Testimony of David M. Bearden
Specialist in Environmental Policy for the Congressional Research Service
Before the House of Representatives Committee on Energy and Commerce,
Subcommittee on Environment and Economy
Hearing on the Federal and State Partnership for Environmental Protection Act of 2013, the Reducing Excessive Deadline Obligations Act of 2013, and the Federal Facility Accountability Act of 2013
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Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, my name is David Bearden. I am a Specialist in Environmental Policy for the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS on legislation under consideration by the Subcommittee: the Federal and State Partnership for Environmental Protection Act of 2013, the Reducing Excessive Deadline Obligations Act of 2013, and the Federal Facility Accountability Act of 2013.

This legislation would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 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.

In brief, the primary areas that the legislation would address include: (1) the designation of sites on the National Priorities List (NPL), (2) credits toward state matching funds requirements at non-federal facilities, (3) the selection of cleanup actions and opportunities for judicial review of such actions, (4) the establishment of financial responsibility requirements for private entities to demonstrate the capability to satisfy cleanup liability if contamination were to occur, and (5) the waiver of sovereign immunity at both current and former federal facilities.

In serving the U.S. Congress on a non-partisan and objective basis, CRS takes no position on this legislation but has been asked by the Subcommittee to identify the federal and state roles

under CERCLA in existing law and the aspects of these roles that the legislation would address. The statements presented in this testimony are based on a preliminary analysis of the legislation within the time available. CRS remains available to assist the Subcommittee in its consideration of this legislation, related issues, and potential concerns among affected stakeholders.

Cleanup Framework of CERCLA in Existing Law

Congress enacted CERCLA in 1980 (P.L. 96-510) in response to a growing desire for the federal government to pursue the cleanup of the nation's most hazardous sites to protect human health and the environment. Under the Superfund program, the Environmental Protection Agency (EPA) may pursue cleanup and enforcement actions to respond to actual or threatened releases of hazardous substances into the environment. Releases of petroleum and certain other materials are excluded from CERCLA and are covered under other federal laws.

CERCLA established a broad liability scheme that holds past and current owners and operators of facilities, generators of wastes, and transporters of wastes who selected a facility for disposal, liable for cleanup costs, natural resource damages, and the costs of federal public health studies. The liability of these "potentially responsible parties" (PRPs) has been interpreted by the courts over time to be strict, generally joint and several, and retroactive. In conjunction with this liability scheme, CERCLA directs EPA to establish requirements for private entities to demonstrate their financial capability to satisfy cleanup liability if contamination were to occur, but EPA has not yet promulgated such requirements.

The Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499, SARA) amended CERCLA to address the applicability of the statute and state law to federal facilities, and modified various cleanup, liability, and enforcement provisions. Several subsequent laws also have amended CERCLA for specific purposes over time. With respect to federal and state

roles, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (P.L. 107-118) amended CERCLA to authorize federal grants to assist states and local governments with the cleanup of "brownfields" that are not addressed under the Superfund program, to give substantial deference to the states in EPA's designation of sites on the NPL, and to limit the use of the federal enforcement authorities of CERCLA to pursue the cleanup of a site, if a state already is pursuing the cleanup under its own law.

In acknowledgment of the limitation of federal resources to address the many thousands of contaminated sites across the United States, CERCLA directs EPA to maintain the NPL to prioritize sites for federal response actions. Under CERCLA, federal response actions may include interim or less extensive "removal" actions to address more immediate risks, and broader "remedial" actions that are intended to offer a more permanent solution to address potential risks over the long-term. Remedial actions also differ in that the use of federal Superfund appropriations is conditional upon federal-state cost sharing, whereas removal actions may be fully federally funded.

Under federal regulation, a site also must be on the NPL as an additional condition for EPA's use of federal Superfund appropriations to finance remedial actions. The cleanup of Superfund sites that are financed with private funds from the PRPs through enforcement actions are not subject to this condition, and therefore do not necessarily require listing on the NPL for the performance of remedial actions. EPA may fund removal actions with federal Superfund appropriations to address immediate hazards, regardless of whether a site is on the NPL.

The response authorities of CERCLA also are available to federal agencies for the performance of the cleanup of federal facilities, regardless of whether a federal facility is on the NPL. The cleanup of federal facilities is not funded with Superfund appropriations, but with

separate appropriations allocated to the agencies responsible for administering those facilities. The Department of Defense and Department of Energy administer the vast majority of federal facilities where cleanup is performed under CERCLA.

EPA and the states still play a role in overseeing and enforcing the cleanup of federal facilities. EPA leads the oversight of the cleanup of federal facilities on the NPL in conjunction with the states through enforceable interagency agreements with the federal department or agency that administers the facility. However, EPA's enforcement of such agreements may be constrained because of the limited ability of one federal agency to sue another. The states typically lead the oversight of federal facilities not on the NPL.

CERCLA authorizes various mechanisms for the states and the public to participate in federal cleanup decisions. However, EPA, or the lead federal agency at a federal facility, generally is responsible for making federal decisions under the statute. Those decisions may involve the application of state cleanup requirements that are more stringent than federal requirements.

CERCLA authorizes citizen suits (including suits by states) to challenge federal decisions regarding response actions, but limits the timing of judicial review until after the action is taken. CERCLA also specifically authorizes states to bring action in U.S. district court to challenge the selection of remedial actions at federal facilities within their respective borders.

Conditions for the use of federal Superfund appropriations also can be a factor in federal cleanup decisions that are made in consultation with the states. The use of federal Superfund appropriations to finance remedial actions generally is conditional upon the state agreeing to pay 10% of the capital costs, and 100% of the long-term operation and maintenance costs, with the exception of the treatment of groundwater for which federal Superfund appropriations may be

used for the first 10 years after the remedy is in place. These state matching funds requirements do not apply to the use of federal Superfund appropriations for removal actions, nor to either remedial or removal actions at federal facilities, as the cleanup of federal facilities is to be funded with federal appropriations to the extent that the United States is liable under CERCLA.

Legislation to Amend CERCLA

Collectively, the legislation under consideration by the Subcommittee would expand the role of the states in the cleanup of contaminated sites under CERCLA beyond the scope of the most recent amendments enacted in 2002 in the 107th Congress. The following points briefly identify how each bill would alter the state role in comparison to existing law.

Federal and State Partnership for Environmental Protection Act of 2013

- Would expand consultation with affected states to include not only remedial actions but also removal actions, including consultation with state (and local) officials at federal facilities.
- Would expand the categories of non-federal funds that states could apply as credits toward meeting matching funds requirements to include state oversight costs and in-kind expenditures.
- Would codify in statute EPA's general practice of obtaining the concurrence of the Governor of the state in which a site is located in making a decision to list a site on the NPL, and would give greater deference to state priorities in the listing process.
- Would broaden the opportunity for judicial review of a remedial action, if a state were to object to the selection of the remedial action in writing.

Reducing Excessive Deadline Obligations Act of 2013

- Would bar federal financial responsibility requirements that EPA may promulgate in the future from preempting state financial responsibility requirements that are in place on the effective date of any such federal requirements.
- Would amend the Solid Waste Disposal Act to require EPA to review and revise regulations under that statute as determined appropriate by the agency, rather than requiring review and revision, as necessary, every three years.

Federal Facility Accountability Act of 2013

- Would expand the waiver of sovereign immunity at federal facilities to include not only current but also former federal facilities, to encompass the entire phase of the cleanup process for both remedial and removal actions, and to clarify in greater detail the extent to which substantive and procedural cleanup requirements of state law apply to federal facilities regardless of whether a federal facility is on the NPL.

- Would authorize EPA to review the actions taken by other federal departments and agencies under CERCLA at federal facilities regardless of whether a facility is on the NPL, and would allow states to request such a review (by EPA) to ensure consistency with EPA cleanup guidelines, rules, regulations, or criteria.

That concludes the remarks of my prepared statement. Thank you for the opportunity to appear before the Subcommittee today. I would be happy to address any questions you may have.