOD has refused to sign
606 interagency agreements with EPA governing the cleanup of NPL
607 sites.

608 Mr. {Latta.} You say that DOD has not signed. Is there
609 a reason for that?

610 Mr. {Trimble.} Not that we can understand. This is an
611 ongoing issue. In our report from a couple years ago, we had
612 identified 11 sites where they had refused to sign the
613 agreement, which is required under CERCLA. After our report,
614 they took action, and now there are only two sites. One of
615 these is Tindall Air Force Base, and even in that situation
616 with Tindall, EPA has issued a RCRA order, which DOD has also
617 not complied with. So there is still letters going back and
618 forth regarding the matter. Regarding the RCRA matter at

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619 DOJ, DOD objected to EPA issuing the order. DOJ upheld EPA's
620 authority to issue it, and we don't have any ongoing work on
621 this, we are just following the issue because it is something
622 we have done work in the past on, but it is a significant
623 issue in terms of hampering the ability of the EPA to oversee
624 the effective cleanup.

625 Mr. {Latta.} Thank you.

626 Mr. Bearden, if I could ask you quickly, can you explain
627 the State cost share requirement under CERCLA and maybe give
628 us some insight regarding why States are concerned with the
629 EPA selecting the remedies that focus on short-term
630 containment rather than long-term stewardship?

631 Mr. {Bearden.} The federal-State cost sharing
632 proportion, as outlined in my prepared statement, is
633 generally 90 percent share of the federal government for the
634 capital costs of the remedial action, 10 percent shared by
635 the State, and again, 100 percent of operation and
636 maintenance with the exception of treatment of groundwater.
637 So for containment methods that may be a concern for the
638 State in terms of being responsible for 100 percent of the
639 long-term operation and maintenance, for example, if there is

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640 a waste cap that has to be maintained for many years, if not
641 decades, the State would be fully responsible for those costs
642 under existing law.

643 Mr. {Latta.} Let me just follow up with that. Would a
644 change in the cost share provision in CERCLA address these
645 State concerns?

646 Mr. {Bearden.} If the cost share provision were changed
647 to have the State bear less than 100 percent, then that would
648 increase the necessity for federal resources and then it may
649 affect decisions that are made. The requirement in existing
650 law is for EPA to consider short- and long-term cost-
651 effectiveness of assessing the remedy, so there is a
652 statutory requirement to consider cost-effectiveness.

653 Mr. {Latta.} Okay. And could you also explain how the
654 criteria for selecting remedial action may be relevant, and
655 would they also need to be addressed?

656 Mr. {Bearden.} I am not sure if I understand your
657 question, sir.

658 Mr. {Latta.} Well, in explaining the criteria for
659 selecting remedial action.

660 Mr. {Bearden.} The criteria for selecting remedial

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661 action under existing law are that there be applicable,
662 relevant and appropriate requirements. There is a whole host
663 of criteria in statute and regulation on determining what is
664 applicable, relevant and appropriate at a site. Generally, a
665 State requirement can be applied as well if it is more
666 stringent than the federal requirement. But then again,
667 those criteria may allow for exclusions of some standards
668 under those criteria.

669 Mr. {Latta.} Just briefly, if I may, Mr. Chairman, I
670 see my time is expired, but would also need to be addressed,
671 do you think, those remedial actions if we are looking at
672 that? Should those actions be addressed out there?

673 Mr. {Bearden.} Well, if one is looking at the federal
674 and State roles in making those decisions and one is
675 concerned about who is sharing the cost, one would need to
676 consider the existing criteria under which those decisions
677 would be made.

678 Mr. {Latta.} Thank you. Mr. Chairman, my time is
679 expired and I yield back. Thank you very much.

680 Mr. {Shimkus.} The gentleman yields back his time. The
681 chair now recognizes the chairman emeritus of the committee,

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682 Mr. Dingell, for 5 minutes.

683 Mr. {Dingell.} Mr. Chairman, I thank you for your
684 courtesy and I commend you for holding this hearing. I want
685 to begin with congratulations to Mr. Bearden and Mr. Trimble.
686 You have given good testimony this morning, and your agencies
687 have been agencies that this committee has looked to most
688 urgently for your help in times past as well as today. These
689 questions are for Mr. Trimble, and I am hopeful to that the
690 degree you can you will answer yes or no.

691 Relating to the amendments to Section 108 of CERCLA, can
692 you tell the subcommittee how many States have promulgated
693 financial responsibility requirements?

694 Mr. {Trimble.} I do not know the answer.

695 Mr. {Dingell.} Could you check and submit that?

696 Mr. {Trimble.} I can check to see if we have that.

697 Mr. {Dingell.} And perhaps you would want to make a
698 comment on that, Mr. Trimble, but I assume you will want to
699 do that for the record, or rather Mr. Bearden.

700 What are the amounts set in each State and for what
701 classes of facilities? I assume that is a matter that you
702 will have to submit for the record also.

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703 Now, the next question: does anything prevent a State
704 from obtaining funding from fees, taxes or other sources of
705 revenue to clean up toxic waste sites in the respective
706 States and thus have total control over the remedy selected
707 or removal action taken? Yes or no. This is to Mr. Trimble.

708 Mr. {Trimble.} Not to my knowledge.

709 Mr. {Dingell.} What does that mean?

710 Mr. {Trimble.} No.

711 Mr. {Dingell.} Next question, if you please, Mr.
712 Trimble. Section 113(h) provides new opportunity for
713 lawsuits where a State simply writes a letter objecting to a
714 remedy selected by the President after such letter is posted
715 by the State. Would this new provision also allow the
716 responsible party who polluted the site in the first place to
717 litigate and to challenge the remedy? Yes or no.

718 Mr. {Trimble.} I am not a lawyer, but I would think it
719 would.

720 Mr. {Dingell.} You would think it would. Do you have a
721 comment on that, Mr. Bearden?

722 Mr. {Bearden.} I addressed that question, a similar
723 question, earlier. Assuming someone would have standing

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724 under that provision, the trigger would be, as you mentioned,
725 the State filing a written objection to the selection of the
726 remedy.

727 Mr. {Dingell.} Thank you. Now, this is to Mr. Trimble.
728 Mr. Trimble, would this provision allow an environmental
729 group to also challenge the remedy if they could get a State
730 to write such a letter? Yes or no.

731 Mr. {Trimble.} Yes.

732 Mr. {Dingell.} And I would assume that almost anybody
733 who could involve themselves in this could enter the
734 litigation of the question, could they not?

735 Mr. {Trimble.} I would defer to Mr. Bearden but I--

736 Mr. {Dingell.} Please, Mr. Trimble.

737 Mr. {Trimble.} I would assume so, but again, we have
738 not done audit work in this area but my understanding would
739 be that is the case.

740 Mr. {Dingell.} Mr. Bearden?

741 Mr. {Bearden.} As with any litigation, it would depend
742 on whether someone has standing, and a judge would have to
743 decide that based on the circumstances.

744 Mr. {Dingell.} We would significantly increase the

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745 number of persons who have standing by this provision, would
746 we not?

747 Mr. {Bearden.} It does broaden the opportunity for
748 judicial review.

749 Mr. {Dingell.} Now, what happens to the citizens and
750 the surrounding communities that is being exposed to the
751 hazardous substance and hazardous conditions or to
752 communities and persons in the communities who wish the site
753 to be redeveloped to create jobs while the remedy decision is
754 litigated in the federal courts? They just have to sit and
755 grind their teeth, don't they? Yes or no.

756 Mr. {Trimble.} I don't know about the grinding of the
757 teeth but--

758 Mr. {Dingell.} I know if I were, I would. This has a
759 significant chance of increasing the number of litigants and
760 the amount of time that is involved in concluding the cleanup
761 of these sites, does it not?

762 Mr. {Trimble.} I would suspect that the delay would add
763 to the time, yes.

764 Mr. {Dingell.} All right. Mr. Chairman, as I stated
765 last Friday, I do not see the factual record in this matter

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766 justifying significant changes to the existing law here. The
767 changes to Section 113(h) expand the opportunities for
768 litigation, meaning communities would have to live longer
769 without a cleanup remedy. Section 121(f) of current law
770 already details requirements for substantial and meaningful
771 involvement by each State in initiation, development and
772 selection of remedial actions. Then there is an amendment to
773 Section 108. In this section, the Congress wanted to EPA to
774 establish financial responsibility requirements for various
775 classes of facilities so that they could maintain evidence of
776 financial responsibility consistent with the degree and the
777 duration of the risk associated with the production,
778 transportation, treatment, storage or disposal of hazardous
779 substances. The Agency has been dilatory in implementing
780 this provision. However, instead of calling the EPA to task
781 for failing to act, the legislation here seems to have a goal
782 to eliminate the one provision that was imposing a mandatory
783 duty on EPA to initiate the action. I feel with regret that
784 the amendments appear to be solutions in search of a problem,
785 and I hope that as we continue our discussion of these
786 matters and our evaluation of these matters, it will be

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787 possible to address the concerns that I have expressed, and I
788 thank you for letting me run over time.

789 Mr. {Shimkus.} And I thank the gentleman. The chair
790 now recognizes the vice chairman of the subcommittee, Mr.
791 Gingrey, for 5 minutes.

792 Dr. {Gingrey.} I thank the chairman for yielding, and
793 Mr. Trimble, I will address my first question to you. In an
794 October 2009 report on formerly used defense sites--I think
795 that's GAO report 1046--GAO found that the Army Corps has not
796 consistently conducted CERCLA 5-year reviews to assure
797 continued protectiveness of remedies on sites where the
798 chosen remedy does not allow for unrestricted use and
799 unrestricted exposure. So did GAO find that the Corps
800 routinely complies with State land-use control and
801 environmental covenant requirements for such sites?

802 Mr. {Trimble.} I do not recall from that report if it
803 got into the details of where there was noncompliance of
804 State-specific requirements. The finding was, if you go
805 through remedial action and you clean up a site and you say
806 your construction is complete and you are adjusting the
807 operation and maintenance phase, at that point you have to

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808 monitor it every 5 years to make sure it is still in good
809 shape. What that review found was that for the formerly used
810 defense sites, the Army Corps was not doing a good job at
811 monitoring those sites to make sure that everything was still
812 as it should be or if new contamination had emerged or new
813 remedies would have to be put in place. Now, the basis for
814 how it could have gone off the rails might have been State
815 requirements versus federal requirements, and I don't know
816 off the top of my head if that report got into that level of
817 detail.

818 Dr. {Gingrey.} Would that be true for commercial sites
819 as well?

820 Mr. {Trimble.} The 5-year requirement would be there
821 but who would be doing it would be different.

822 Dr. {Gingrey.} But the 5-year requirement is there.

823 Mr. Bearden, we also understand that there are EPA
824 regulations pertaining to consultations with the States
825 regarding remedy selection, and we understand that the
826 statute already requires consultation at certain points in
827 the process. Do you think that codifying that regulatory
828 practice in statute would be a bad thing?

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829 Mr. {Bearden.} Well, there are many instances where
830 Congress chooses to codify a regulatory requirement to
831 elevate it in statute, and that is a policy decision of the
832 Congress.

833 Dr. {Gingrey.} Well, wouldn't codifying the regulations
834 regarding consultation regarding remedy selection ensure
835 consistency among all the EPA regions and ensure that other
836 federal agencies also consult with States when selecting a
837 remedy?

838 Mr. {Bearden.} Well, the regulatory requirements
839 already apply to all regions and to other federal agencies
840 who implement a national contingency plan, which are the
841 regulations to which you are referring. Whether in practice
842 they implement them consistently may be a question, but they
843 already are required to follow those regulations.

844 Dr. {Gingrey.} Well, the question was, wouldn't
845 codifying the regulations make this work better and more
846 consistently?

847 Mr. {Bearden.} It would elevate it as a statutory
848 requirement. It already is a requirement. There may be
849 questions of application on a consistent basis.

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850 Dr. {Gingrey.} Well, that is my whole point. CERCLA
851 specifically requires consultation with the States before
852 selecting a remedy. The Federal-State Partnership for
853 Environmental Protection Act would amend the timing of the
854 consultation to ensure that States are consulted during the
855 process of selecting a remedy. What is your opinion about
856 changing the timing for the consultation?

857 Mr. {Bearden.} Well, CRS would make no opinion on any
858 amendments, but in terms of timing, that difference would be
859 in current law, it is in determining the remedy, and that may
860 be interpreted as the point at which you are selecting as
861 opposed to earlier in the process before a determination is
862 made, so the bill would expand the time frame to an earlier
863 stage of the process in statute.

864 Dr. {Gingrey.} Mr. Chairman, I see I have got about 45
865 seconds, if anyone on this side, or do you want me to yield
866 back to you.

867 Mr. {Shimkus.} Just yield back.

868 Mr. {Gingrey.} I will yield back.

869 Mr. {Shimkus.} The gentleman yields back. The chair
870 now recognizes the gentleman from California, Mr. McNerney,

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871 for 5 minutes.

872 Mr. {McNerney.} Thank you, Mr. Chairman, for holding
873 this follow-up hearing.

874 Mr. Bearden, in your testimony you stated that the
875 States have input into the designation of the NPLs. Can the
876 EPA list sites on the NPL without State concurrence or
877 cooperation?

878 Mr. {Bearden.} EPA has the statutory authority to list
879 a site without State concurrence. I don't know of an example
880 in which that has occurred. The amendments in 2002 address
881 that very issue that limited EPA's authority to list a site
882 without the State's concurrence. A State may request EPA to
883 defer and there would have to be a set of conditions that EPA
884 would determine that a State was not making adequate progress
885 toward the cleanup in order to list the site despite a
886 State's request to defer the listing. So it is more limited
887 in current law as a result of the 2002 amendments.

888 Mr. {McNerney.} Well, last week we heard from State
889 organizations who claim to have little or no input into the
890 process. Could you explain the disconnect?

891 Mr. {Bearden.} Well, I can't speak to their level of

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892 understanding but if one reads Section 105(h) of CERCLA,
893 which was added again in the 2002 amendments, a State merely
894 has to request that EPA not list a site, and at that point
895 that limits EPA's authority, again, unless a determination is
896 made under the statutory criteria that listing is necessary
897 to protect human health and the environment.

898 Mr. {McNerney.} Okay. There is a disconnect there,
899 clearly. You said that the Federal Facility Accountability
900 Act of 2013 would hold federal agencies more accountable at
901 federal facilities to include current and former federal
902 facilities to encompass the entire phase of the cleanup
903 process and to clarify in greater detail the extent to which
904 substantive and procedural cleanup requirements of State law
905 apply to federal facilities. Can you explain the impact that
906 this would have on listing of NPLs?

907 Mr. {Bearden.} Well, it would not have a direct bearing
908 on the listing of sites on the National Priorities List. It
909 would determine--based on the language in the bill, it would
910 apply to either National Priorities List sites or non-
911 National Priorities List sites. It would determine what
912 requirements that are substantive and procedural of the State

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913 may be applied to the cleanup. It would determine how the
914 cleanup may be performed and apply regardless of listing
915 status.

916 Mr. {McNerney.} Thank you. Mr. Trimble, in your
917 testimony you stated that CERCLA authorizes the EPA to compel
918 potentially responsible parties to clean up their sites. Do
919 you think that the proposed bills would undermine the EPA's
920 authority in this compelling the potentially responsible
921 parties to clean up their sites?

922 Mr. {Trimble.} I don't know if I have any work that
923 would speak directly to that, and I think you would have to
924 see how these things sort of were implemented. I think the
925 issues of if EPA is restricted in taking immediate, sort of
926 response actions, that could be one issue that could come up.
927 I am not sure I have much more to offer than that on that
928 question.

929 Mr. {McNerney.} Well, the authority for funding the
930 actual cleanup expired 18 years ago despite the increasing
931 financial liability since that time. Rather than trying to
932 restructure the authority in CERCLA, Congress should, in my
933 opinion, reinstate the fees on which the old funds relied.

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934 Are there other funding sources that would be viable to
935 supplement the fund?

936 Mr. {Trimble.} GAO has not taken a position or looked
937 at alternative funding issues for Superfund. The tax was one
938 option. Right now it is coming out of general taxes, general
939 fund. We have done work looking at sort of anticipated
940 future costs in the Superfund program, and those costs are
941 very difficult to measure for a variety of reasons.
942 Superfund program managers have estimated that their costs
943 will likely exceed available monies going forward as many of
944 these sites get more complex and complicated, for example,
945 some of the mining sites. But we don't have an opinion. It
946 is more of a policy question in terms of where the money
947 comes from, so we don't have a position on that.

948 Mr. {McNerney.} But there is going to be a critical
949 shortage of funds from all sources to clean up these sites.

950 Mr. {Trimble.} Well, the program will continue to need
951 a lot of money going forward.

952 Mr. {McNerney.} Thank you. I yield back, Mr. Chairman.

953 Mr. {Shimkus.} The gentleman yields back his time. The
954 chair now recognizes the gentleman from Ohio, Mr. Johnson,

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955 for 5 minutes.

956 Mr. {Johnson.} Thank you, Mr. Chairman, for the time,
957 and gentlemen, thank you both for being here with us today.

958 Mr. Trimble, has your office ever conducted a review of
959 other federal agencies' implementation of institutional
960 controls as a part of removal or remedial actions conducted
961 pursuant to authorities granted under CERCLA or Executive
962 Order 12580?

963 Mr. {Trimble.} To my knowledge, we haven't. I mean, I
964 can certainly check when I go back, but I am not familiar
965 with prior work on that issue.

966 Mr. {Johnson.} Would you please check and get back with
967 us?

968 Mr. {Trimble.} Absolutely.

969 Mr. {Johnson.} I would appreciate that. Do you think
970 it would be constructive to conduct such a review?

971 Mr. {Trimble.} Absolutely.

972 Mr. {Johnson.} Let me go also to you, Mr. Trimble. In
973 June of 2006, GAO conducted a review of EPA's implementation
974 of institutional controls by the EPA Superfund program. In
975 this or any subsequent review, were you able to ascertain

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976 whether EPA routinely complies or requires compliance with
977 State land-use control or environmental covenant laws and
978 regulations?

979 Mr. {Trimble.} And I apologize, I am not familiar with
980 that report and I would love to take that for the record, if
981 I could.

982 Mr. {Johnson.} Good. I would appreciate that as well.
983 Would it be fair to anticipate that requiring federal
984 agencies, in your mind, would it be fair to anticipating that
985 requiring federal agencies to comply with State laws that
986 require that institutional control be implemented and
987 enforced in perpetuity that this would help ensure that these
988 controls are in fact maintained for as long as they are
989 necessary to protect human health and the environmental?

990 Mr. {Trimble.} I am curious on the work we have done in
991 the past but I think the key question is whether or not they
992 currently are considered in the existing procedures and
993 processes, whether or not there is a disconnect between the
994 States' desires to apply certain controls and whether those
995 are actually going on into effect and whether or not they
996 have enough leverage to make that happen. If there a

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997 breakdown there, then certainly there is an issue to be
998 looked at.

999 Mr. {Johnson.} Thank you. If you would get back to the
1000 committee on that, I would appreciate it.

1001 Mr. {Trimble.} Absolutely.

1002 Mr. {Johnson.} Mr. Chairman, with that, I will yield
1003 back my time.

1004 Mr. {Shimkus.} The gentleman yields back his time. The
1005 chair now recognizes the gentlelady from California, Ms.
1006 Capps, for 5 minutes.

1007 Mrs. {Capps.} The bills before us may affect many
1008 aspects of the program's ability to accomplish this goal but
1009 my time is limited so I want to focus on one particular
1010 provision. My first question is going to be for you, Mr.
1011 Bearden. The federal and State partnership bill we are
1012 examining includes an amendment that could complicate and
1013 impede, in my opinion, the streamlined process currently in
1014 place for short-term Superfund removal actions. So I wanted
1015 to ask you, Mr. Bearden, can you explain what removal actions
1016 are and why we need to be able to undertake them quickly?

1017 Mr. {Bearden.} Removal actions can be conducted in two

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1018 different capacities. One is referred to programmatically as
1019 time critical. The other is non-time critical. At any site
1020 where a release is reported and EPA, State and local
1021 officials become aware of it, the very earliest actions to
1022 stabilize the site may be considered in practical terms to be
1023 the early emergency phase of the response, but the removal
1024 action can continue much longer than that, especially the
1025 non-time-control removal actions. So there are various
1026 phases even for the removal aspect of the process.

1027 Mrs. {Capps.} So some removal actions are very pressing
1028 and are needed to address imminent public health threats. I
1029 mean, that could be the trigger that necessitates quick
1030 action. Am I right?

1031 Mr. {Bearden.} Correct. The initial response is a
1032 removal, and the very earliest stage of the response is to
1033 stabilize the site and prevent potentially harmful exposures
1034 at the very earliest stages.

1035 Mrs. {Capps.} Okay. Moving on, these imminent threats
1036 are why these actions have always been done in a streamlined
1037 process. In testimony they provided last week, the EPA
1038 expressed concern that this legislation as currently drafted

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1039 would require consultation before removal actions could even
1040 begin. The Agency said the bill could, and this is a quote
1041 from EPA, ``The bill could have an adverse impact on your
1042 emergency removal program by introducing potential delays
1043 when EPA needs to conduct time-critical emergency removal
1044 actions.'' Having a Superfund site in my district, this is a
1045 big concern for me, the timing that we are talking about.

1046 So Mr. Bearden, do you agree with EPA's assessment that
1047 this procedural change has a potential to delay removal
1048 actions?

1049 Mr. {Bearden.} Well, CRS would not agree or disagree
1050 with an agency position but what I can say is, at the very
1051 earliest stages of the emergency response, even under the
1052 regulations of the National Contingency Plan that EPA
1053 promulgated, State and local officials are expected in most
1054 cases to be the first responders. So it is actually the
1055 State and local officials who are on site. Most often it is
1056 the local fire department, local police department, to
1057 stabilize the emergency conditions and then it becomes
1058 elevated to EPA's attention.

1059 Mrs. {Capps.} And your careful delineation of those

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1060 steps indicates that the reason they are done that way is to
1061 enable a prompt response and timely response.

1062 I have only one question left, but I want to make sure
1063 that I ask you, Mr. Trimble, the GAO has done work on
1064 contamination at Superfund sites nationwide and on health
1065 assessments of Superfund sites done by the Agency for Toxic
1066 Substance and Disease Registry. These assessments find risks
1067 of cancer, development issues, neurological effects. So my
1068 question to you, Mr. Bearden, what could be the consequences
1069 of delaying emergency removal actions?

1070 Mr. {Bearden.} Assuming the delay actually resulted in
1071 increased exposure to whatever contaminants, then the
1072 problems being cited by ATSDR could be expected to be great.

1073 Mrs. {Capps.} So you two are sort of in agreement with
1074 the notion that if something is discovered, that the local
1075 responders really are in a position because they are close to
1076 make that initial assessment. It doesn't removal EPA's
1077 responsibility but it allows the emergency response to happen
1078 the way emergency responders are trained to do and then they
1079 come in and make an assessment when there is a little more
1080 time in their favor. Would you agree? Any other comments

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1081 you wish to make on either of these points, either of you?

1082 Mr. {Bearden.} No.

1083 Mrs. {Capps.} Then I will yield back the balance of my
1084 time.

1085 Mr. {Shimkus.} The gentlelady yields back her time.

1086 The chair now recognizes the gentleman from Florida, Mr.

1087 Bilirakis, for 5 minutes.

1088 Mr. {Bilirakis.} Thank you. I appreciate it, Mr.

1089 Chairman.

1090 Mr. Bearden, what recourse do States currently have if
1091 they disagree with an EPA decision or remedy and what
1092 recourse do States have if they disagree with another federal
1093 agency's decision or remedy?

1094 Mr. {Bearden.} The current existing mechanisms if it is
1095 a site that would be funded with federal Superfund
1096 appropriations for the remedial action. If since the State
1097 is responsible for sharing the cost, as I outlined in my
1098 prepared statement, if the State chooses not to provide those
1099 matching funds, under existing law and CERCLA, EPA does not
1100 have the authority to use the federal Superfund
1101 appropriations. So that is some leverage that the State

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1102 could be provided, and that is the underlying intent of the
1103 way the matching funds requirements are structured to have a
1104 factor be included in the federal decision on whether or not
1105 the State agrees to provide its match. So those again are
1106 circumstances where Superfund appropriations are used so that
1107 would not apply to sites where private potentially
1108 responsible party funds are used through enforcement actions.
1109 In those cases, then the State input is limited to the
1110 consultation process under existing law.

1111 In terms of federal facilities, as was mentioned
1112 earlier, there is a provision in existing law for States to
1113 challenge a selection of a remedial action in a U.S. District
1114 Court as outlined in my statement, so that is a mechanism
1115 specifically at federal facilities where it would be
1116 administered and funded by other federal agencies like
1117 Department of Defense and Department of Energy.

1118 Mr. {Bilirakis.} Thank you. Mr. Trimble, during the
1119 first day of this hearing, the subcommittee heard testimony
1120 comparing the compliance rate of federal facilities under the
1121 Clean Water Act and the RCRA. The testimony indicated that
1122 due to the ability of the States to impose and collect

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1123 penalties under RCRA but not under the Clean Water Act, that
1124 RCRA experiences a significantly higher compliance rate by
1125 federal facilities than does the Clean Water Act. Has GAO
1126 ever conducted a similar evaluation, and if so, what did you
1127 find?

1128 Mr. {Bearden.} Again, to my knowledge, we have not done
1129 such a study. I am happy again to look to make sure I am not
1130 missing something when I say that. I think in general, the
1131 issue of having a stick to ensure compliance makes people
1132 behave better. As I noted earlier, we have made
1133 recommendations in terms of EPA's ability to make other
1134 federal agencies comply. I think that the issue of DOD's
1135 noncompliance with the requirement that they sign an
1136 interagency agreement with the EPA governing the cleanup at
1137 two NPL sites, Tindall Air Force Base in particular comes to
1138 mind, GAO has made recommendations in the past as a matter of
1139 congressional consideration to give EPA more authority to
1140 force compliance by DOD when they are faced with these kinds
1141 of situations.

1142 Mr. {Bilirakis.} Okay. One more question, Mr.
1143 Chairman.

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1144 Mr. Trimble, in your testimony you mention Executive
1145 Order 12580. Does this Executive Order enable some or all
1146 federal agencies including those that are potentially
1147 responsible parties to self-regulate and make determinations
1148 regarding their compliance with State and federal cleanup
1149 requirements, and if you can please explain briefly?

1150 Mr. {Trimble.} Again, I will probably lean on David to
1151 help me out here.

1152 Mr. {Bilirakis.} Okay. That would be great.

1153 Mr. {Trimble.} But I think it gives agencies like DOE
1154 and DOD the authority to manage the cleanups. EPA is still
1155 in sort of a partner position but also to provide independent
1156 oversight on those activities to make sure the cleanups are
1157 done appropriately, which, again, speaks to the need for that
1158 interagency agreement at places like Tindall to make sure
1159 they are being done appropriately on time and to the correct
1160 standards.

1161 Mr. {Bilirakis.} Yes, please.

1162 Mr. {Bearden.} Yes. All I would add to that is, when
1163 it is a federal agency like the Department of Defense,
1164 Department of Energy, there can be other federal agencies as

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1165 well, the Executive Order that you cited authorizes that
1166 agency to execute the President's authority for the response
1167 action, which is carrying out the cleanup itself. But when
1168 it is a National Priorities List site and a federal facility,
1169 as Mr. Trimble mentioned, EPA has a prominent oversight role,
1170 and actually under existing law has final decision-making
1171 authority at the federal level for selecting the cleanup
1172 actions and the deference is to EPA, not the federal agency
1173 responsible for carrying out the cleanup. And in terms of
1174 State involvement, if it is a non-National Priorities List
1175 site, the State primarily is responsible for overseeing that
1176 cleanup carried out with the President's delegated
1177 authorities under the Executive Order.

1178 Mr. {Bilirakis.} Thank you. I yield back, Mr.
1179 Chairman.

1180 Mr. {Shimkus.} The gentleman yields back his time. The
1181 chair now recognizes the gentleman from Pennsylvania, Mr.
1182 Pitts, for 5 minutes.

1183 Mr. {Pitts.} Thank you, Mr. Chairman. I just had a
1184 couple questions. Sorry to be in and out with meetings. I
1185 apologize if this has been asked.

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1186 Mr. Bearden, we understand that it is currently EPA's
1187 policy not to list a site on the National Priorities List
1188 over the objection of the State. Do you think that codifying
1189 the EPA policy in the statute would ensure that States could
1190 count on this policy?

1191 Mr. {Bearden.} Well, codifying it in statute and making
1192 it binding by law would certainly require EPA to adhere to
1193 that policy?

1194 Mr. {Pitts.} Wouldn't codifying the policy to not list
1195 a site on the National Priorities List eliminate any
1196 potential inconsistent among the regions?

1197 Mr. {Bearden.} Yes, there would not be any discretion
1198 in implementing the existing policy if it were to become a
1199 uniform statutory requirement in all cases.

1200 Mr. {Pitts.} Now, do you have any comments or opinions
1201 regarding whether it would be benefit to authorize EPA to
1202 review actions taken by other federal agencies under CERCLA
1203 to ensure consistency with EPA cleanup guidelines, rules and
1204 regulations?

1205 Mr. {Bearden.} Well, under existing law, when it is a
1206 federal facility on the National Priorities List, already EPA

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1207 has the authority under the interagency agreement to make a
1208 decision on the final remedy selection. So there already is
1209 that mechanism for ultimate review in making a decision.

1210 Mr. {Trimble.} If I could add to that, what is missing,
1211 though, is giving EPA the stick if they find noncompliance.
1212 So I believe the way the language is written, it allows EPA
1213 to review, but what happens if EPA finds somebody is in
1214 noncompliance? And that is sort of the situation we have
1215 today.

1216 Mr. {Pitts.} Thank you. Thank you, Mr. Chairman.

1217 Mr. {Shimkus.} The gentleman yields back his time. The
1218 chair wants to ask unanimous consent for a couple letters to
1219 be submitted in the record, one letter from public interest
1220 groups on RCRA Section 202(b) and CERCLA 108(b), a letter
1221 from other public interest groups on CERCLA Section 113(h)
1222 and Section 105, and a letter from Headwaters Resources, also
1223 signed by Boral Material Technologies. They were referred to
1224 in the first testimony, and I quote a line in here:
1225 ``Headwaters and Boral utilize Section 202(b) of RCRA in an
1226 attempt to end the recent uncertainty as a matter of overall
1227 governance. We think Section 202(b) RCRA makes for poor

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1228 public policy. It could enable special interest groups
1229 through deadline suits to set EPA's agenda.' ' So we will
1230 submit those into the record.

1231 [The information follows:]

1232 ***** COMMITTEE INSERT *****

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1233 Mr. {Shimkus.} I am joined by my colleague from Texas,
1234 Mr. Green. You are recognized for 5 minutes.

1235 Mr. {Green.} Thank you, Mr. Chairman. I apologize to
1236 our witnesses. We are balancing two committees at the same
1237 time, and I just finished in the O&I Committee.

1238 I want to thank you for holding the hearing today. I am
1239 happy to see GAO and CRS come before us subcommittee to speak
1240 on proposals to amend CERCLA and RCRA.

1241 I have a very urban district in Houston, and it is East
1242 Harris County, which is a heavy industrial large
1243 petrochemical complex in the country, and there are a number
1244 of Superfund sites in and near our district that I have been
1245 involved with other the years. The most recent one, although
1246 it has been there a while, includes the U.S. oil recovery
1247 site in Pasadena, which was added to the National Priorities
1248 List last year. From my experience, the Superfund program
1249 has played a value role in protecting the environment and
1250 human health of my constituents and for Americans for all 50
1251 States, and I am concerned how the proposed legislation would
1252 change this program.

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1253 Mr. Bearden, is it true that the EPA is already
1254 obligated by federal statute to give substantial deference to
1255 the States on naming sites to the NPL?

1256 Mr. {Bearden.} The substance deference is a result of
1257 the 2002 amendments. EPA may still list a site if EPA
1258 determines it is necessary to protect human health and the
1259 environment but generally defers to the State if they desire
1260 not to list the site.

1261 Mr. {Green.} Well, the two I have been involved in, we
1262 got concurrence from the State agency. In fact the State
1263 agency was very happy to have them listed on the site
1264 including the current one.

1265 Mr. Bearden, is it that true that the 2002 amendments to
1266 limit EPA's enforcement authorities to CERCLA to pursue the
1267 cleanup of a site if a State is already pursuing the cleanup
1268 under its own law?

1269 Mr. {Bearden.} Yes. The 2002 amendments address that
1270 issue.

1271 Mr. {Green.} You know, again, my experience with Texas
1272 is that we have had good cooperation between our regional
1273 office on our Superfund sites. I wish we didn't have them,

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1274 but again, in an industrial area, that is going to happen if
1275 you have been producing chemicals and things for 60, 70
1276 years.

1277 Mr. Bearden or Mr. Trimble, to your knowledge, has a
1278 site ever been added to the NPL without the concurrence of
1279 the governor of the State in which a site is located?

1280 Mr. {Bearden.} I am not aware of one myself.

1281 Mr. {Trimble.} I am not either.

1282 Mr. {Green.} Mr. Trimble, in your testimony you noted
1283 that over 40,000 potential hazardous release sites have been
1284 reported to EPA over the past 30 years and yet EPA has
1285 determined only a few thousand of those sites for NPL
1286 designation. Is that true?

1287 Mr. {Trimble.} That is correct.

1288 Mr. {Green.} What happens to those sites that are
1289 reported to EPA and not added to the NPL?

1290 Mr. {Trimble.} They are generally cleaned up under
1291 other cleanup authorities, so in our most recent report, we
1292 note that sites that are assessed at a level where the
1293 contamination would make them eligible for Superfund, so they
1294 are severely contaminated sites, the majority of those sites

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1295 actually are not handled by the Superfund program but are
1296 cleaned up under cleanup authorities principally managed by
1297 the States. The States manage about 47 percent of all those
1298 sites.

1299 Mr. {Green.} So the States handle about--so some of the
1300 sites are deferred to the States and so that is about 47
1301 percent of them?

1302 Mr. {Trimble.} Yes, the States handle more Superfund-
1303 caliber sites than EPA does under the Superfund program.

1304 Mr. {Green.} You know, in my experience, though, I
1305 haven't had the State being one to take it over because it
1306 has always been EPA oversight in cleaning up. Our problem is
1307 making sure we do due diligence and find a responsible party.
1308 Otherwise it is going to be the taxpayer that ultimately does
1309 it, which makes it harder, Mr. Chairman, when we don't have
1310 budget appropriations. That is why responsible parties are
1311 really important.

1312 You stated in your testimony the number of NPL site
1313 designations has increased in recent years. Is that true?

1314 Mr. {Trimble.} That is correct. I believe it is
1315 running about 22 a year.

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1316 Mr. {Green.} And again, a few years ago, in Congressman
1317 Ted Poe's district we were borders. It is a dioxin facility
1318 that actually submerged back in the 1960s and nobody knew
1319 about it, but we always knew that the Port of Houston had
1320 higher dioxin levels, but my industries that were there were
1321 being blamed for it and yet it was from an old site that very
1322 quickly Congressman Poe and I worked with EPA to be able to
1323 put it on the NPL. So it was a very bipartisan effort, and
1324 again, the State was happy that we finally were able to find
1325 the source of that. We still have a cleanup problem. It is
1326 encapsulated. How do you deal with sediment in a river that
1327 is, you know, 40 years old. Can you explain the number of
1328 designations has increased and why the number of designations
1329 increased in recent years?

1330 Mr. {Trimble.} A couple of factors that we have
1331 discussed in our reports. One is, it is often linked to
1332 States' abilities to take on these sites so with the economic
1333 downturn in the last few years, the States' ability or
1334 willingness to take on the cleanup responsibilities for these
1335 has gone down, which means the burden gets shifted to the
1336 federal government. And then also there is some emergence of

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1337 a growing number of these sites, abandoned mine sites, that
1338 have come on over.

1339 Mr. {Green.} Thank you, Mr. Chairman, for having the
1340 hearing.

1341 Mr. {Shimkus.} The gentleman's time is expired. The
1342 chair now recognizes the ranking member of the full
1343 committee, Mr. Waxman, for 5 minutes.

1344 Mr. {Waxman.} Thank you very much, Mr. Chairman. I
1345 thank you for reconvening the hearing today, and I am pleased
1346 that we have the opportunity to hear from knowledgeable
1347 experts about the Superfund program.

1348 The legislation before us has been presented as
1349 correcting a problem where States are not sufficiently
1350 consulted in the decisions to clean up contaminated sites
1351 through the Superfund program. The argument is that although
1352 Superfund is a federal program carried out by federal
1353 employees using federal resources, a State should be able to
1354 slate sites for cleanup, veto sites from being slated for
1355 cleanup, have a greater say in cleanup decisions, and even
1356 collect their attorney fees from the U.S. taxpayer when they
1357 sue the federal government. I am not sure this approach

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1358 strikes the right balance.

1359 Mr. Trimble, if a State wants more control over the
1360 cleanup of a contaminated site, the State can simply conduct
1361 its own cleanup under State law and retain full control of
1362 all decisions. Isn't that right?

1363 Mr. {Trimble.} That is correct.

1364 Mr. {Waxman.} And in fact, this happens regularly,
1365 doesn't it?

1366 Mr. {Trimble.} Yes, it does. About 47 percent or 48
1367 percent of all Superfund-caliber sites are managed by the
1368 States.

1369 Mr. {Waxman.} The States don't always do that, though,
1370 because they want federal resources and expertise brought to
1371 bear to get sites cleaned up. Isn't that correct?

1372 Mr. {Trimble.} That is correct.

1373 Mr. {Waxman.} In fact, the States often request that
1374 EPA come in and conduct expensive removal actions and
1375 response actions, don't they?

1376 Mr. {Trimble.} Yes.

1377 Mr. {Waxman.} The federal government pays the entire
1378 cost of a removal action. The States pay just 10 percent of

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1379 the cost of a response action. The rest is picked up by the
1380 federal government. Is that correct?

1381 Mr. {Trimble.} I believe that is true for remedial
1382 actions. I am not sure about removal.

1383 Mr. {Waxman.} And there is a great variation among the
1384 States in their capacity and resources to carry out site
1385 cleanups, isn't there? Some are better at it than others?

1386 Mr. {Trimble.} Absolutely.

1387 Mr. {Waxman.} Even though Superfund is a federal
1388 program, the law provides for significant State involvement.
1389 Under the statute as it currently stands, EPA is required to
1390 provide ``substantial and meaningful participation'' to
1391 States.

1392 Mr. Trimble, under current law, are States involved in
1393 suggesting sites for cleanup under Superfund?

1394 Mr. {Trimble.} They are, yes, in terms of reporting
1395 sites with contamination and then EPA has a consultative
1396 process.

1397 Mr. {Waxman.} So they can propose sites and have the
1398 ability to directly list one site on the National Priorities
1399 List. Isn't that the case?

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1400 Mr. {Trimble.} I would defer to Mr. Bearden for a more
1401 through answer on that, but I don't think they have the
1402 authority to list. I mean, I wouldn't go quite that far.

1403 Mr. {Waxman.} Let me continue with my questioning for
1404 you. Under current law, EPA seeks concurrence from States
1405 before slating a site for cleanup on the National Priorities
1406 List. Is that correct?

1407 Mr. {Trimble.} Under policy, correct.

1408 Mr. {Waxman.} Under current law, States can block EPA
1409 from carrying out a selected response action by not agreeing
1410 to pay the cost share for that response action. Isn't that
1411 right?

1412 Mr. {Trimble.} Yes, EPA could not use funds to clean
1413 that site up under the Superfund program without State
1414 concurrence.

1415 Mr. {Waxman.} Finally, Mr. Trimble, if a State wants to
1416 take a leadership role at a Superfund site under current law,
1417 they can assume the lead under cooperative agreements with
1418 EPA. Isn't that correct?

1419 Mr. {Trimble.} That is correct.

1420 Mr. {Waxman.} Thank you. It is natural that a State

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1421 would want to be able to tell EPA what to focus on and what
1422 to spend money on and what not to spend money on. It is
1423 natural that a State would want federal resources available
1424 for use at their discretion, but this is a national program
1425 that must be available to clean up the most contaminated
1426 sites in every State. It is our job to ensure a balanced
1427 approach.

1428 Mr. Chairman, I have serious concerns about certain
1429 aspects of these bills. I think they are a work in progress,
1430 and if you are interested in moving these bills, I urge you
1431 to convene a process that would allow us to examine whether
1432 there are problems here that need to be addressed and how to
1433 address them.

1434 I thank the witnesses, and I hope the chairman will
1435 consult with us on some of these ideas.

1436 Mr. {Shimkus.} The gentleman yields back his time.
1437 Just to address the ranking member, we have already had some
1438 staff attempts to talk about this. This is a legislative
1439 hearing. I think there are two issues raised on some of the
1440 provisions that it would be helpful to get input and maybe
1441 move forward, and we will let our staffs give that a try

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1442 first, and if members want to be engaged, they know where to
1443 find me.

1444 With that, we want to thank our second panel for coming.
1445 This is a legislative hearing, which is for us to gather
1446 input, which we have done today with your help and your
1447 expertise. We thank you, and with that, the hearing is now
1448 adjourned.

1449 [Whereupon, at 11:33 a.m., the Subcommittee was
1450 adjourned.]