

**GAO Responses to Questions for the Record
Hearing before the Subcommittee on Environment and the Economy
Committee on Energy and Commerce, U.S. House of Representatives
On May 22, 2013**

Member Requests for the Record

The Honorable Bill Johnson

1. In June of 2006, GAO conducted a review of EPA's implementation of institutional controls by the EPA Superfund program. In this or any subsequent review, were you able to ascertain whether EPA routinely complies or requires compliance with State land-use control or environmental covenant laws and regulations?

- GAO's findings with regard to EPA's implementation of institutional controls at Superfund sites were included in our reports *Hazardous Waste Sites: Improved Effectiveness of Controls at Sites Could Better Protect the Public* (GAO-05-163, Jan. 28, 2005) and *Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public* (GAO-06-900T, June 15, 2006). These reports did not specifically address the issue of whether EPA routinely complies or requires compliance with State land-use control or environmental covenant laws and regulations. However, GAO did find that EPA faces challenges in ensuring that institutional controls are adequately implemented, monitored, and enforced. Institutional controls at the Superfund sites GAO reviewed, for example, were often not implemented before the cleanup was completed, as EPA requires. In addition, EPA may have difficulties ensuring that the terms of institutional controls can be enforced at some Superfund and RCRA sites: that is, some controls are informational in nature and do not legally limit or restrict use of the property, and, in some cases, state laws may limit the options available to enforce institutional controls.

The Honorable John D. Dingell

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

- GAO has not looked into this issue in any of our past work.

2. What are the amounts set in each State and for what classes of facilities?

- As noted above, GAO has not looked into this issue in any of our past work.

Additional Questions for the Record

The Honorable John Shimkus

1. Has GAO 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?

- GAO has not specifically addressed whether EPA Regions may inconsistently interpret and implement policies regarding remedy selection, listing sites on the National Priorities List, or remediation at federal facilities, and has not identified any such inconsistencies in past work. With regard to Regions' listing of sites on the National Priorities List (NPL), GAO's recent report *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List* (GAO-13-252, April 9, 2013), shows that the number of sites listed on the NPL varies widely by Region. According to officials in one region, EPA has access to more resources than states and typically addresses sites that require greater or more specialized resources through the NPL approach. For example, regional officials noted, states face different limitations that can prevent them from pursuing cleanup under their programs including: technical capacity, legal resources, and financial resources. In addition, EPA officials in four regions noted examples where a state environmental program requested that the Superfund program pursue NPL listing because the state was having trouble getting a potentially responsible party (PRP) to cooperate or the PRP went bankrupt.

The Honorable Ralph M. Hall

I am aware of a very promising initiative involving the Superfund program of EPA and the Civil Works program of the Corps of Engineers that is focused on restoring contaminated urban rivers, which pose some of the most difficult challenges of all Superfund sites across the nation. That initiative, referred to as the Urban Rivers Restoration Initiative, gives States a much greater role in proposing and managing restoration at Superfund sites on urban rivers due to the Federal-State partnership relationship inherent in the Water Resource Development Authorities of the Corps. The proposal has been examined with positive results and recommendations for expansion by the EPA IG.

1. Might you provide what steps you might take in this Administration to provide greater support and more enthusiastic backing for this proposal?

- GAO has not reviewed this initiative and, therefore, cannot comment on the proposal.

The Honorable Henry A. Waxman

Based on your testimony during a hearing in the Environment and the Economy Subcommittee in May, it seems that the majority of contaminated sites are currently being cleaned up by Other Cleanup Activity deferrals, many of them to states.

1. Based on your analysis of contaminated sites currently being cleaned up under Other Cleanup Activity deferrals, is there a need for a more defined or consistent federal role, when cleanups are deferred to states?

- GAO's recent report *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List* (GAO-13-252, April 9, 2013) reported that a majority (52 percent) of sites eligible for listing on the NPL is currently being addressed as Other Cleanup Activity (OCA) deferrals. GAO found that, as of December 2012, of the 3,402 sites EPA identified as potentially eligible for the NPL, EPA has deferred oversight of 1,766 OCA deferrals to states and other entities. However, EPA has not issued guidance for OCA deferrals as it has for the other cleanup approaches. Moreover, EPA's program guidance does not clearly define each type of OCA deferral or specify in detail the documentation EPA regions should have to support their decisions on OCA deferrals. Without clearer guidance on OCA deferrals, EPA cannot be reasonably assured that its regions are consistently tracking these sites or that their documentation will be appropriate or sufficient to verify that these sites have been deferred or have completed cleanup. GAO recommended that EPA provide guidance to EPA regions that defines each type of OCA deferral and what constitutes adequate documentation for OCA deferral and completion of cleanup. EPA agreed with this recommendation.

Although there is no record of heavy litigation under the deadlines targeted in the Reducing Excessive Deadline Obligations Act of 2013, there is an informative record of deadline lawsuits and litigation in general against the Environmental Protection Agency (EPA).

2. What is the primary category of plaintiff bringing deadline lawsuits against EPA?

- Our report, *Environmental Litigation: Cases against EPA and Associated Costs over Time* (GAO-11-650), issued August 1, 2011, identified categories of plaintiffs that brought suit against EPA under 10 major environmental acts, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund. The data used in that analysis did not include reliable information on the claim(s) in each lawsuit and as a result, we were not able to determine whether the litigation was filed as a deadline suit or under other claims. Deadline suits are not, however, significant in the CERCLA context; they are generally used in connection with statutes that specify that EPA shall issue a regulation or perform an action by a certain date, and most of the CERCLA regulations were issued years ago.

3. What are the other major categories of plaintiffs, in order?

- Our report, *Environmental Litigation: Cases against EPA and Associated Costs over Time* (GAO-11-650), identified categories of plaintiffs that brought suit against EPA under 10 major environmental acts, including CERCLA. For the nearly 2,500 lawsuits filed from fiscal year 1995 through fiscal year 2010, the categories of plaintiff were trade associations (25 percent); private companies (23 percent); local environmental and citizen groups (16 percent); national environmental groups (14 percent); states, territories, municipalities, and regional government entities (12 percent); individuals (7

percent); unions, workers' groups, universities, and tribes (2 percent); other (1 percent); and unknown (less than 1 percent).

Under section 108 of Superfund, EPA has been working to establish financial responsibility requirements for hardrock mining. Financial responsibility requirements would ensure that any company undertaking this dangerous practice has the resources necessary to cover the costs of anticipated clean up needs.

4. What are some of the environmental and health risks associated with hardrock mines?

- As we have reported previously, hardrock mining operations have the potential to create serious environmental and physical safety hazards. Mining operations can extract millions of tons of material, much of which is left at the mine site in the form of waste rock piles and mine tailings. When exposed to air and water, acids and metals can leach out of these wastes and contaminate surface and ground water. For example, during the extraction of uranium (a hardrock mineral), the waste rock piles that are formed can introduce radionuclides such as radium, and heavy metals such as selenium and arsenic into the environment. The mine structures used to extract the minerals, such as open pits or underground shafts and tunnels, can also become sources of contamination. In addition, physical safety hazards may be created on the land disturbed by mining operations. These hazards may include open or concealed shafts, unstable or decaying structures, or explosives.

The Government Accountability Office (GAO) has studied some financial responsibility requirements for hardrock mining, and evaluated their adequacy.

5. Do all financial responsibility requirements for hardrock mining provide the same protections for taxpayers?

- The Bureau of Land Management (BLM) and the Environmental Protection Agency (EPA) have expressed concerns with one particular type of financial assurance known as corporate guarantees. Corporate guarantees are promises by mine operators, sometimes accompanied by a test of financial stability, to fulfill their environmental reclamation or remediation obligations. However, these guarantees do not require that funds be set aside by the operators to pay such costs. In 2000, BLM stopped accepting corporate guarantees for new mining operations, stating that they are less secure than other forms of financial assurance, particularly in light of fluctuating commodity prices and the potential for an operator to declare bankruptcy. Similarly, EPA has stated that corporate guarantees offer EPA minimal long-term assurance that a company with an environmental liability will be able to fulfill its financial obligations. EPA does not have regulations on the use of corporate guarantees as financial assurances under CERCLA, however, and still accepts them to ensure mine operators remediate contamination from hardrock mines under CERCLA settlement agreements.

6. Is it correct to say that some financial responsibility requirements for hardrock mining may require bonds or insurance for too small an amount, or may be limited in the types of reclamation or cleanup activities they cover?

- This statement is correct. In reports issued in 2005, 2008, and 2012, we analyzed BLM financial assurances and determined that the financial assurances in place were or may be inadequate to cover estimated reclamation costs. For example, in 2012 we determined that BLM held financial assurances valued at approximately \$1.5 billion to guarantee reclamation costs for 1,365 hardrock operations on federal land managed by BLM. At that time, however, 57 hardrock operations had inadequate financial assurances—amounting to about \$24 million less than needed to fully cover estimated reclamation costs. Furthermore, of the 11 BLM state offices with a hardrock mining program, only 2 —Montana and Wyoming—had fully implemented a 2009 BLM policy designed to improve the management of hardrock financial assurances by conducting timely reviews of financial assurances and ensuring that financial assurances for hardrock operations under their purview were adequate..

In introducing the Federal Facility Accountability Act of 2013 during a hearing in the Environment and the Economy Subcommittee in May, Chairman Shimkus said that the bill would amend Superfund by requiring federal Superfund sites to comply with the same state laws and regulations as private entities.

7. Does Superfund impose additional requirements on federal agencies, beyond what applies to private entities?

- Yes, Superfund imposes additional requirements on federal agencies.

8. Please describe those additional requirements?

- Section 120 of CERCLA, as amended, requires federal agencies to comply with CERCLA and submit information to EPA on certain potentially hazardous releases. EPA maintains this information in a Federal Agency Hazardous Waste Compliance Docket which includes a history of federal facilities that generate, transport, store, or dispose of hazardous waste or which have had some type of hazardous substance release or spill. For each site on the docket, CERCLA Section 120 requires EPA to take steps to ensure that a preliminary site assessment is conducted by the responsible federal agency.

The preliminary assessment, which is generally based on site records and other information regarding hazardous substances stored or disposed of at the facility, forms the basis for EPA to evaluate the site for listing on the NPL. EPA reviews preliminary site assessments to determine whether a site poses little or no threat to human health and the environment or requires further investigation or assessment for possible cleanup. Based on this assessment, EPA may then score and rank the site based on whether the contamination presents a potential threat to human health and the environment. If a site scores at or above a minimum threshold for cleanup under CERCLA, EPA may place the site on the NPL or defer it to another regulatory authority, such as a state agency, for

cleanup under other statutory authorities or programs, such as the Resource Conservation and Recovery Act (RCRA).

Section 120 of CERCLA also establishes specific procedures for cleaning up federal facilities on the NPL. As part of its oversight responsibility, EPA works with federal agencies to evaluate the nature and extent of contamination at a site, select a remedy, track cleanup, and monitor the remedy's effectiveness in protecting human health and the environment. Under Section 120 of CERCLA, the relevant federal agency and EPA are required to enter into an interagency agreement within 180 days of the completion of EPA's review of the remedial investigation and feasibility study at a site. These agreements are required to include, at a minimum, a review of the alternative remedies considered and the selected remedy, a schedule for cleanup, and plans for long-term operations and maintenance. The Federal Facility Accountability Act of 2013 would broaden the applicability of state requirements to cleanups at federal facilities by, for example, extending these requirements to NPL sites, and would specifically waive the federal government's sovereign immunity from suits with respect to these requirements.

During the hearing, witnesses testified that cleanups at formerly used defense sites may be delayed by the Department of Defense claiming sovereign immunity.

9. What responsibility does the Department of Defense have for contamination at former defense properties, if that contamination happened while the site was under the Department's jurisdiction?

- Under the Defense Environmental Restoration Program (DERP), DOD is required to carry out a program of environmental restoration activities at sites located on former and active defense installations that were contaminated while under DOD's jurisdiction. The goals of the program include the identification, investigation, research and development, and cleanup of contamination from hazardous substances, pollutants, and contaminants; the correction of other environmental damage (such as detection and disposal of unexploded ordnance) which creates an imminent and substantial endangerment to public health or welfare or the environment; and demolition and removal of unsafe buildings and structures.

The DERP was established by section 211 of the Superfund Amendments and Reauthorization Act of 1986 which amended CERCLA. In implementing the DERP, DOD is required to carry out its activities addressing hazardous substances, pollutants, or contaminants in a manner consistent with section 120 of CERCLA (see the response to question 8).

DOD is responsible for cleaning up its releases of hazardous substances under DERP, in accordance with CERCLA. The remedy chosen for such a release must meet certain standards for contaminants set under state or federal laws or regulations. If there is no standard for a given contaminant, DOD must still achieve a degree of cleanup, which at a minimum, assures protection of human health and the environment.

GAO has spent a considerable amount of time looking at Department of Defense Superfund sites, and has offered several recommendations to improve those cleanups.

10. Are the GAO's recommendations to improve the cleanups of Department of Defense Superfund sites reflected in the Federal Facility Accountability Act of 2013?

- The Federal Facility Accountability Act of 2013 would not specifically implement recommendations or matters for Congressional consideration included in recent GAO reports on DOD cleanup activities. We have not analyzed the extent to which the bill's provisions could nevertheless facilitate the timely and effective cleanup of DOD facilities.

11. Does the Federal Facility Accountability Act of 2013 reflect issues GAO has identified in its oversight of Superfund cleanups at federal facilities?

- In our federal facilities Superfund cleanup work we have identified a number of issues meriting further attention from Congress and EPA, including the need for greater EPA enforcement authority at DOD sites and a uniform method for reporting cleanup progress at DOD installations. The bill would seek to enhance state enforcement authority over DOD cleanup activities, and give EPA additional authority to review certain cleanup activities carried out by federal agencies. It would not specifically provide for any sanctions against federal agencies that EPA finds, as a result of its reviews, to be acting inconsistently with applicable rules, regulations, or guidelines.