



ECOS

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COUNCIL OF  
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Alexandra Dapolito Dunn  
Executive Director &  
General Counsel

October 29, 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, for the hearing entitled "Oversight of Federal Facility Cleanup under CERCLA." Please find attached responses to your questions submitted by the Honorable John Shimkus regarding Ms. Dieck's testimony at the September 16<sup>th</sup> hearing. Should you have any follow-up questions, please contact me at (202) 266-4920.

Sincerely,

Alexandra Dapolito Dunn  
Executive Director and General Counsel

Attachment

**Responses to Additional Questions from the Subcommittee on Environment and Economy  
Hearing Entitled “Oversight of Federal Facility Cleanup under CERCLA,”  
Wednesday September 16, 2015, Testimony by Elizabeth Dieck on Behalf of the  
Environmental Council of the States (ECOS)**

**The Honorable John Shimkus**

**1. How does Executive Order 12580 shield federal agencies from State statutes and regulations?**

E.O. 12580 delegates several CERCLA authorities to Executive Branch agencies, if there is a release on or solely from a facility under the agency’s jurisdiction, custody, or control. Under these circumstances, Sections 2, 3, and 6 of E.O. 12580 delegate to the head of the Executive Branch agency a number of specific powers and duties, including the authority to:

- Gather information necessary to carry out their functions under E.O. 12580 or CERCLA (Executive agencies have information gathering authority no matter whether they own/operate property)
- Issue information/access orders to gather necessary information and gain access (with concurrence from the U.S. Attorney General)
- Award response action contracts (RACs) and indemnify RAC contractors.

In addition, Sections 2 and 4 of E.O. 12580 delegate authorities to Executive agencies to respond to releases in particular situations, including the authority to carry out the following:

- Initiate studies and investigations of releases on or from a facility under the jurisdiction, custody, or control of the federal agency;
- Select remedial actions (at non-National Priorities List (NPL) federal facilities); and
- Conduct removal or remedial actions.

**A. What revisions has ECOS sought to Executive Order 12580?**

ECOS has developed Resolution Number 00-9 (attached), entitled “Clarification of CERCLA Sovereign Immunity Waiver for Federal Facilities.” The resolution requests the Administration revise Executive Order 12580 to clarify that federal facilities are subject to appropriate state regulations and are not unduly shielded by sovereign immunity and lead agency authority.

**B. Can you please explain why revisions to the Executive Order are necessary?**

State experience for many contamination actions at federal facilities has shown that assertions of sovereign immunity and CERCLA lead agency authority have led to inappropriate and/or inconsistent interpretation of state law and have not supported cleanup to the same standards as private parties. In addition, assertions of sovereign immunity and CERCLA lead agency authority hamper consistent state regulatory oversight and responsibility to its citizens.

**C. Is a statutory change to CERCLA necessary to address the issue regarding delegation of lead agency authority?**

Yes. ECOS encourages the U.S. Congress act to support the States by implementing specific legislation that will, without equivocation, acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities.

**2. The Department of Interior and the United States Department of Agriculture have a significant number of federal facilities that they are in the process of cleaning up. How are those agencies doing with respect to keeping states involved in the identification, assessment, and cleanup process?**

State experience has shown that, in general, the Department of Interior (DOI) and the U.S. Department of Agriculture (USDA) are not keeping states involved with respect to the identification, assessment, and cleanup process. Most states are unaware of the existence of DOI and USDA sites requiring investigation and cleanup. More often than not, States are not consulted about work priorities or what state requirements apply to the investigation and cleanup of these federal facilities. Additionally, because DOI and USDA are quite decentralized, it is difficult to understand who the appropriate points of contact are for the sites within a state.

**A. Do the Department of Interior and the USDA assert the waiver of sovereign immunity more frequently than the other federal agencies involved in CERCLA cleanups?**

ECOS has not collected data on the frequency at which Federal Agencies assert the waiver of sovereign immunity; however, state experience has shown that DOI and USDA often use their CERCLA lead agency authority to make removal decisions as a way to avoid involving states or be subject to state oversight at their contaminated sites. Further, we understand that both agencies have asserted that they do not have to follow state regulatory rules or pay state oversight costs.

**3. What barriers do States face with respect to cleanups at Federal Facilities?**

- Inability to require state-endorsed cleanups. Because federal agencies are often the lead agencies under CERCLA, they have the final say over what remedy is implemented and what cleanup standards must be met. Though states can challenge the remedy proposed by federal agencies, the federal agencies can still choose to implement a remedy that the state does not endorse. Federal agencies also have the final say in what state regulations apply to implementation of the remedy and what do not. While states can sue federal agencies to force compliance with state regulations, federal agencies can assert sovereign immunity to prevent these lawsuits from proceeding.
- Inadequate federal resources create barriers to effective cleanup. Some federal agencies do not reimburse states for oversight costs of their investigations and cleanups and without this funding, states may be unable to provide the necessary resources for

adequate oversight. States also are concerned that the available federal agency budget determines the remedial approach at some sites, meaning that they may not be implementing the most effective and appropriate cleanup approach at a site.

- Unilateral decisions by federal agencies can compromise cleanups. As discussed in Ms. Dieck's testimony, states frequently see federal agencies unilaterally changing site cleanup schedules or goals, pushing ultimate completion out by years and in some cases decades and compromising the site's ultimate usability. One way federal agencies unilaterally change cleanup schedules is by failing to seek or allocate sufficient funding for their cleanup commitments. When a federal agency unilaterally decides to change the terms of a cleanup by extending a deadline or changing other goals, the trust-based relationship breaks down and can lead to tension and then to costly litigation, taking funds away from cleanup efforts.

#### **A. What can Congress do to remove barriers to State oversight and regulation at federal facilities?**

ECOS suggests the following Congressional actions to remove barriers to state oversight and regulation at federal facility cleanups:

- Strengthen the state voice in cleanup decisions, making them equal partners with federal agencies in investigation and cleanup at federal facilities.
- Ensure that the Administration and relevant federal agencies request sufficient, stable funding for site investigation, oversight, interim risk management, and clean up.
- Recommend that federal agencies establish a baseline of all of their contaminated sites with risk-informed prioritization so that states can meaningfully establish clean-up priorities based on environmental concerns and economically beneficial reuse.
- Disallow unilateral changes to cleanup schedules by federal agencies.

#### **4. Does ECOS think that changes are necessary to make CERCLA function more efficiently? If so, please specifically identify such changes.**

While ECOS cannot address changes to make CERCLA function more efficiently in general, ECOS does believe that CERCLA should be amended to address state concerns with federal facility cleanups under CERCLA by waiving sovereign immunity for federal agencies implementing cleanups under CERCLA and by including language that requires federal agencies to comply with state regulations in the investigation and cleanup of their facilities.



Resolution Number 00-9  
Approved April 12, 2000  
Philadelphia, Pennsylvania

Retained April 4, 2003  
By mail vote

Retained March 17, 2006  
By mail vote

Revised March 23, 2009  
Alexandria, Virginia

Revised March 20, 2012  
Austin, Texas

Renewed March 18, 2015  
Washington, DC

As certified by  
Alexandra Dapolito Dunn  
Executive Director

## **CLARIFICATION OF CERCLA SOVEREIGN IMMUNITY WAIVER FOR FEDERAL FACILITIES**

WHEREAS, current and former federal facilities have some of the most pressing environmental problems, such as hazardous substances, unexploded ordnance, radioactive materials, and abandoned mines; and

WHEREAS, problems associated with some of these federal facilities pose substantial threats to public health, safety, and the environment; and

WHEREAS, ECOS believes the States' regulatory role at federal facilities should be recognized and that federal agency environmental cleanup activities are subject to and should receive the same regulatory oversight as private entities; and

WHEREAS, for many contamination actions the federal agencies assert Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) lead agency authority under Executive Order 12580; and

WHEREAS, state experience for many contamination actions has shown that assertions of sovereign immunity and CERCLA lead agency authority have led to inappropriate and/or inconsistent interpretation of state law and have not supported cleanup to the same standards as private parties; and

WHEREAS, assertions of sovereign immunity and CERCLA lead agency authority hamper consistent state regulatory oversight and responsibility to its citizens; and

WHEREAS, a clarification of Executive Order 12580 and/or federal legislation would aid states in implementing regulations which have been duly enacted by the states; and

WHEREAS, this resolution fully supports Policy NR-03 (specifically Section 3.5 on "Natural Resources") executed by the National Governors' Association.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES (ECOS):

Requests the Administration revise Executive Order 12580 to clarify that federal facilities are subject to appropriate state regulations and are not unduly shielded by sovereign immunity and lead agency authority;

Encourages the U.S. Congress act to support the States by the implementation of specific legislation which will without equivocation acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities; and

Authorizes the transmittal of this resolution to the Administration, appropriate congressional committees, federal agencies, and other interested organizations and individuals.