



MEMORANDUM

June 26, 2013

To: House Committee on Energy and Commerce
Subcommittee on Environment and the Economy
Attention: Nick Abraham

From: David M. Bearden
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Resources, Science, and Industry Division

Subject: **Responses to Questions for the Record of a Hearing held by the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce on May 22, 2013**

This memorandum responds to seven questions you submitted for the record of the hearing held by the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce on May 22, 2013, at which I testified on behalf of the Congressional Research Service (CRS). The hearing examined three legislative proposals: Federal and State Partnership for Environmental Protection Act of 2013, Reducing Excessive Deadline Obligations Act of 2013, and Federal Facility Accountability Act of 2013. As addressed in my prepared statement presented at the hearing, this legislation would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ to address various aspects of the federal and state roles in the cleanup of contamination resulting from releases of hazardous substances into the environment, and the applicability of state cleanup requirements at both current and former federal facilities. I have prepared the following responses to the seven questions you submitted to CRS for the hearing record. Each question and response is presented separately below in the same order as outlined in the June 12, 2013 letter from Chairman Shimkus. If you have any additional questions, you may contact me at 7-2390 or at dbearden@crs.loc.gov.

Question 1

The Environmental Protection Agency (EPA) must already consult States in selecting a removal action (40 CFR 300.525). Would codification of that regulation in statute change the status quo?

Response

Section 300.525(e) of the regulations of the National Oil and Hazardous Substances Pollution Contingency Plan (often referred to as the National Contingency Plan or NCP for short) requires EPA to

¹ 42 U.S.C. § 9601 et seq.

“consult with a state on all removal actions to be conducted in that state.”² The regulations of the NCP establish the procedures for implementing the authorities of CERCLA to respond to releases of hazardous substances into the environment.³ Removal actions generally are the initial federal response actions taken at a site that are intended to address more immediate risks.⁴ Remedial actions generally are more extensive measures that are intended to offer a more permanent solution to address potential risks over the long-term.⁵ Removal actions may be used in the interim to stabilize site conditions (such as stopping the spread of contamination) and to prevent potentially harmful exposures while remedial actions are developed. At sites where less extensive cleanup is needed, a removal action may constitute the entire scope of the federal response under CERCLA and may not involve a remedial action in such instances.

Section 121(f) of CERCLA requires states to be provided the opportunity for “substantial and meaningful” involvement in the initiation, development, and selection of remedial actions by the federal government.⁶ However, the statute does not include a similar requirement for removal actions. This difference in statutory treatment for the involvement of states in large part may be attributed to the participation of states in sharing the costs of remedial actions funded with federal Superfund appropriations by EPA. As a condition for the use of federal Superfund appropriations to finance a remedial action, Section 104(c)(3) of CERCLA requires states to provide certain assurances, including agreeing generally to pay 10% of the capital costs of the remedial action and 100% of the costs of “all future maintenance” of that action.⁷ Section 104(c)(6) provides an exception for the treatment of groundwater for which federal funds may be used for the first 10 years once the remedial action is in place and operating as intended.⁸ This matching funds requirement is limited to sites that EPA has designated on the National Priorities List (NPL), as a site first must be listed on the NPL to be eligible for the use of federal Superfund appropriations to finance remedial actions.⁹

Although removal actions generally are not subject to this matching funds requirement, Section 104(c)(3) does specify that states also must agree to provide “all future maintenance” of removal actions at a site as an additional condition for the use of federal Superfund appropriations to finance remedial actions at that same site. Furthermore, Section 300.415(k) of the NCP specifies that arrangement for “post-removal site control” by the state is encouraged to the extent practicable, prior to the initiation of the removal action.¹⁰ In conjunction with these statutory and regulatory provisions, Section 300.525(e) of the NCP requires EPA to “consult with a state on all removal actions to be conducted in that state,” as noted above.

Whether to codify the regulatory requirement of Section 300.525(e) of the NCP in statute would be a policy decision of Congress. Promulgated federal regulations already constitute binding requirements. As

² 40 C.F.R. § 300.525(e).

³ 40 C.F.R. Part 300. Subpart E establishes procedures and criteria for taking federal actions to respond to releases of hazardous substances into the environment. Subpart F establishes procedures for the involvement of states in such federal response actions. As authorized in Section 104 of CERCLA, the NCP also addresses federal actions to respond to releases of pollutants or contaminants into the environment that may present an imminent and substantial danger to the public health or welfare.

⁴ 42 U.S.C. § 9601(23).

⁵ 42 U.S.C. § 9601(24).

⁶ 42 U.S.C. § 9621(f).

⁷ 42 U.S.C. § 9604(c)(3). If a site was owned or operated by the state, or a political subdivision of the state, at the time of the disposal of hazardous substances, the state would be responsible for paying at least 50% or more of the response costs at the site. State costs in such instances would be dependent upon the degree of the responsibility of the state at the site. Section 300.525(b) of the NCP clarifies the applicability of this provision to include removal costs.

⁸ 42 U.S.C. § 9604(c)(6).

⁹ 40 C.F.R. § 300.425(b).

¹⁰ 40 C.F.R. § 300.415(k).

such, codifying a regulatory requirement in statute may have the practical effect of continuing existing practice, but would make any potential revisions then subject to amendment by Congress rather than revision by the requisite federal department or agency responsible for the promulgation of the regulations. Section 105(a) of CERCLA authorizes the President to revise and promulgate the regulations of the NCP.¹¹ This responsibility of the President is delegated to the Environmental Protection Agency (EPA) by Executive Order 12580.¹²

The Federal and State Partnership for Environmental Protection Act of 2013 would amend Section 104(a)(2) of CERCLA to require the President to consult with states in the undertaking of removal actions by the federal government. Section 104(a)(2) in existing law requires the President to consider the contribution that a removal action may make to the “efficient” performance of a long-term remedial action, but does not require consultation with the state.¹³ Executive Order 12580 delegated the President’s response authorities under Section 104 of CERCLA to EPA in the inland zone, the U.S. Coast Guard in the coastal zone, and federal departments and agencies that administer federal facilities. Accordingly, the amendment to Section 104(a)(2) to require the President to consult with states in undertaking removal actions would apply not only to EPA (as in Section 300.525(e) of the NCP), but also to other federal departments and agencies with delegated federal response authorities under CERCLA.

The amendment also potentially could have a bearing on the opportunity for citizen suits, if a federal department or agency were to fail to consult with a state in the undertaking of a removal action in that state. Section 310(a) of CERCLA authorizes any person to commence a civil action for failure of the President or any other officer of the United States to perform a non-discretionary duty under the statute.¹⁴ The extent to which this authority may be available to compel a federal department or agency to consult with a state in undertaking a removal action would depend on whether consultation required under the amendment may be interpreted as a non-discretionary duty (although it likely would considering the use of the term “shall” with respect to consult). Still, such challenges may be limited. Section 113(h)(4) of CERCLA limits the timing of judicial review of a removal (or remedial) action until after the action is “taken” and explicitly bars challenges regarding a removal action if that action would precede a remedial action undertaken at the same site.¹⁵

Question 2

States may perform certain removal-type actions that obviate the need for an EPA removal action at the site, contribute to the benefit of the long-term remedial action, or reduce the cost of the long-term remedial action at the site. Do States typically get credit for this work toward the 10% cost-share under 104(c)(3)?

Response

Section 104(c)(5) of CERCLA requires EPA (as delegated by Executive Order 12580) to grant a state a credit for the costs of a remedial action the state incurs toward the requirement for the state to match 10% of the capital costs of the remedial action under Section 104(c)(3) as a condition for the use of federal

¹¹ 42 U.S.C. § 9605(a).

¹² Executive Order 12580, Superfund Implementation, January 23, 1987, 52 *Federal Register* 2923.

¹³ 42 U.S.C. § 9604(a)(2).

¹⁴ 42 U.S.C. § 9659(a).

¹⁵ 42 U.S.C. § 9613(h)(4).

Superfund appropriations to finance the remedial action.¹⁶ Such credit generally is limited to amounts expended by the state specifically for elements of a remedial action, as provided under a contract or cooperative agreement with EPA. Section 104(c)(5) limits the types of expenditures for which a state may receive such credit to expenditures that are reasonable, documented, direct out-of-pocket expenditures of non-federal funds, subject to determination by EPA.

There is one potential exception in existing law under which a state may receive a credit for costs it incurred for a removal action to apply toward the state cost-share for a remedial action. The timing of such a removal action is limited to a specific, historical time frame prior to the enactment of CERCLA on December 11, 1980. Section 104(c)(5)(C) allows a credit to be applied to a state cost-share for a remedial action for funds expended or obligated by the state (or a political subdivision thereof) after January 1, 1978, and before December 11, 1980, for “cost-eligible response actions.”¹⁷ Section 101(25) of CERCLA defines the term “response” to include either a removal or a remedial action.¹⁸ The regulations that EPA promulgated to govern cooperative agreements and contracts with states reflect this limitation on the timing of response expenditures that may be applied as credits. The regulations specify that a state “may claim credit for response activity obligations or expenditures incurred by the State or political subdivision between January 1, 1978, and December 11, 1980” and that a state “may not claim credit for removal actions taken after December 11, 1980.”¹⁹

The Federal and State Partnership for Environmental Protection Act of 2013 would amend Section 104(c)(5) of CERCLA to allow a state to receive credit for amounts expended by the state for a removal action after December 11, 1980. The bill would amend Section 104(c)(5)(A) to allow state credits for removal actions conducted at sites on the NPL that are performed under a cooperative agreement or contract with EPA. The bill also would amend Section 104(c)(5)(B) to allow state credits for expenditures for removal actions incurred prior to the listing of a site on the NPL, or prior to the state entering into a cooperative agreement or contract with EPA, but under the same conditions in existing law for allowing credits for remedial actions. These conditions include that the site is subsequently listed on the NPL, the state subsequently enters into a cooperative agreement or contract with EPA, and EPA determines that the earlier expenditures of the state otherwise would have been eligible, if they had been incurred after the site was listed on the NPL or the state had entered into a cooperative agreement or contract.

As a practical matter, a removal action may contribute to the performance of a remedial action and thereby help to lower the costs of the remedial action. As discussed with respect to Question 1, Section 104(a)(2) of CERCLA in existing law directs removal actions undertaken by the federal government to contribute to the “efficient performance” of a remedial action over the long-term, to the extent practicable. Conversely, there may be some instances in which a removal action may not contribute to the performance of a remedial action because of practical constraints. In such instances, a removal action may not help to offset the costs of the remedial action. The Federal and State Partnership for Environmental Protection Act of 2013 would not make such a practical distinction with respect to when a state may receive a credit for expenditures incurred for a removal action. Rather, the bill would appear more broadly to authorize state credits for removal actions to be applied toward state cost-shares for remedial actions, subject to the conditions noted above.

¹⁶ 42 U.S.C. § 9604(c)(5).

¹⁷ 42 U.S.C. § 9604(c)(5)(C).

¹⁸ 42 U.S.C. § 9601(25).

¹⁹ 40 C.F.R. § 35.6285(c).

Question 3

Does allowing States to get credit for these removal-type actions somehow require that there be a cost-share for removal actions?

Response

None of the three bills examined at the hearing noted in this memorandum would amend the criteria for state matching funds in Section 104(c)(3) of CERCLA to alter the applicability of those criteria to remedial actions in a manner that would apply to removal actions. As noted in the response to Question 1, Section 104(c)(3) in existing law does require a state to agree to assume responsibility for “all future maintenance” of removal actions conducted at a site as a condition for the use of federal Superfund appropriations to finance *remedial actions* at that same site. However, the capital costs of a removal action may be fully funded with federal Superfund appropriations (unless the state itself is a responsible party). As discussed with respect to Question 2, the Federal and State Partnership for Environmental Protection Act of 2013 would allow a state to receive a credit for amounts expended by the state on a removal action at a site to apply toward the requirement for the state to match 10% of the capital costs of a *remedial action* at that site. However, no provisions in the bill would appear to create a new state matching funds requirement for the financing of a removal action itself with federal Superfund appropriations.

Question 4

Is the concept of providing credit for in-kind contributions (toward the 10% cost share for remedial action) a novel concept under CERCLA? If not, please explain the context in which in-kind contributions are permitted?

Response

The statutory provisions of CERCLA in existing law do not explicitly address the application of in-kind contributions as a credit toward a state cost-share of a remedial action financed with federal Superfund appropriations. However, the regulations that EPA promulgated to govern cooperative agreements and contracts with states under CERCLA to govern state cost-shares do allow the application of in-kind contributions toward payment of such cost-shares. Under these regulations, the allowance of in-kind contributions as payment toward a state cost-share is conditional upon the state first entering into a support agency cooperative agreement with EPA.²⁰ In such instances, in-kind contributions may be applied as a credit toward a state cost-share for a remedial action under existing regulation, although not expressly provided in statute under CERCLA. As a practical matter, in-kind contributions may provide equipment or services that could help to offset the costs of a remedial action, if such equipment or services otherwise would have been necessary to procure to carry out that action. EPA regulations define in-kind contributions as:

The value of a non-cash contribution (generally from third parties) to meet a recipient’s cost sharing requirements. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.²¹

²⁰ 40 C.F.R. § 35.6285(b) and 40 C.F.R. § 35.6815(a)(1).

²¹ 40 C.F.R. § 35.6015.

The Federal and State Partnership for Environmental Protection Act of 2013 would amend Section 104(c)(5)(A) of CERCLA to clarify in statute that the use of non-federal funds by a state as a credit toward its cost-share for a remedial action could include “in-kind expenditures” incurred by the state. The scope of the definition of the term in-kind expenditures in the bill is similar in some respects to the scope of in-kind contributions in existing EPA regulation, but broader in other respects including basing contributions on fair market value. However, related EPA regulations that govern the use of non-federal funds to satisfy matching funds requirements or cost-shares do allow for consideration of the market value of donated property, equipment, or supplies.²² The Federal and State Partnership for Environmental Protection Act of 2013 would define in-kind expenditures as:

expenditures for, or contributions of, real property, equipment, goods, and services, valued at a fair market value, that are provided for the removal or remedial action at the facility, and amounts derived from materials recycled, recovered, or reclaimed from the facility, valued at a fair market value, that are used to fund or offset all or a portion of the cost of the removal or remedial action.

Question 5

Please explain the contrast between how a currently owned federal facility would fund a cleanup versus how formerly owned defense sites would pay for a cleanup generally and does that funding mechanism also apply with respect to compliance with State cleanup requirements.

Response

Although CERCLA broadly authorizes the cleanup of contamination resulting from releases of hazardous substances at federal facilities, other related statutes also may apply to certain aspects of the cleanup of an individual facility to address specific types of wastes or contamination. The corrective action authorities of the Solid Waste Disposal Act (also referred to as the Resource Conservation and Recovery Act or RCRA) apply to the cleanup of hazardous wastes.²³ Section 101(14) of CERCLA defines the term “hazardous substance” generally to include wastes possessing the characteristics of hazardous wastes identified or listed under RCRA.²⁴ Consequently, the cleanup of hazardous wastes under RCRA may be incorporated as an element of a cleanup performed more broadly under CERCLA, and often is in practice at a federal facility. The Atomic Energy Act²⁵ and other related statutes apply to the cleanup of certain nuclear materials and types of radiological contamination that are excluded from the authorities of CERCLA. As a matter of implementation, the cleanup of a federal facility may involve the application of these statutes by the administering federal department or agency in a collective approach to address differing types of wastes and contamination among individual parcels located on the facility.

Through the annual discretionary appropriations process, Congress appropriates funding to various accounts of federal departments and agencies to pay for the performance of the cleanup of federal facilities administered by those respective departments and agencies under the above authorities. The vast

²² 40 C.F.R. § 31.24.

²³ 42 U.S.C. § 6901 et seq. The Solid Waste Disposal Act often is referred to as the Resource Conservation and Recovery Act (RCRA, P.L. 94-580) because it substantially amended the Solid Waste Disposal Act in 1976 to regulate the storage, treatment, and disposal of hazardous wastes. The Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616) amended the Solid Waste Disposal Act to authorize corrective actions for the cleanup of environmental contamination from hazardous wastes, among other purposes.

²⁴ 42 U.S.C. § 9601(14).

²⁵ 42 U.S.C. § 2011 et seq.

majority of federal funds available for the cleanup of federal facilities are appropriated to accounts administered by the Department of Defense (DOD) and the Department of Energy (DOE) for the cleanup of federal facilities which served national defense purposes. There are separate accounts dedicated to the cleanup of national defense facilities currently owned by the federal government, and national defense facilities that the federal government owned or operated in the past. Federal public land management agencies, such as the Bureau of Land Management and U.S. Forest Service, also receive funding to administer the cleanup of sizeable inventories of contaminated sites, including mining sites. Congress appropriates several billion dollars annually to fund the cleanup of federal facilities.

DOD primarily administers the cleanup of active and decommissioned U.S. military facilities located in the United States under the Defense Environmental Restoration Program. Section 211 of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499) established this program and directed DOD to implement it in accordance with CERCLA and in consultation with EPA.²⁶ RCRA corrective actions also may be incorporated under this program as an element of the cleanup to address contamination from hazardous wastes that had been subject to permits under RCRA. Congress appropriates funding to the Defense Environmental Restoration Accounts of the Army, Navy, Air Force, and Defense-wide agencies principally for the cleanup of active U.S. military facilities located in the United States. The Base Closure Accounts of DOD separately fund the cleanup of U.S. military facilities designated for closure under consolidated Base Realignment and Closure (BRAC) rounds that began in 1988.²⁷ Cleanup performed by DOD at BRAC facilities to prepare them for reuse typically is done under federal ownership prior to transfer for reuse. As amended in 1986, Section 120(h) of CERCLA generally requires remedial actions to be in place and operating “properly and successfully” prior to transfer out of federal ownership.²⁸ The Defense Environmental Restoration Account for Formerly Used Defense Sites (FUDS) funds the cleanup of U.S. military facilities that were decommissioned prior to 1986 and at which the contamination occurred at the time the facility was under the jurisdiction of DOD. Many of these properties were transferred out of federal ownership before the property transfer requirements of CERCLA were added in the 1986 amendments.²⁹ The FUDS inventory constitutes the largest number of former federal facilities at which cleanup is performed by the federal government.

DOE administers the cleanup of U.S. nuclear weapons production facilities and federal nuclear research facilities under the Office of Environmental Management. Three appropriations accounts fund the Office of Environmental Management. The Defense Environmental Cleanup account constitutes the vast majority of the funding for the Office of Environmental Management and is devoted to the cleanup of former nuclear weapons production facilities. The Non-Defense Environmental Cleanup account funds the cleanup of wastes and contamination resulting from federal nuclear energy research, and the Uranium Enrichment D&D Fund account finances the cleanup of facilities that were used to enrich uranium for national defense (and civilian) purposes. Once the cleanup of a facility is complete under the Office of Environmental Management, it is transferred to the Office of Legacy Management and other offices within DOE for the long-term operation, maintenance, and monitoring, for which separate funding is appropriated.³⁰ Congress also appropriates funding to the Army Corps of Engineers for the Formerly

²⁶ 10 U.S.C. § 2700 et seq. These authorities also apply to the cleanup of unexploded ordnance and the demolition and removal of unsafe buildings and structures. The National Defense Authorization Act for FY2002 (P.L. 107-107) amended these authorities to direct DOD to clean up military munitions on decommissioned training ranges and munitions disposal sites in the United States.

²⁷ Congress has authorized consolidated BRAC rounds in 1988, 1991, 1993, 1995, and 2005.

²⁸ 42 U.S.C. § 9620(h).

²⁹ The performance of the cleanup of a former defense site by DOD is subject to access provided by the current property owner.

³⁰ The Office of Legacy Management administers the long-stewardship of DOE facilities that do not have a continuing mission once cleanup remedies are in place. Facilities that have a continuing mission after completion of cleanup are transferred to the DOE offices that administer those missions, which are responsible for their long-term stewardship.

Utilized Sites Remedial Action Program (FUSRAP) to clean up former facilities that were involved in the early years of the U.S. nuclear weapons program. The FUSRAP inventory of sites was transferred from DOE to the Corps in 1997.³¹ Once the Corps completes the cleanup of a FUSRAP site, it is transferred back to DOE for long-term stewardship under the Office of Legacy Management.³²

Funding appropriated to DOD, DOE, and other federal departments and agencies for the performance of the cleanup of federal facilities still does not constitute a federal cleanup liability fund in a broader sense. Although these funds are authorized to pay for the performance of the cleanup of the federal government's own facilities, the funds are not more broadly authorized to pay cost-recovery or contribution claims that may be submitted to the United States by non-federal parties who may have incurred cleanup costs for which liability may be shared with the federal government.³³ A U.S. Comptroller General decision in 1993 ruled that the Judgment Fund of the U.S. Treasury was the appropriate source of federal payment for litigative awards or compromise settlements for cost-recovery or contribution claims to satisfy the federal share of cleanup liability under CERCLA.³⁴ By statute, the Judgment Fund is a permanent, indefinite appropriation that is intended to pay monetary claims against the United States, which are not otherwise provided by Congress through separate appropriations.³⁵

The application of state requirements to the cleanup of federal facilities generally would be funded through appropriations for the performance of the cleanup by federal departments and agencies, as would the application of federal cleanup requirements. Section 121(d) of CERCLA authorizes the application of state standards, requirements, criteria, or limitations to remedial actions selected by the federal government, if they are more stringent than federal standards, requirements, criteria or limitations.³⁶ Section 120(a)(4) of CERCLA also explicitly authorizes the application of state laws to removal and remedial actions at federal facilities that are not on the NPL.³⁷ State requirements may be applied to federal facilities on the NPL under Section 121(d). The Federal Facility Accountability Act of 2013 would amend Section 120(a)(4) to clarify the application of “substantive and procedural requirements” of state law to federal facilities and to expand such application explicitly to include both current and former federal facilities regardless of whether they are on the NPL.

The eligibility of a federal department or agency cleanup appropriation for payment of a state fine or penalty for violation of a cleanup requirement would depend on whether the fine or penalty was assessed administratively or owed as a result of a litigative award or compromise settlement. A U.S. Comptroller General decision in 1979 ruled that an administrative fine or penalty that may be assessed at a federal facility for violation of a requirement applicable to a particular action may be paid with a federal department or agency appropriation, if the requirement were relevant to the performance of the action for

³¹ Enacted October 13, 1997, the Energy and Water Development Appropriations Act for FY1998 (P.L. 105-62) directed DOE to transfer the cleanup of 21 FUSRAP sites to the Army Corps of Engineers. DOE has remained responsible for determining the eligibility of additional sites, and Congress has designated certain sites in legislation.

³² Memorandum of Understanding between the U.S. Department Of Energy and the U.S. Army Corps Of Engineers Regarding Program Administration and Execution of the Formerly Utilized Sites Remedial Action Program (FUSRAP), March 1999.

³³ In relatively few instances, Congress has authorized the use of federal cleanup appropriations for the payment of cost-recovery or contribution claims for federal liability at specific defense facilities, but the appropriations generally are authorized for the performance of the cleanup of federal facilities by the federal government, not the payment of such claims.

³⁴ See General Accounting Office, *The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act*, B-253179, November 29, 1993, available on GAO's website: <http://archive.gao.gov/lglpdf63/151167.pdf>

³⁵ 31 U.S.C. § 1304.

³⁶ 42 U.S.C. § 9621(d).

³⁷ 42 U.S.C. § 9620(a)(4).

which the appropriation was made.³⁸ If a state fine or penalty were owed as a result of a litigative award or compromise settlement, the 1979 U.S. Comptroller General decision ruled that the Judgment Fund would be the appropriate source of federal funds for payment instead.

Question 6

Has CRS identified inconsistencies among the EPA Regions with respect to interpretation and implementation of policies regarding remedy selection, listing sites on the National Priorities List, or with respect to remediation at federal facilities?

Response³⁹

CRS has not undertaken research to determine whether there may be variability among the individual EPA Regions in interpreting and implementing agency policies that address the selection of remedial (or removal) actions, the listing of sites on the NPL, or the oversight of the performance of the cleanup of federal facilities by the federal departments and agencies that administer those facilities. There may be considerable variability in the outcome of decisions for these purposes among the EPA Regions on a site-specific basis, because of unique or differing circumstances and conditions at each location. For example, a specific type of remedial action may be selected at one site but not another, because of the differing nature of the contamination and potential risks, or because of practicality or cost considerations relative to the scope of the action that would be performed at each site. Differences in state requirements applicable to cleanup also may result in variability among the EPA Regions in the selection of remedial actions. With respect to which sites are listed on the NPL, the eligibility of a site for listing is based primarily upon the severity of the potential hazards, as evaluated under the Hazard Ranking System of the NCP.⁴⁰ Sites that score a minimum threshold of hazard are eligible, whereas those scoring below this threshold are not.⁴¹ Whether an eligible site may be listed on the NPL would depend upon numerous other factors, including whether the site may be deferred to the state to pursue the cleanup under its own authorities instead.

Although the outcome of decisions may vary among the EPA Regions on a site-specific basis, the policies that EPA Headquarters adopts to implement the authorities of CERCLA and the NCP generally apply to all EPA Regions in terms of the procedures and criteria under which decisions are to be made and actions are to be taken.⁴² Numerous reports issued by the EPA Office of the Inspector General (OIG) have examined various aspects of the implementation of the authorities of CERCLA and the NCP under the Superfund program among the individual EPA Regions. These OIG reports have identified variability among the EPA Regions in implementing various aspects of the Superfund program at certain points in time, including elements of the remedial process, deletion of sites from the NPL, EPA oversight of federal facilities, and other aspects. These OIG reports typically contain recommendations that EPA may execute to mitigate any identified inconsistencies or deficiencies. A compilation of EPA OIG reports on the

³⁸ See General Accounting Office, B-194508, July 19, 1979, 58 Comp. Gen. 667, available on GAO's website: <http://www.gao.gov/products/451187#mt=e-report>

³⁹ Jerry Yen, CRS Environmental Policy Intern, Resources, Science, and Industry Division, contributed to the preparation of this response regarding potential variability among EPA Regions in implementing the Superfund program.

⁴⁰ 40 C.F.R. Part 300, Appendix A.

⁴¹ The Hazard Ranking System is based on a scoring scale of 1 to 100. Sites scoring 28.5 and higher generally are eligible for listing on the NPL.

⁴² For additional information, see the compilation of relevant law, regulation, policy, and guidance available on EPA's Superfund program website: <http://www.epa.gov/superfund/policy/index.htm>

implementation of the Superfund program is available on the EPA OIG website.⁴³ Subsequent to the issuance of these reports, EPA may have taken specific actions to mitigate inconsistencies or deficiencies that the OIG initially had identified, and the issues may since have been resolved in such instances.

Question 7

Does EPA currently have authority to ensure that other federal agencies rules, regulations, policies, interpretations, and application to sites concerning the implementation of CERCLA Removal and Remedial Programs are consistent with EPA rules, regulations, policies, interpretations? If so, please identify the authority.

Response⁴⁴

Section 120(a)(2) of CERCLA subjects federal facilities to all “guidelines, rules, regulations, and criteria” applicable to the performance of preliminary assessments, evaluation for listing of a facility on the NPL, and remedial actions in the same manner and to the same extent as non-federal facilities.⁴⁵ This provision also bars a federal department or agency from adopting or utilizing any such guidelines, rules, regulations, or criteria that are inconsistent with those established by EPA under CERCLA. The Federal Facility Accountability Act of 2013 would amend Section 120(a)(2) to broaden its applicability to response actions, which in effect would encompass *both* removal and remedial actions. As discussed with respect to Question 2, Section 101(25) of CERCLA defines the term “response” to include either a removal or a remedial action.⁴⁶ The Federal Facility Accountability Act of 2013 also would amend Section 120(a)(2) explicitly to subject former federal facilities to this provision in addition to current federal facilities, and would authorize EPA to review actions or regulations of other federal departments and agencies taken under their delegated authorities of CERCLA to determine whether they are consistent with EPA guidelines, rules, regulations, or criteria.

EPA’s authority to ensure that a federal facility complies with Section 120(a)(2) in applying guidelines, rules, regulations, and criteria established under CERCLA primarily is rooted in Section 120(e) of the statute.⁴⁷ This oversight authority of EPA is limited to federal facilities that are listed on the NPL. The states play a more prominent role in overseeing the cleanup of federal facilities not listed on the NPL. As discussed with respect to Question 5, Section 120(a)(4) of CERCLA explicitly authorizes the application of state laws regarding removal actions, remedial actions, and enforcement at federal facilities that are not on the NPL.⁴⁸ Once an interagency agreement at a federal facility on the NPL is finalized, EPA may enforce the terms of the agreement through administrative civil penalties under Section 109 of CERCLA.⁴⁹ Section 106(a) also authorizes the President (as delegated to EPA) to issue administrative

⁴³ EPA OIG Superfund and Land Reports: http://www.epa.gov/oig/reports/reportsByTopic/Superfund_and_Land_Reports.html

⁴⁴ This response identifies the provisions of CERCLA under which EPA typically oversees the cleanup of federal facilities in practice. However, interpretations among federal departments and agencies may vary in some instances as a matter of carrying out their respective authorities, for which further analysis of potential legal issues may be warranted.

⁴⁵ 42 U.S.C. § 9620(a)(2).

⁴⁶ 42 U.S.C. § 9601(25).

⁴⁷ 42 U.S.C. § 9620(e).

⁴⁸ 42 U.S.C. § 9620(a)(4).

⁴⁹ 42 U.S.C. § 9609. The payment of an administrative penalty assessed by EPA under CERCLA against another federal department or agency is executed through a transfer of appropriations from the respective account of the other federal department or agency to the Superfund account of EPA, and therefore has no net effect on the federal budget.

orders to require the abatement of an imminent and substantial endangerment to the public health or welfare because of an actual or threatened release of a hazardous substance.⁵⁰ However, the availability of this enforcement mechanism at a federal facility is subject to the concurrence of the U.S. Attorney General under Executive Order 12850, and therefore would be constrained absent such concurrence.

The taking of judicial enforcement actions by EPA at federal facilities under Section 109 or Section 106(a) typically has been avoided because of the long-standing position within the Executive Branch that the ability of one federal department or agency to sue another is generally limited. Because of potential conflict of interest, the Department of Justice could be precluded in court from representing both a federal department or agency pursuing a judicial penalty or a judicial order and the department or agency subject to the penalty or order. In light of such complications, a 1979 Executive Order outlines a process for the U.S. Attorney General to resolve legal disputes among federal departments or agencies prior to proceeding in court.⁵¹ For these reasons, interagency agreements under Section 120(e) have been the primary mechanism in practice under which EPA oversees the cleanup of federal facilities on the NPL to ensure compliance with applicable requirements established under CERCLA.

Within 6 months of the listing of a federal facility on the NPL, Section 120(e)(1) requires the federal department or agency with administrative jurisdiction over the facility to consult with EPA (and the state) to begin a Remedial Investigation/Feasibility Study (RI/FS).⁵² A RI/FS involves an investigation of contamination to assess potential risks to human health and the environment, and a study of the feasibility of the remedial alternatives to address those risks. While consultation with EPA is required, CERCLA does not give explicit decision-making authority to EPA to dictate precisely how a federal department or agency performs this investigation and study phase of the cleanup process at a federal facility.

Within 180 days of the completion of the RI/FS and review by EPA, Section 120(e)(2) requires the federal department or agency with administrative jurisdiction over the facility to enter into an interagency agreement with EPA to govern the remedial actions to be taken at that facility.⁵³ This agreement provides an opportunity for EPA to formalize how the other federal department or agency will carry out the cleanup of the facility to satisfy the requirements of CERCLA. In practice, states also may be signatories to these interagency agreements to fulfill the opportunity provided under Section 121(f) for “substantial and meaningful” involvement in the initiation, development, and selection of remedial actions.⁵⁴ Section 120(e)(4) identifies four elements that are to be included in each interagency agreement:

- a list of the remedial alternatives considered at the facility;
- identification of the remedial actions selected from among the alternatives;
- a schedule for completing each remedial action; and
- arrangement for any long-term operation and maintenance activities that may be necessary to ensure the performance of the remedial actions over time.⁵⁵

⁵⁰ 42 U.S.C. § 9606(a).

⁵¹ Executive Order 12146, Management of Federal Legal Resources, July 18, 1979, 44 *Federal Register* 42657.

⁵² 42 U.S.C. § 9620(e)(1).

⁵³ 42 U.S.C. § 9620(e)(2).

⁵⁴ 42 U.S.C. § 9621(f).

⁵⁵ 42 U.S.C. § 9620(e)(4).

If EPA and the federal department or agency with administrative jurisdiction over the facility cannot agree on the selection of the remedial actions in negotiating an interagency agreement, Section 120(e)(4)(A) authorizes the Administrator of EPA to resolve the dispute and select the remedial actions he or she deems most appropriate to protect human health and the environment.⁵⁶ Although the Administrator may delegate this dispute-resolution authority to an officer or employee of EPA, Section 120(g) prohibits the transfer of the Administrator's authorities under Section 120 to any other agency, official, or employee of the United States, by Executive Order of the President or otherwise, or to any other person.⁵⁷ This prohibition primarily is intended to ensure that the role of the Administrator of EPA is maintained in making the final determination with regard to the selection of remedial actions.

CERCLA does not provide the Administrator of EPA similarly explicit final decision-making authority with respect to other elements of an interagency agreement for a federal facility listed on the NPL, namely the schedule for completing the remedial actions and arrangement for any long-term operation and maintenance activities that may be necessary to ensure the performance of those actions over time. These latter elements would appear to be subject to negotiation between EPA and the federal department or agency with administrative jurisdiction over the facility. If consensus cannot be reached and the agreement finalized within the statutory deadline of 180 days from the completion of the RI/FS, Section 120(e)(5) requires the federal department or agency with administrative jurisdiction over the facility to report the delay to Congress.⁵⁸

With respect to the timing of the cleanup, Section 120(e)(3) requires the federal department or agency with administrative jurisdiction over the facility to complete the remedial actions "as expeditiously as practicable" once those actions are selected, but does not indicate a specific time frame or deadline for their completion.⁵⁹ The timing of a remedial action ultimately would depend on numerous factors such as the technical feasibility of the action, the availability of appropriations by Congress, and the competing cleanup priorities of other facilities administered by the federal department or agency. Accordingly, Section 120(e)(3) requires federal agencies to notify Congress of the amount of funding needed to carry out the selected remedial actions at their facilities in their annual budget requests.

Notably, the lack of a final interagency agreement governing an entire facility does not preclude individual remedial actions from proceeding to address discrete contaminated sites at a facility. Furthermore, removal actions are not subject to an interagency agreement under Section 120(e). The main reason for this difference is that the time required to finalize an agreement may delay a removal action needed to address more immediate hazards. Because of these reasons, some cleanup actions may proceed without an interagency agreement in place, in effect leaving EPA with less formal means to oversee the cleanup. Over time, nearly all of the federal facilities listed on the NPL have an interagency agreement in place under CERCLA to govern the cleanup, with relatively few exceptions. Many of these agreements have been revised multiple times as more has been learned about cleanup challenges. At the hearing noted in this memorandum, the Government Accountability Office testified that two federal facilities administered by DOD had not yet finalized an interagency agreement with EPA to govern the cleanup.⁶⁰

⁵⁶ 42 U.S.C. § 9620(e)(4)(A).

⁵⁷ 42 U.S.C. § 9620(g).

⁵⁸ 42 U.S.C. § 9620(e)(5).

⁵⁹ 42 U.S.C. § 9620(e)(3).

⁶⁰ Government Accountability Office, Testimony before the Subcommittee on Environment and the Economy, Committee on Energy and Commerce, House of Representatives, *Hazardous Waste Cleanup: Observations on States' Role, Liabilities at DOD and Hardrock Mining Sites, and Litigation Issues*, GAO-13-633T, May 22, 2013.