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May 1, 2018

Kelly Collins
Legislative Clerk
U.S. House of Representatives - Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Ms. Collins:

Please find attached responses to additional questions requested by members of the Committee on Energy and Commerce in regards to my testimony at the recent hearing entitled "*Modernizing the Superfund Cleanup Program*." In preparing these responses, I have incorporated our experience in Alabama, as well as obtaining input and examples from my colleagues from other States and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO).

Thank you for the opportunity to provide these additional clarifications and to assist the Committee with this important issue.

Please contact me at (334) 271-7732 or via electronic mail at sac@adem.alabama.gov should you or the Members have any additional questions.

Sincerely,

[redacted]

Stephen A. Cobb, Chief
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Attachment

cc: Dania Rodriguez

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Attachment---Reponses Additional Questions for the Record regarding the Testimony of Stephen A. Cobb before the Committee on Energy and Commerce in the Hearing Entitled "*Modernizing the Superfund Cleanup Program*"

The Honorable John Shimkus

1. **How can States help reduce the number of sites on the National Priorities List (NPL)?**

   Reduction in the number of sites on the NPL begins with prevention, and the inherent value of early intervention and prevention programs in reducing the need for after-the-fact remediation programs has repeatedly been underscored. States play key roles in these prevention efforts through the implementation of preventative regulations, such as those under the Resource Conservation and Recovery Act (RCRA). Today fifty states and territories have been authorized to implement their own base RCRA regulations in lieu of the federal program (USEPA, n.d.). These State programs, like RCRA, are designed to prevent releases of wastes into the environment, mitigating public health threats and environmental damage caused by such releases. RCRA and authorized State programs ensure that past and present releases of waste and hazardous constituents are investigated, monitored, and cleaned-up to protective levels. This provides incentives to industry to prevent future releases and places the burden on the industry owner/operator, not the taxpayer, to address known releases (ASTSWMO, 2011). In summary, these efforts prevent future NPL sites. Continued support of RCRA and authorized State programs by EPA and Congress is essential for maintaining this level of prevention.

   Another key component to reducing the number of NPL sites is actually in the Superfund Site Assessment Program, which identifies actual and potential releases of hazardous substances and their eligibility for inclusion on the NPL. The Site Assessment Program is conducted in partnership with many States. Through this process, where the majority of sites are screened out from inclusion on the NPL, states have been able to identify sites for action by state cleanup programs. A 2011 study by the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) noted that almost 50 percent of study sites identified through the Site Assessment Program were undergoing or had already completed non-NPL cleanup/closure actions (ASTSWMO, 2011). This demonstrates the value of the Site Assessment Program beyond supporting NPL listing and its importance to the national cleanup effort. ASTSWMO has recommended additional federal funding to States to continue support and grow this phase of the Superfund process (ASTSWMO, 2017).

For sites already on the NPL, States implement a variety of robust cleanup programs, including both mandatory and voluntary programs, and have gained experience and an advanced understanding of assessing, investigating, remediating, and monitoring contaminated sites (Cobb, 2018). Working under cooperative, work-sharing agreements that provide detailed but flexible scopes of work and adequate funding, EPA can leverage this advanced knowledge and experience by placing more sites, particularly PRP-led cleanups, under State control.

One of the areas that EPA itself has identified for improvement is the identification of tools for third party investors interested in the reuse of Superfund sites (USEPA, 2017). Many states have robust brownfield redevelopment programs and other tools that can facilitate expedited reviews, remedy implementation and pragmatic yet protective long term monitoring as may be required. Investors require a level of certainty not typically found in the Superfund program. The States can assist EPA in facilitating and negotiating agreements with third parties (Steers, 2017). Leveraging additional human and monetary resources by working cooperatively with State co-regulators and third-party investors will lead to faster cleanups and ultimately fewer sites remaining on the NPL.

2. How can States take more of a leadership role in addressing sites on the NPL?

As I stated in my testimony, in the four decades following the enactment of CERCLA, States have implemented many different types of comprehensive cleanup programs under multiple authorities. In fact, the vast majority of cleanups of contaminated sites across the U.S. have been conducted under State oversight. CERCLA is only one tool in our cleanup toolbox and EPA's Superfund program must begin to recognize this.

States are already well positioned to take on more responsibilities and greater leadership roles in Superfund cleanups. Making this a reality begins not with the States themselves but with EPA. First of all, EPA's Superfund program must end the practice of "federalizing" sites under CERCLA where a State program is already in place overseeing all or portions of the cleanup, as they have done in Alabama and many other states. We have seen this result in losses of progress and momentum of cleanups by having to shift into a new regulatory oversight structure, particularly the highly procedural and inflexible structure of Superfund. Secondly, EPA must be willing to defer more CERCLA cleanup activities, specifically including the decision-making role for deferred sites, particularly those at PRP-led sites. The NCP currently allows for this, but many times EPA and State activities are conducted in tandem. EPA allowing States to take the lead on more cleanup actions avoids duplication and redundancy.

Deferral of site management without concurrent deferral of the decision-making role too often results in EPA re-reviewing work already completed by states, and also results in sites/states being unwilling to move sites forward without EPA concurrent review.

3. **Your written testimony discussed allowing States to directly implement certain parts of the remedial and removal process---would you please explain why States may be more effective at directly implementing certain aspects of the Superfund cleanup program?**

States implement many different types of cleanup programs under both State and federal statutes, including CERCLA, RCRA, Brownfields, State voluntary programs, and State regulatory programs. Many of these programs, such as RCRA Corrective Action, have already benefited from process and procedural improvements. And because states oversee cleanups under so many different authorities, they have become adept at focusing on common cleanup tools, technologies, and goals rather than procedural constructs and regulatory process.

As a result of having to adapt to inadequate funding, States have also been forced to develop and leverage internal resources and expertise for cleanup oversight, whereas EPA's Superfund program relies heavily on third-party contractors for many cleanup oversight functions. This allows States to conduct many oversight functions at lesser costs than EPA in many circumstances.

Also as a result of these experiences, States tend to be more focused on a "culture of completion," where the goal is to reach a protective and sustainable endpoint for a cleanup as quickly and efficiently as possible (as opposed to continued study in search of the "perfect" solution), and to prefer remedies which are sustainable and protective for the long-term with a minimum (to the extent possible) of long-term resource requirements for continued operation and maintenance.

States have more direct knowledge of local area issues and characteristics that are critical to the success and acceptance of a Superfund cleanup. State cleanup managers understand the local soil and geological characteristics, topography, hydrology and hydrogeology, weather patterns, and many other technical aspects involved in the cleanup process. More often than not, States cleanup programs already have relationships with local communities and are in a more effective position to communicate with them about cleanup issues and concerns.

a. What changes would need to be made to CERCLA to effectuate such a change?

On this particular issue, neither I nor my ASTSWMO partners believe that the CERCLA statute or the NCP provides legal impediments to States assuming greater leadership in the Superfund process. On this matter, all that must change is a simple willingness on the part of EPA to defer more actions to States. However, since the CERCLA statute does not currently provide for delegation of CERCLA removal and remedial implementation or decision-making authorities to State programs, adding these provisions would be helpful in facilitating more State leadership in the program.

4. How can EPA better utilize enforcement as a tool for getting sites cleaned up?

The most effective enforcement tool is one that is tailored to the specific project considering such factors as the PRPs level of willingness and ability to perform the cleanup, willingness and ability of State programs to assist, and the conditions of the specific site. Enforcement cannot be viewed as a "one-size-fits-all" approach, especially in the CERCLA program.

I agree with many of the recommendations that EPA has already identified for more effective use of enforcement tools, such as adding flexibilities and reduced oversight, adjustments to financial assurance requirements, and addressing liability protection issues for cooperating PRPs (USEPA, 2017).

Overall, the CERCLA enforcement process should be operated in a manner to provide incentives to cooperative PRPs by applying the full rigor of the CERCLA process to non-cooperative or recalcitrant PRPs.

5. How can EPA use incentives for PRP's to get sites cleaned up?

The most effective "incentive" EPA can offer a willing and cooperative PRP is the ability to "navigate" the Superfund process as quickly and concisely as possible. The Superfund process itself is costly and time-consuming and any effort to modernize the program must recognize and address this issue.

My agency and its fellow ASTSWMO members stand ready to assist EPA in refining and implementing recommendations that EPA has already identified (USEPA, 2017), such as:

- Recognizing, promoting, and facilitating third party investment in inactive and abandoned Superfund sites;

- Recognizing that PRP-led cleanups are fundamentally different from cleanups led by EPA and tailoring oversight accordingly;
- Reducing procedural oversight milestones for cooperative, high-performing PRPs; and
- Realigning EPAs own internal resources to conduct oversight activities, like plan and report reviews, more quickly.

6. **Your testimony noted that industry and federal government responsible parties should be held to the same high standards. How is it that federal responsible parties are held to a different standard and are there changes that need to be made to the program or the statute to ensure that all parties are held to the same standards?**

   CERCLA makes clear that Federal facilities are subject to the requirements of the NCP, but only to State laws where CERCLA action is deferred and the Federal facility in not on the NPL (42 USC §9620(a)(4)). As I testified on January 18, deferral of CERCLA actions to States is rare and an area we recommend for consideration in the modernization of the Superfund program. But in addition, CERCLA should be amended making clear that all Federal facilities, including those on the NPL, are subject to applicable and relevant State laws, particularly those State laws governing state-specific cleanup goals and land use/institutional controls, which are critical parts of many cleanups and essential to the State's long-term maintenance of the selected remedy.

7. **Your written testimony indicated that many States have the resources, expertise, and desire to pay a greater role in the Superfund process and that States should be encouraged to do so---can you provide examples of how we can encourage greater participation by the States?**

   Many of the impediments to more State participation in Superfund cleanups include such issues as:

   - Clarification and enhancement of the State role, through delegation of various aspects of the program, including decision-making authorities, as discussed in my testimony and above responses.
   - CERCLAs remedy cost-sharing requirements, discussed in more detail below;
   - Difficulties in the ARAR process, also discussed in more detail below;
   - EPA's general tendency to perform CERCLA activities in tandem with States, discussed earlier, and its general reluctance to defer actions to States.

   Addressing these issues and others designed to streamline and modernize the Superfund program will help pave the way for more State access and involvement.

8. Are State requirements appropriately identified and accepted as Applicable or Relevant and Appropriate Requirements (ARARs) during the investigation and remedy selection process?

States as a whole have raised the following policy concerns regarding the identification and acceptance of ARARs (ASTSWMO, 2018):

- Inconsistencies in ARAR determination from one site to another and from EPA Region to EPA Region;
- EPA's application of State requirements as ARARs that is inconsistent with how States apply their cleanup requirements and standards;
- EPA's determination that a State requirement is procedural rather than substantive when the State believes it is an ARAR critical to implementation of the chosen remedy;
- Reluctance of other federal entities (e.g., DOD, DOE, DOI, NASA, BLM, etc.) to recognize State environmental laws and regulations as ARARs;
- Lack of written documentation on an ARAR determination where EPA finds that a State cleanup requirement was not an ARAR;
- EPA delays when determining whether a State requirement is an ARAR, and as a result, leaving the State inadequate time to challenge the finding; and
- EPA and other federal entities reluctance to recognize State land-use control and environmental covenant laws and regulations as "environmental laws", and thus as ARARs.

a. Are State cleanup program personnel appropriately consulted before ARARs are waived by EPA or other federal agencies implementing CERCLA?

This is an area States have identified as needing improvement, although it should be noted that EPA has taken certain steps to improve this process. In October 2015 States and EPA participated in an ARARs LEAN event to help explore ways to improve the overall ARARs process. Drawing on these discussions, EPA's Office of Land and Emergency Management (OLEM) issued Directive 9200.2-187, *Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot* (USEPA, 2017).

I refer the Committee to recommendations made by ASTSWMO to EPA regarding the overall ARARs process, such as providing better training and guidance to Regions on the ARAR identification process and consideration of State requirements to ensure the concepts identified in OLEM Directive 9200.2-187 are consistently applied (ASTSWMO, 2018):

9. What other steps could EPA take to enable the Superfund cleanup program to complete cleanups faster, more effectively, and more efficiently?

EPA should review and revise the NCP to reflect the many important lessons-learned from the years of experience by States and EPA under CERCLA and other cleanup programs, including RCRA, Brownfields, and State cleanup programs. A few examples of changes to the NCP that EPA should consider include:

- Reduce the reliance on pre-approved written plans for assessment and investigation activities on PRP-led cleanups. CERCLA sites tend to stay in this stage of the process for many years before the first actual cleanup activities are undertaken. We've observed that much of that time is spent negotiating plans for field activities, and many times the negotiations take longer than the field activities themselves. Also, as we've seen in other programs, most notably RCRA, these back-and-forth exchanges, and multiple iterations of Remedial Investigation/Feasibility Study (RI/FS) plans provide opportunities for recalcitrant PRPs to delay work;
- Reduce the requirements for, or even eliminate the Feasibility Study (FS) for PRP-lead cleanups. The FS is most certainly needed for Fund-led cleanups to ensure that public money is being spent in the most efficient way while providing for a protective cleanup, and to support future cost-recovery actions against recalcitrant PRPs. But where public monies are not involved in the cleanup process, EPA can and should reduce or eliminate these requirements and provide cooperative PRPs with more flexibility and discretion, with appropriate oversight, to develop remedies that are both protective and affordable;
- Address ARARs more effectively and earlier in the Superfund process; and
- Increase the use of interim removal actions and other interim remedy components throughout the assessment, investigation, and remedy development process to speed up actual cleanup.

10. What other steps could Congress take to enable the Superfund cleanup program to complete cleanups faster, more effectively, and more efficiently?

While not necessarily related to the speed and efficiency of ongoing NPL cleanups, States have concerns about the current requirements for State assurance, specifically the requirements for States to assure 10% of the cleanup cost and 100% of the future maintenance costs for cleanup remedies (42 USC §9604(c)(3)). Many States simply do not have this funding available and are prevented from entering into Superfund State Contracts or from concurring with NPL listings that would obligate them to these costs. Consideration should be given to providing more flexibility to EPA to credit States for

"in-kind" contributions to cleanups, such as human resources, technical equipment, and income which may be generated from the property, such as the recycling of valuable materials from the wastes and other materials removed from the property as part of the cleanup.

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