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OVERSIGHT OF FEDERAL FACILITY

CLEANUP UNDER CERCLA, PART 2

WEDNESDAY, SEPTEMBER 16, 2015

House of Representatives,

Subcommittee on Environment and the Economy,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 4:04 p.m., in Room 2322, Rayburn House Office Building, Hon. John Shimkus, [chairman of the subcommittee] presiding.

Present: Representatives Shimkus, Harper, Pitts, Murphy, Latta, McKinley, Bucshon, Tonko, and Pallone (ex officio).

Staff Present: Will Batson, Legislative Clerk; David McCarthy, Chief Counsel, Environment and Economy; Tina Richards, Counsel, Environment; Chris Santini, Policy Coordinator, O&I; Chris Sarley, Policy Coordinator, Environment and Economy; Dan Schneider, Press

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Secretary; Dylan Vorbach, Staff Assistant; Jacqueline Cohen, Minority Senior Counsel; and Alexander Ratner, Minority Policy Analyst.

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Mr. Shimkus. We are going to call the hearing back to order. This is the second day and the second panel of a hearing that we started on Friday.

We are glad to have you here. So all the openings statements have been done, so you don't have to listen to that.

I will introduce you individually. You will have 5 minutes for your opening statement, and then your official statement is filed in the record already. And then we will go to questions. So thanks for coming.

Could I get staff to get the door closed? Someone?

Okay. So first we have Ms. Elizabeth Dieck, director of environmental affairs for the South Carolina Department of Health and Environmental Control, on behalf of ECOS, Environmental Council of the States, who have become good friends of mine.

And we are glad that you are here. Welcome. You are recognized for 5 minutes.

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STATEMENTS OF ELIZABETH DIECK, DIRECTOR OF ENVIRONMENTAL AFFAIRS, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, ON BEHALF OF THE ENVIRONMENTAL COUNCIL OF THE STATES; BONNIE BUTHKER, CHIEF SOUTHWEST DISTRICT OFFICE, OHIO EPA, ON BEHALF OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS; AND MICHAEL HOULEMARD, JR., EXECUTIVE OFFICER, FORT ORD REUSE AUTHORITY

STATEMENT OF ELIZABETH DIECK

Ms. Dieck. Thank you.

Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee, good afternoon. My name is Elizabeth Dieck, and I am here today in my capacity as secretary/treasurer of ECOS, whose members are the leaders of the State and territorial environmental protection agencies. I serve as the director of environmental affairs for the South Carolina Department of Health and Environmental Control.

I appreciate the opportunity to share with you the States' views on the progress of cleanup of contaminated Federal facilities and what solutions may help address the related challenges.

ECOS commends the subcommittee for holding these hearings on the state of Federal facility cleanups in our Nation. Your attention to these sites is relevant to nearly every State and territory in our Nation where contaminated sites exist on lands managed by Federal

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agencies such as the U.S. Department of Defense, Department of Energy, Department of Agriculture, and the Department of the Interior.

Your oversight of these cleanups, the resources being devoted to them, and the legislative actions that can be taken to advance cleanup progress is critical, as all Americans have a collective interest in seeing the hundreds of millions of dollars we allocate to these sites annually yield the most effective results.

State environmental regulators are involved in every stage of the cleanup process, from identifying and reporting sites to staffing and overseeing cleanup efforts. We are on the front lines of answering questions from our citizens about the risks these sites may pose to their health and welfare, the scope of the contamination, the status of the cleanup progress, and the management of waste streams from building debris to more hazardous waste.

We share with you and our Federal partners a priority interest in responding to these complex sites as expeditiously as possible and, when we can, returning them to productive use.

I would first like to highlight for you where States have seen an improvement by Federal agencies in site remediation progress and in maintaining communication with us during the remediation process. This progress is due not only to thoughtful process improvements within the agencies but also in response to your oversight and legislation which passed the House last Congress and a series of GAO reports calling into question whether the Federal Government is moving expeditiously

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and with sufficient resources to achieve the needed results at these sites.

It is important to know that the creation of State-Federal groups has allowed States and DOD to work towards mutually acceptable cleanup solutions. In addition to these DOD sites, States have played a major role, working with DOE, in the cleanup of heavily contaminated sites affected by the nuclear weapons complex. States work closely with DOE and U.S. EPA to eliminate risks posed by these sites and oversee the cleanup of sites within the complex through Federal facility agreements, permits, and consent orders.

Collaboration between the States and Federal agencies has resulted in significant financial savings from reduced future maintenance costs that can be put towards further cleanup of sites within the complex.

ECOS commends Federal agencies on progress. However, we are concerned that there are instances where the interests of the States are not being considered as thoughtfully as needed. We have three overarching concerns.

First, the State voice in cleanup decisionmaking should be further strengthened.

Where States have clear regulatory and enforcement authority under legislation, much progress has been made at DOD and DOE sites across the Nation, as Mr. Whitney and Mr. Conger have testified this past week. States are concerned, however, that assertions of

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sovereign immunity and CERCLA-led agency authority under Executive Order 12580 by Federal agencies have led to inappropriate or inconsistent interpretations of State law and have not supported cleanup to the same standards as private parties. This hampers States' abilities to oversee effective cleanup efforts and be accountable to their citizens.

We encourage Congress to implement legislation that will acknowledge State authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated Federal facilities and fully recognize States' regulatory roles at Federal facilities. There is no reason for Federal agency environmental cleanup activities to be subject to less oversight than private parties.

Secondly, States frequently see the Federal agencies unilaterally changing site cleanup schedules and goals, pushing ultimate completion out by years and sometimes decades and compromising the sites' ultimate usability. Federal agencies effectively change cleanup schedules by failing to seek or allocate sufficient funding for their cleanup commitments.

When a Federal agency unilaterally changes the terms of a cleanup by extending a deadline or changing other goals, the trust-based relationship breaks down, and it can lead to tension, and then it can lead to costly litigation, and that takes away from cleanup efforts. Federal agencies should consult meaningfully with States before

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seeking to change schedules or cleanup goals.

Third, we are concerned that the available budget determines the remedial approach at some sites, meaning we may not be implementing the most effective and appropriate cleanup approach at a given site. Due to the complexity of the contamination of these sites and the proximity of many of them to communities, States recommend that Federal agencies, in consultation with the States, determine the most appropriate remedy and then work together to pursue sufficient and stable funding solutions to implement that remedy. Transparent statements about the actual funding necessary to achieve results are imperative.

Mr. Chairman and members of the subcommittee, I hope that my testimony today sheds some light both on the progress that has been made as well as additional areas that are in need of attention in the area of Federal facilities. I look forward to answering any questions you may have.

[The prepared statement of Ms. Dieck follows:]

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Mr. Shimkus. Thank you very much. Great to have you.

And now I would like to turn to Ms. Bonnie Buthker, chief of Southwest District Office for the Ohio Environmental Protection Agency, on behalf of ASTSWMO.

You are recognized for 5 minutes. Welcome.

STATEMENT OF BONNIE BUTHKER

Ms. Buthker. Thank you.

Good afternoon, Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee. I thank you for the opportunity to be here today to represent the Association of State and Territorial Solid Waste Management Officials and provide testimony.

Our membership includes managers from the State environmental protection programs, including those responsible for overseeing the restoration and reuse of current and former Federal facilities. While Ohio EPA is a member of ASTSWMO and I work for Ohio EPA, today I am here representing ASTSWMO.

While States do not assume primary CERCLA authority, we do play a role in implementation. States share a common goal with the Federal Government in ensuring that risks to human health and the environment are appropriately addressed. Like U.S. EPA's in NPL Federal facilities, the States' role is to ensure that remedies implemented will be protective of human health and the environment and in compliance

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with Federal and State law.

While States try to work in partnership with both the Federal agencies and U.S. EPA, there are times when we disagree on what cleanup standards should be used and what remedies should be implemented. For these partnerships to work, all parties must focus on the technical and practical issues rather than focusing on the legal authorities, including sovereign immunity. Discussions involving legal authorities lead to protracted posturing, no-win situations, and delayed investigation and cleanup of these facilities.

ASTSWMO has consistently supported any mechanism that encourages greater State collaboration with our Federal partners while ensuring that our voice and opinions are not diminished. ASTSWMO and our members actively engage with representatives of the U.S. EPA, DOD, DOE, and Federal land management agencies on national policy issues.

ASTSWMO has had a long history of working collaboratively with DOD that began in the 1990s. In recent years, DOD and the military components have worked closely with ASTSWMO and the States to effectively resolve issues concerning the investigation and remediation of their current and former facilities.

Since 2008, DOD and the military components have formed three different committees with States and ASTSWMO to resolve difficult challenges that were ongoing problems for several years. All three committees provide for collaboration among States and Federal agencies on several challenging cleanup issues, including remediation

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technologies and interim risk management, which can be especially challenging on property no longer owned by DOD.

ASTSWMO continues to support legislation that clarifies that Federal agencies, like private companies, are subject to appropriate State regulations. While ASTSWMO appreciates the leadership DOD has shown in recent years by focusing on resolving issues with States versus their legal authorities, this has not always been the case.

Throughout the years, States have had several experiences with Federal agencies being unwilling to ensure their investigation and cleanups were done in accordance with State regulations. When States tried to use their authorities to compel Federal agencies to compel Federal agencies to comply with these laws, Federal agencies invoked sovereign immunity in an attempt to prevent State oversight.

Because of this, ASTSWMO has had longstanding policy positions opposing the assertion of sovereign immunity by Federal agencies. These positions have not changed over time, because our members continue to have experiences where Federal agencies use sovereign immunity to avoid compliance with State requirements. These experiences involve all Federal agencies, including DOD, the Department of Interior, and the Department of Agriculture.

For example, in 2013, ASTSWMO did a survey of State and Federal facility managers asking if they recently experienced Federal agencies' invoking sovereign immunity during the application, implementation, and enforcement of CERCLA or State regulations. Of

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the 19 States that responded, the States listed 12 cases where they had had such experiences.

And though Federal agencies have accomplished a great deal of cleanup at their facilities over the last 20 years, there are still difficult issues left to address, including complicated groundwater contamination, emerging contaminants unique to Federal facilities, and sites contaminated with munitions. Sovereign immunity could still be a barrier to States in ensuring compliance with State requirements and Federal agency decisions concerning such issues.

States need funding so that they can provide necessary resources to be engaged in Federal facility investigations and cleanups. Both DOD and DOE have programs that provide funding to States for their involvement in the investigation and cleanup of their facilities. These programs have provided numerous benefits to both these agencies and the States, including cost savings, reduced litigation, expedited cleanup, and increased public trust in their investigations and cleanups. ASTSWMO, therefore, supports legislation that requires Federal agencies to reimburse States for costs associated with State involvement and oversight.

Thank you for this opportunity to offer testimony, and I would be pleased to answer any questions you may have.

[The prepared statement of Ms. Buthker follows:]

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Mr. Shimkus. Thank you very much.

And, finally, I will turn to Mr. Michael Houlemard, executive officer of Fort Ord Reuse Authority.

And before I ask him to begin, I think the minority staff is pretty smart or they got lucky. The Monterey area and Ford Ord is my last duty station. So I served there when it was, you know, a jewel. And there are great locations there -- beautiful golf course, new housing. I was just there a couple years ago -- and University of California Monterey, which is very exciting. But, obviously, there is a lot of the post that still has issues and challenges.

So we are happy to have you here. Monterey is the second-most-beautiful spot on the face of the Earth, right behind the 15th District of Illinois. And so we are glad to have you here.

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STATEMENT OF MICHAEL HOULEMARD, JR.

Mr. Houlemard. Chairman Shimkus, Ranking Member Tonko, all distinguished members of the subcommittee, I want to just thank you for that acknowledgement of how great Monterey is, but it is no better than Rantoul in Illinois.

I would also like to note that, as the executive officer at the Fort Ord Reuse Authority, I have spent quite a bit of my last 20 years spending many hours back here in Washington, D.C., representing communities across the Nation. So I want to thank the committee for its decision that it would include communities as part of the testimony on this very important committee.

I am honored to have spent those last 25 years of my career serving military communities. I served some of that time working with the Association of Defense Communities that has a Defense Communities Caucus support effort. And I know that it is important for all of you to recognize that the communities that have served this Nation by supporting military services have done it in a way that helps the Department of Defense increase its mission-effectiveness.

I also want to take the time to acknowledge our colleagues in U.S. EPA that are tasked with the regulatory oversight that is required to address the many environmental conditions between military communities and their adjacent communities, whether they be active installations

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or closing or closed installations.

Today I want to focus my comments on the Superfund relationship with military services and defense communities, which is at least an uphill battle given the limited resources and the potential for hazards, both recognized and emerging, to be present.

I also, Mr. Chairman and members of the committee, assert that our defense in part relies on how DOD addresses the sensitive mix of downsizing and the burden of excess infrastructure in the future and its relationship to the ongoing environmental hazards that remain in many of our military installations. Our communities suffer from the many technical, regulatory, processing, resource, and other delays that affect our ability to have access to property in a safe and reliable way.

And many communities across this Nation are provided partial or inadequate information about Federal or other agency contamination that will affect their exposure to potential catastrophic hazards. This is particularly acute with recent past property transfers from the Department of Defense to local communities after downsizing and closing former properties and then abandoning them to local jurisdictions.

Remedial actions are often governed under the resource application decisions by and within the primary polluter's oversight. Those decisions are often determined to be under the regulatory control of the Antideficiency Act, even when DOD has determined them to be

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exempt from such limitations. In those cases, communities have to wait for the annual funding process, which often causes significant delays in mobilizing and demobilizing. In our case, we are looking at the possibility of another 7 to 10 years before getting full access to the Fort Ord National Monument for an installation that was announced for closure 25 years ago.

Another item is, as a Superfund site due to subsurface remediation, we at the former Fort Ord are ineligible for funding resources and other support under brownfields that would greatly assist us in addressing these aboveground issues. We think that there is a conflict of the regulatory controls here and that Congress should look at that and understand the potential for helping communities. We now have projects that cannot survive even in the great Monterey Bay, with our underlying land value, because we are left with the burden of buildings that are contaminated, with considerable cost putting them under water economically.

Another critical item -- and this is not brand-new; I guess you have heard this repeatedly -- but the long-term stewardship of properties that is being transferred from Federal hands to local communities is critical. In many, if not nearly every case nationwide, Federal agencies are motivated to complete cleanups that enable property transfers in a way that reduces long-term Federal obligations. And while that may be a great goal for the Federal agencies, it is real important for the communities to be able to have an economic recovery,

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which demands access to property and ability to manage the long-term stewardship.

This is especially important that that long-term burden be provided in a way that is a part of a remedial action and assessed economically in the remedial action what is being left to local communities.

How such responsibility transference is assessed is crucial under CERCLA. This is especially key as the EPA addresses emerging contaminants such as PFCs that may exist on properties already transferred but yet there is no current way for the Federal agency to return to take care of those problems.

Five on my item list -- I just finished the fourth -- community voices are often not heard. It is my assertion that communities are often only provided the minimum opportunity to participate in the process, including CERCLA. Superfund regulatory requirements read like a checkoff list to meet certain public comment requirements, but those regulations fall woefully short of meeting the intent for engaging the community in the process.

A true engagement process goes well beyond these citizen participation minimums, community involvement review timelines, or news publication requirements to encourage -- that would allow for encouraging active engagement in communities in the forms and methods that solicit input in the way that communities interact.

These technical assistance programs that are currently being

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funded must be proactive and not responsive to just those few communities that respond. Further, the EPA and other agencies need to help communities build capacity so that they strengthen their local knowledge base and that their comments are of value.

I assert that the community engagement process is a full-contact sport, and it has to be done in the full spectrum of what 21st-century communications are all about.

Ultimately, I would like to add that this is a resource issue, as well. And given the limits of certain Federal support, U.S. EPA must be given the combination of decisionmaking power that allows flexibility between programs and supplemental authority that allows for an increase in the interface with States and local communities.

This collaborative effort would greatly enhance our interactions over the serial reviews that we have today. In fact, we are under a process of collaboration that has been extremely effective at Fort Ord that brings all the parties to the table in a concurrent manner rather than in a serial fashion.

So I assert that we have learned quite a few things: that it is difficult for citizenry to get up to speed with this complex, sophisticated effort; and it is important that we have property transfer and project delivery delays that are collaborative and use 21st-century communications. I ask that we eliminate contravening regulatory issues through focused oversight. And that is essential to community understanding. That also leads to community voices being

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heard that may not be heard today.

And, finally, we must move to address the long-term stewardship issues that are current a major potential unfunded mandate to local communities and States.

Chairman Shimkus, thank you for the communities' having a voice here at the table.

[The prepared statement of Mr. Houlemard follows:]

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Mr. Shimkus. You are welcome, and it is great to have you.

So I will now open it up for the line of questions, and I will recognize myself, 5 minutes for the first round.

And I asked this line of questions to our Federal witnesses last week, but I am guessing that I will hear different responses from the witnesses on the panel. I did talk to them and say please tune in to hear your voices when I spoke to them a couple times on Friday.

My question stems from the issue of the delegation of the present CERCLA authority under Executive Order 12580 to other Federal agencies who are also potential responsible parties. And it is really the same question to all of you, and we will just go first to Ms. Dieck.

Is there a conflict when a Federal agency is a potential responsible party because it caused the contamination or owns the contaminated property but the same agency is also the lead agency responsible for making cleanup decisions? Why or why not?

Ms. Dieck. I would have to say there is a conflict. If you have the Federal agency that has created the contamination is responsible for the cleanup and is also responsible for selecting the remedial action, that is an inherent conflict.

It has to be something that is coordinated clearly with the States so that our voice is heard and so that there is an understanding of what the appropriate remedial action would be so that the land can be protected and the proper protective measures are in place.

Mr. Shimkus. Ms. Buthker, same question. And I can restate it

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if you need it, but --

Ms. Buthker. No. I would say there is definitely a conflict. Because the Federal agencies, they are trying to look at the funding that they have and trying to do as much as they possibly can, and if they can put in a cheaper remedy at a facility than what maybe the State wants or the community wants, then they can use that money somewhere else. And so, definitely, there is a conflict.

Mr. Shimkus. Mr. Houlemard?

Mr. Houlemard. Thank you, Chair. I concur with my colleagues.

I would add a quick note that the former Fort Ord, we had an experience that the United States Army, which serves as the president for the cleanup at the former Fort Ord -- we elected to do our own cleanup under contract. And during the course of that process, we have attempted to be collaborative, but it breaks down at certain points.

The United States Army had a certain concern about what the language was going to look like that directly related to the return of the United States Army to cover under 120(h). EPA had a difficult language issue. It took over 18 months to get that resolved, and we wound up with delays. Similar things have happened in Kansas and in Texas on similar kind of, but different, issues that create the delays.

So I concur with my colleagues.

Mr. Shimkus. Thank you very much.

And a followup to Ms. Dieck: Your written testimony acknowledges that States are concerned that when Federal agencies assert sovereign

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immunity and when they assert a CERCLA lead agency authority under Executive Order 12580 that this has led to, in quotations here, "inappropriate or inconsistent interpretations of State law that have not supported cleanup to the same standards as private parties," close quote.

Can you explain what you mean by this?

Ms. Dieck. Sure.

Assertion of sovereign immunity or lead agency authority enables Federal agencies to bypass or partially meet State requirements that normally would apply to private parties. For example, if the lead agency does not deem that a State requirement is applicable, relevant, or appropriate, then that agency does not have to meet that particular requirement. So that is problematic.

Mr. Shimkus. And, in my final time, in this debate of cleanup, the cost, the agency that could have created the problem is directed to clean up, but of course they do it based upon the money available.

If you were to object -- first of all, do you have a right to object? And then is that where the claim of sovereign immunity comes in, saying, well, thank you, but we can do whatever we want anyway?

Ms. Dieck. Certainly that would be the case for sites on the NPL list. And, generally, you know, the way they are reading it with the Executive Order 12580 and the language in CERCLA, that is the way that it is being applied, and that is problematic.

Mr. Shimkus. Anyone else have --

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Ms. Buthker. I would say, you know, definitely what you see happening is, because of the cost issue, a lot of times Federal facilities will look at the State requirements and say, well, if I can whittle down these State requirements that I have to meet, then I might be able to implement a cheaper remedy.

So that definitely has that impact where you see that, and because they are lead agency and they are the final say on how that remedy is going to be implemented and what happens, then, you know, yeah, the State can try to challenge that, but then that is when you have a situation with sovereign immunity. If the State says, well, I am going to sue you because you are not doing something consistent with what we would want you to do in this particular instance, they are like, okay, fine, sue me, but we have sovereign immunity.

Mr. Shimkus. And you would agree, Mr. Houlemard?

Mr. Houlemard. Yes, I would. I think the collaborative process is going to serve us all a lot better. In the case where we have -- our experiences, the collaborative process treats the remediation as what is most effective rather than what is most cost-effective.

Mr. Shimkus. Thank you. And I apologize for going over.

Now the chair recognizes the ranking member of the subcommittee, Mr. Tonko, for 5 minutes.

Mr. Tonko. Thank you, Mr. Chair. And thank you for convening this panel today so that we can hear from States and communities affected by the Superfund cleanups.

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At last week's panel, we heard that a lot of progress has been made to address dangerous contamination at Federal facilities owned by the Department of Defense and Department of Energy. So I would like to start by asking the panel, have you seen that progress in your States and communities? And what do these cleanups mean for communities around those sites?

Ms. Dieck, if you want to start.

Ms. Dieck. Sure.

I would start by saying we do have a collaborative -- a strong working relationship with DOE, and we have seen some tremendous successes at SRS. I think that the problems arise when, as I think I mentioned earlier in my testimony, there can be unilateral decisions that are made with regard to milestones, with regard to funding, that create a tension and make it difficult for the States to have that trust relationship.

And so, while good things are happening, we have been able to achieve a lot, specifically at SRS, I think that we could do better.

Mr. Tonko. Ms. Buthker?

Ms. Buthker. There has been a lot of progress made in Federal facility cleanups, not just in, you know, Ohio, but throughout all our member States have said that. And a good deal of it has to deal with the fact that we have been able to collaborate with DOD and DOE on the cleanups and work through these issues.

The problem, where it breaks down is when, you know, whatever the

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Federal agency is all of a sudden decides that they don't want to collaborate anymore and they want it their way or the highway. And when that situation happens, then that is when we start having less progress. That is when we start getting into a lot more of these battles over jurisdiction.

But there has been a great deal of cleanup that has been done because States have been working collaboratively. Most Federal facilities are not on the NPL, so the State is the only regulatory agency involved.

Mr. Tonko. Thank you.

And Mr. Houlemard?

Mr. Houlemard. Well, yes, Ranking Member Tonko, I would agree that there has been a lot of progress made, but then there is still so much more to do. We still have 8,000 acres of property that we are seeking access at the former Fort Ord, and I could describe another dozen cases where access to property is crucial to their economic recovery.

Mr. Tonko. Thank you.

And it seems that some cleanups have progressed more smoothly than others and can offer best practices for how to work with States and engage communities. So can you cite for us observations of best practices to foster community involvement and strong cooperation amongst the stakeholders?

Mr. Houlemard?

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Mr. Houlemard. Yes, I would give as examples McClellan Air Force Base in California; McClellan Army in Anniston, Alabama; and the Fort Ord Reuse Authority, where we as communities chose to collaborate with military services and the regulatory agencies to undertake a portion of our own cleanup and to make sure that we understood how it was happening, under effective cost working relationships, using private-sector companies to make sure that happened, with an insurance company that would assist us, and using collaborative processes. That worked for us, and we suggest that that is a formula that works many other places.

Mr. Tonko. Thank you.

Ms. Buthker?

Ms. Buthker. I would say that some of the successes that I have experienced -- Wright-Patterson Air Force Base. And it was very much that collaboration of working with the Air Force, the State, and U.S. EPA together, focused on how do we do the cleanup quicker, easier, more efficient. And we did a lot of things there.

Several of our base closure sites in Ohio -- Defense Electronic Supply Center, again, where we were working with not just U.S. EPA and the Air Force, but we were also working with the local community to ensure that, when that facility was cleaned up and transferred to them, that they could use it how they wanted to us it.

So, yeah, there definitely are those experiences.

Mr. Tonko. Thank you.

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And Ms. Dieck?

Ms. Dieck. I would echo what these folks have said. It is critical to have significant communication outreach efforts in place when you are dealing with contaminated sites in any area of your State. To have the education, the outreach, the understanding of what the contamination is, the status of the cleanup, what the implications are is critical. And you find that, with that collaborative approach, you can really see tremendous benefit.

Mr. Tonko. Thank you very much.

I think my time is exhausted. I was going to sneak one more question in, but thank you very much. I yield back.

Mr. Shimkus. The gentleman yields back his time, and we thank him.

The chair now recognizes the vice chair of the committee, Congressman Harper, from Mississippi, 5 minutes.

Mr. Harper. Thank you, Mr. Chairman. Appreciate it very much.

And thanks to each of you for being here to shed some light on a very important issue.

I will start with you, Ms. Buthker. Your written testimony gives an example of DOD historically asserting sovereign immunity in order to unilaterally decide issues such as what constitutes a State applicable or relevant and appropriate requirement. And we also understand that Federal agencies assert or threaten to assert sovereign immunity and thereby discourage States from enforcing otherwise

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applicable State laws.

Obviously, this is a problem for States, but can you please explain the issue?

Ms. Buthker. Well, the biggest problem with it for States is that, when States inconsistently apply their cleanup regulations from private parties to Federal facilities, then the private parties can raise the issue about, why are you picking on me? We hear a lot about Federal agencies wanting to be treated by private parties, but when it really comes down to it, they don't necessarily want to do that.

How that also creates problems with us is that, if ARAR is not consistent -- applicable or relevant and appropriate regulation isn't consistently applied, then U.S. EPA can come in and say, well, since you are not consistently applying that on both your private-party cleanups and your Federal facility cleanups, we can waive that ARAR on our future cleanups because you are not consistently doing it.

So both of those ways can impact the State.

Mr. Harper. Okay.

You also mentioned that DOD previously took the position that enforcement actions taken by the State could constitute a breach of the Defense-State Memorandum of Agreement. Could you first explain what the Defense-State MOA is and then tell us why this is problem for States?

Ms. Buthker. The Defense-State Memorandum of Agreement is the mechanism by which DOD and a State would come to agreement on how States

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would be reimbursed for their costs. It outlines what particular services the State provides. It doesn't say State oversight; it says the State will provide these services to DOD. But it also outlines the agreement that the State would agree to a prioritization system for funding, making sure that the most funding goes to the worst sites.

But then it also had a provision in most DSMOAs that before the State could take an enforcement action on a facility that was listed under the DSMOA, then they were supposed to go through the dispute resolution process; it also had a dispute resolution process in it. And, initially, what States thought that that meant was that, for the cleanup part of the -- because the DSMOA only covers cleanup -- that that was where States needed to go through dispute resolution if they had a disagreement. Like, for number of monitoring wells or number of soil samples being collected, that is when they would use dispute resolution. But if there was something that was a violation of State law and it was even outside of the cleanup program, we felt that was off limits; we could still use our regulatory authority.

And, before 2008, where the DSMOA program really started to have problems was that DOD started to any interpret that any regulatory program that the State was involved in that dealt with those facilities under our DSMOA, that would apply.

And I can give you an example. If a base had their own drinking water system and they exceeded a contaminant level and were issued an NOV, there were concerns that States would end up jeopardizing their

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funding under the DSMOA and actually be a breach of DSMOA if they sent a violation letter to the facility for that.

So that was pre-2008 when that was happening.

Mr. Harper. Does DOD ever -- do they ever currently assert this position?

Ms. Buthker. In 2008, where the big shift in all this was, we actually formed -- ASTSWMO States and DOD formed the DSMOA Steering Committee, where we worked through all these issues. And they clarified that that was not their intent, that the leadership at the time had misinterpreted what that clause was in the State's DSMOA. And it doesn't apply to any violation. It only applies to disagreements about the cleanup program itself. And they actually modified their guidance in 2011 in order to address that specific issue.

But, again, that is guidance and policy statement that is in place now. If the leadership at DOD would change, we could have something that would happen again back to that same situation.

Mr. Harper. I know we don't have time for you to answer and explain, but are there other agencies besides DOD that are doing the same thing in asserting sovereign immunity in order to decide what constitutes an ARAR?

Ms. Buthker. Yes, there are other agencies. When we --

Mr. Harper. Just tell me which agencies they are, and maybe somebody else will follow up.

Ms. Buthker. Department of Interior and Department of

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Agriculture are two that specifically our members have cited.

Mr. Harper. Thank you very much.

Mr. Shimkus. The gentleman yields back his time members.

And, for us members, DSMOA is Defense-State Memorandum of Agreement. So I am watching acronyms here.

So the chair now recognizes the ranking member of the full committee, Mr. Pallone, for 5 minutes.

Mr. Pallone. Thank you.

I am trying to get through these questions because I wanted to get through a bunch of them. So, first of all, I wanted to ask about the funding limitations that can delay and complicate cleanups.

Mr. Houlemard, can you describe some of the economic impacts cleanup delays have on communities around Federal facilities. And then, secondly, what about the economic impacts of successful cleanups? How do they help local communities?

Mr. Houlemard. Thank you, sir.

I would like to first address the second one. As we have been able to get access to the property at the former Fort Ord and the economics in our region have changed in the last several years, we have seen a boost in our activities, including the fact that, at the current time, we have about a billion dollars of construction underway, with new hotels, new residential, and many other activities. Getting access to the property is crucial. We had funding early that enabled us to get access to those properties.

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On the other side, we have not been able to get access fully to all of the properties on the former Fort Ord because of annual funding restrictions under the Antideficiency Act. While that means annually Congress has to approve, I know that DOD sometimes is able to overcome that because there is a DOD allowance that requires or allows multiyear funding. When you can use that kind of funding, you don't have to lose the time in mobilization and demobilization that we have lost every single year in creating new contracts, going through the USACE, United States Army Corps of Engineers, to be able to do that oversight.

That saves time in processing, it saves time in mobilization and demobilization, and gets the properties cleaned quicker.

Mr. Pallone. Okay.

Let me move to the second question. When Congress fails to fund agencies consistently because of sequestration, shutdown, or just short-term extensions that unfortunately become the norm, it can have a significant impact on cleanup schedules.

So let me ask Ms. Buthker and Ms. Dieck: From the State perspective, are these budget fluctuations and schedule changes disruptive? Quickly, if you can.

Ms. Buthker. Speaking on behalf of the members of ASTSWMO, having a stable level of funding for the cleanups so that can ask plan and prioritize definitely makes things work a lot easier. States can meet with DOD and say, these are the things we want to try to accomplish.

In addition, because our funding that we receive from DOD is based

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on a set work plan, the activities under that work plan, if those things do not happen, then States don't get money. So they also have the issue about potentially having to pull off staff that were assigned to work with DOD on those particular Federal facility cleanups. So it could definitely cause some disruption there.

Mr. Pallone. And let me ask Ms. Dieck quickly, because then I have a third question.

Ms. Dieck. Well, very briefly, when Federal agencies -- they don't always ask for the money that they need to meet the commitments that have been made to the States. And that becomes very problematic. That is why transparency is critical.

We do rely on -- we work with Federal agencies to come up with a plan that has certain goals and milestones put in place, and when we miss those goals, it can have economic impacts. If we don't have the land returned to productive use, it is problematic.

So it is critical that we have reliable funding that we can count on.

Mr. Pallone. All right. Thank you.

Let me go back to Mr. Houlemard about the brownfields program. I was one of the -- myself and Congressman Gillmor put together the first brownfields authorization years ago, and I am very interested in ways to strengthen the program and make it more effective.

Could you just elaborate briefly on your suggestion that a flaw in the brownfields legislation must be fixed to allow unique sites like

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Fort Ord to qualify for the program?

Mr. Houlemard. Yes. In the case of the former Fort Ord, fence line to fence line, we are Superfund under CERCLA for reasons having to do with groundwater contamination. The United States Army has a process that they are undertaking to remove the groundwater problem. It still has 15 years to go before it is going to be complete, maybe more. As a consequence, brownfields funding to support our efforts aboveground are -- we are not eligible because we are fence-line-to-fence-line Superfund.

And so that is the way that the legislation has been written. We have asked U.S. EPA about this issue in the past. They themselves recognize that there is a little bit of a conflict because our other environmental concerns of asbestos, lead, PCBs, and other things that are left to us by the United States Army cost significant amounts of dollars to remove.

In fact, California State University, Monterey Bay, is spending \$30 million just to remove buildings over the coming years. We have already spent \$45 million just to remove buildings, and we don't have any kind of assistance or brownfields program that can help us with that kind of problem.

Mr. Pallone. All right.

Let me just say to the chairman and to the ranking member of the subcommittee, I hope we have an opportunity to work on potential improvements to brownfields in the coming months. When I worked with

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Congressman Gillmor years ago and President Bush signed the bill, you know, we did it in a very bipartisan way, and, you know, I would like to see if we could do that again in terms of a reauthorization.

Mr. Shimkus. The gentleman yields back his time.

We thank you for that suggestion. And we all mourn the passing of Paul, and that is a good memory of Paul, of successful legislation, bipartisan, that was moved and passed.

So now I would like to recognize, looks like, obviously, the member who took the seat of Paul Gillmor, Bob Latta, for 5 minutes.

Mr. Latta. Well, thanks very much, Mr. Chairman.

And thank you very much for our witnesses for being here. I really appreciate it.

And if I could start with you, Ms. Buthker, I am going to assume from your testimony that you believe that current and formerly owned Federal facilities should have to comply with the same State requirements as a private entity conducting a cleanup under CERCLA?

Ms. Buthker. Yes.

Mr. Latta. Okay.

And let me ask this: With your leadership at -- and I hope I am pronouncing this right -- at ASTSWMO, how often do Federal facilities comply with State requirements?

Ms. Buthker. How often?

Mr. Latta. How often, in your experience, at ASTSWMO do you see that the Federal Government, Federal agencies are complying with State

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requirements?

Ms. Buthker. This issue of Federal agencies complying with State requirements and not saying that -- or waiving them has pretty much been a constant issue for the 20 years I have been involved at ASTSWMO.

Mr. Latta. Okay.

And do you believe that section 120 of CERCLA is evidence that Congress intended to waive sovereign immunity?

Ms. Buthker. I believe that it is. But I am not an attorney, so I am saying that. But I would believe it is because they were -- the way that I read it when I read it is that, you know, they are supposed to, especially the non-NPL facilities, they are supposed to be meeting State requirements.

Mr. Latta. And does the current waiver of sovereign immunity in CERCLA result in less oversight of Federal agency cleanups than in cleanups by private parties?

Ms. Buthker. I would say for the non-NPL sites that are under State oversight, yes, because you always have that specter of sovereign immunity in the picture.

If you have good collaboration with DOD, DOE, or the other Federal agencies, then you can work through these issues and these problems and these disagreements as you have them. But if you have a Federal facility project manager who doesn't want to listen to the State or the community, then they can basically shut down the program because they are lead agency, and if the State tries to sue, then sovereign

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immunity raises its head.

Mr. Latta. Okay.

One last question, with my remaining time here. Last Congress, I introduced and the House passed H.R. 2318, which was the Federal Facility Accountability Act -- and kind of following up with what you were talking about -- which ensures that current and formerly owned Federal facilities will have to comply with the same State requirements as a private entity doing a cleanup under CERCLA.

And then, in your testimony, you discuss the need for this type of legislation and how your association's positions have not changed over time because your members continue to have experiences where Federal agencies use sovereign immunity to avoid compliance with State requirements during investigation and cleanup of Federal facilities.

And can you describe some of the State requirements that the Federal agencies are trying to avoid?

Ms. Buthker. Probably the biggest one or one of the biggest ones is land use control, State regulations that implement restrictions on property. A lot of States have developed their own environmental covenant programs, and Federal agencies do not like to use that format for restricting property. They want to use their own mechanism.

How that causes problems for the States is, when there isn't a consistent means to restrict property, there is the potential that those restrictions can fail over time. And that is a very big issue for States. That is one.

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Cleanup standards. Some States have set generic standards for cleanup, and DOD may or may not or the Federal agencies may or may not want to clean up to those levels.

There is also things such as how landfills should be capped. A lot of States have their own regulations for those, and there are times when DOD says, no, those -- or I shouldn't say just DOD -- all the Federal agencies will say those shouldn't apply.

Mr. Latta. Thank you.

And, Mr. Chairman, in the interest of time, I am going to yield back my time and also say it is a privilege to hold the seat that Paul held.

Mr. Shimkus. Yes. Thank you.

The gentleman yields back his time.

The chair now recognizes the gentleman from West Virginia, Mr. McKinley, for 5 minutes.

Mr. McKinley. Thank you, Mr. Chairman.

I missed the first portion last week when we began, so perhaps this question has come up, but I am just curious on your perspective, because you are coming at, it looks like, from a different panel than we had before. But I am curious about some of the discussion about the Animus River out in Colorado. And I know it is about 126 miles long, and the EPA caused some problem there. They caused the issue to occur at the Gold King Mine.

Now, two things here with that is, are you hearing, from your

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perspective, did they solve it in a quick way? Do you think that -- again, because we were talking earlier about if it is federally -- if the Federal Government caused the problem, they can take a long time to get it resolved, or not, or they can find ways to cut corners, perhaps. I have heard some of this.

Do you think they did a pretty good job out there? Have you heard anything from the States, from other people talking about how they cleaned up the river? Let me just start with that. Any comments about the -- you haven't heard? You don't know anything about it?

Ms. Dieck. I have to say, I know some things about it, but I really would -- I would like to refrain from commenting on that.

Mr. McKinley. Okay. I am just thinking, since it touched several States and it had some impact on -- again, it goes back to what you were saying, sir, about individual input. With 126 miles long, there were a lot of people that were affected by that. Their farms were affected by it. I don't know whether or not they had a chance to participate in a solution of how -- I know it is going to clear up themselves naturally, I understand that, but the damage has been done.

So part of my point would be -- or the second question would be, who should pay for the cleanup? The taxpayers? Or should the government pay for that out of their current funding? Who would you think? Just -- it is kind of input. We are sitting around a table now where maybe you don't have an official position, but who do you think should pay for the damage the government caused by what they did?

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Is that something we are going to ask the taxpayers to come up with the money, or do you think maybe it should come out of their budget?

Does anyone have the courage to speak on this?

Ms. Buthker. I really don't know enough about the situation. It hasn't --

Mr. McKinley. But just in general, if a government causes a problem, should the government clean it up on their dime, or should they pass that on to the taxpayers of the country?

Ms. Buthker. Well, I would say, when you are looking at Federal agencies and Federal agency cleanup and those Federal agencies caused the contamination, some of it were from practices that they didn't know were bad things to do at the time. And, in that case, the Federal agencies are cleaning it up, but that is also taxpayer money that is funding that.

Mr. McKinley. Uh-huh.

Ms. Buthker. So I don't know if that answers your question or not, but --

Mr. McKinley. It doesn't. It doesn't. Because this one is something -- they directed the work to be done; it caused a problem. And I am just questioning -- if they were a private person in the mining industry -- I come from coalfields of West Virginia. When they cause a problem, the mines are fined immediately, and they have to come up with the money.

I am just curious on this, whether or not this is something that

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fits into some of this discussion about responsibility, where the Federal Government should be. So it is more of just a general discussion. It may be very generic rather than specific to the Gold King Mine, whether or not they should pay for it out of their budget rather than a separate appropriation to clean it up. Because it is going to be millions of dollars in damages to the farmers and the fisheries and all that are affected by that.

So I go back to your point again, do the people have a chance to speak? Because from what I can understand from reading the newspapers out there, there are a lot of people who have been damaged out there, and I am just wondering who is going to compensate them. Is it going to be the taxpayers, or is it going to be the EPA for calling the wrong shot?

Mr. Houlemard. I am not aware of the circumstances, sir, but I would always encourage the EPA and all Federal agencies to engage in a very active way with the local community, and the same would be for this case.

Mr. McKinley. Thank you very much.

I yield back my time.

Mr. Shimkus. The gentleman yields back his time.

That is all the members seeking time to ask questions. We appreciate you all being here. I think there is -- with the comments from the ranking member of the full committee, there may be some issues that we can talk -- on brownfields, and we will see where we go from

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here.

That is why we have hearings, to identify problems and maybe address solutions. And I look forward to working with my ranking member, Mr. Tonko, as we have successfully in the past, and maybe there is something we can do.

With that, I will adjourn the hearing. Thank you for coming.

[Whereupon, at 4:59 p.m., the subcommittee was adjourned.]