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October 19, 2015

Will Batson, Legislative Clerk
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Mr. Batson:

Thank you again for the opportunity to testify before the Subcommittee on the Environment and the Economy on Wednesday, September 16, 2015 concerning the oversight of federal facility cleanups under CERCLA. Per your request, attached please find my responses to questions submitted by the Honorable John Shimkus concerning my testimony at the hearing on September 16, 2015.

If you have any questions or need further information, please contact me at (937) 285- 6469.

Sincerely,

Bonnie B. Buthker
Vice President

Responses to Additional Questions from Hearing Entitled "Oversight of Federal Facility Cleanup under CERCLA:

The Honorable John Shimkus

1. **Please describe the relationship between States and the Department of the Interior and the Department of Agriculture, and in particular the federal land managers such as the Forest Service and the Bureau of Land Management?** The relationship between States and the Department of Interior and the Department of Agriculture is, in general, different than the relationship between States and the Department of Defense and Department of Energy. First of all, both DoD and DOE have tried to foster good working relationships with States, involving them in their budget and planning process, ensuring that they have an active role in the investigation and cleanup of their facilities, even providing States funding to cover our oversight costs. For the Department of Interior and Department of Agriculture, most States do not know about those sites within their state that require investigation and cleanup. States are also not consulted about prioritization of work or consulted about what state requirements apply to the investigation and cleanup of these facilities. These agencies are also highly decentralized compared to the DoD and DOE. For example, the Department of Interior has nine Bureaus and several Offices. Within these there are several Headquarters, field, or regional offices, all of which could be involved in federal facility cleanups. This decentralization makes it difficult to determine the appropriate points of contact for sites within a State.

In addition, federal land managers (FLM), the Bureau of Land Management in particular, have insisted in having States and DoD invite them to the national Workgroup forums {Defense State Memorandum of Agreement and Formerly Used Defense Sites (FUDS)} and the local State-FUDS meetings so that they can be part of the discussions on site and policy issues between States and DoD. Some States welcome this for local meetings, but States do not know who at the local FLM offices to contact. Headquarters requests that all invitations bypass the local FLM offices and go directly to Headquarters. Overall, I think a major problem is internal communication and Federal to Federal Communication within the FLM agencies.

- A. **Do these agencies more frequently assert the waiver of sovereign immunity?** Based on an informal information request conducted by ASTSWMO in 2012, the number of examples of the Department of Interior and Department of Agriculture invoking sovereign immunity were less than those of the Department of Defense since 2008. However, because there are more DoD facilities that require investigation and cleanup, and States are provided funding for oversight costs, this could account for the larger number of examples where DoD invoked sovereign immunity. Nonetheless, some States have had the waiver sovereign immunity raised as a defense for failing to comply with state law.
- B. **Do these agencies comply with applicable state statutes and regulations in conducting cleanups?** ASTSWMO has heard from States that both the Department of Interior and the

Department of Agriculture do not always comply with applicable state statutes and regulations in conducting cleanups. In addition, as mentioned previously, States also relayed to ASTSWMO that neither the Department of Interior, nor the Department of Agriculture, consult with States regarding what requirements would apply to the investigation and cleanup of these facilities.

2. **What barriers do States face with respect to cleanups at federal facilities?** The first barrier States face is that, because federal agencies are often the lead agencies under CERCLA, they have final say over what remedy is implemented and what cleanup standards will be met. Though States can challenge the remedy proposed by federal agencies, the federal agencies can still choose and implement a remedy that States do not support. The federal agencies also have final say in what state regulations apply to implementation of the remedy and what do not. Like I said in my testimony, States can sue federal agencies to try to force them to comply with state regulations; however, federal agencies can invoke sovereign immunity to prevent state lawsuits from moving forward. Another barrier that States face is that some federal agencies do not reimburse States for oversight costs of their investigations and cleanups. Without funding, States may not be able to provide necessary resources for adequate oversight.
 - A. **What can Congress do to remove barriers to State oversight and regulation at federal facilities?** There are three things that Congress can do to remove these barriers. First, Congress could waive sovereign immunity for federal agencies (including federal land managers) implementing cleanups under CERCLA consistent with the same waiver of sovereign immunity under the Resource Conservation and Recovery Act. Secondly, Congress could clarify that federal agencies implementing CERCLA must comply with state regulations in the investigation and cleanup of their facilities. These two actions would ensure that States were equal partners in the investigation and cleanup of federal facilities. Thirdly, Congress could also clarify that federal agencies are required to reimburse States for oversight costs.
3. **Your written testimony stated that federal agencies should ensure that state costs for regulation of federal facilities, including costs associated with State agency oversight, should be fully reimbursed to States in the same extent and manner as other regulated entities. Would you please explain what you mean by that?** States require private companies undergoing investigation and cleanup to pay for costs associated with state oversight. These include personnel costs associated with document review and field oversight and laboratory costs for sample analysis. If private companies refuse to pay these costs, the State will sue the company for reimbursement. Though States also expect federal agencies to reimburse States for oversight costs, they do not always agree to do so and can use sovereign immunity to prevent States from recovering these expenditures. Some federal agencies voluntarily reimburse States for oversight costs through programs such as the Defense State Memorandum of Agreement program, but even through this program, they determine which state costs are

reimbursable and which are not. Some federal agencies (such as the Department of Interior and Department of Agriculture), generally refuse to reimburse States for any oversight costs.

A. **Is a change to CERCLA necessary to make sure that States receive full reimbursement of these costs?** States believe it would be helpful if it could be clarified that federal agencies are required to reimburse States for oversight costs. As I discussed during my testimony, for those federal agencies that voluntarily agree to fund States (DoD and DOE) these programs have provided numerous benefits to both the States and the federal agencies, including cost savings, expedited cleanup, reduced litigation, and increased public trust in the investigation and remediation of these facilities.

4. **Your written testimony also noted that DoD and DOE currently provide cost reimbursement to States for oversight costs. What about the federal land managers-do they reimburse States for oversight costs? If not, please explain.** No, the federal land managers do not typically reimburse States for costs. From past meetings that ASTSWMO has had with federal land managers, the federal land managers have indicated that they have very limited budgets for investigation and cleanup of their facilities. Therefore, they believe they should not use these limited funds for reimbursing state costs for oversight. They believe that, if States want to be involved in the investigation and cleanup of these facilities, States should cover their own costs.

5. **What barriers to States face with respect to cleanups at federal facilities?** Please see answer to question 2 above.

A. **What can Congress do to remove barriers to state oversight and regulation at federal facilities?** Please see answer to question 2A above.

6. **Does ASTSWMO think that changes are necessary to make CERCLA function more efficiently? If so, please specifically identify such changes.** Since this hearing was focused on federal facilities, I am answering this question focused on that topic. For ASTSWMO's response, see 2A above.