ASTSWMO, Providing Pathways to Our Nation's Environmental Stewardship Since 1974

Hearing

"Modernizing the Superfund Cleanup Program"

U.S. House of Representatives

Committee on Energy and Commerce

Subcommittee on the Environment

January 18, 2018

Testimony of

Stephen A. Cobb

on behalf of the

Association of State and Territorial Solid Waste Management Officials

Main Points:

1) States consider the Superfund Cleanup Program to be a vitally important tool for cleaning up many of our nations' contaminated sites.
2) States have positioned themselves to be effective partners and co-regulators with EPA in implementing the Superfund Cleanup Program.
3) The National Contingency Plan (NCP) should be updated to reflect important lessons-learned from almost 40 years of environmental cleanup experience by States and EPA under not only CERCLA, but also under the RCRA, Brownfields and State cleanup programs.
4) The process for identifying and selecting ARARs, including the applicability permits and of State environmental covenant and land use control laws and regulations, should be addressed.

1101 17th Street NW, Suite 707, Washington, DC 20036
T: (202) 640-1060 F: (202) 331-3254
www.astswmo.org

5) The federal facilities compliance provisions of CERCLA should be strengthened and clarified in a manner similar to improvements made to the federal Solid Waste Disposal Act (SWDA) through the Federal Facilities Compliance Act of 1992.

6) The Superfund Cleanup Program should more clearly recognize and embrace that investigations and cleanups conducted under other cleanup authorities achieve results at least as protective as CERCLA actions. Recognizing the protectiveness and value of cleanups conducted under State and federal cleanup programs other than CERCLA expands our capacity as a nation to respond effectively to releases of hazardous substances, and increases our cleanup efficiency by minimizing unnecessary redundancy and duplication of efforts.

7) State's concerns related to the 10% Cost Share and the 100% of operations and maintenance (O&M) costs which States are required to contribute to Fund-lead cleanups should be evaluated and addressed, including consideration of greater flexibility and credit for States in providing "in kind" contributions to cleanups.

8) Modernization of the Superfund Cleanup Program should include provisions to ensure that needed regulatory cleanup standards for emerging contaminants are developed and updated in an expeditious manner using sound science and the best information available.

9) Consideration should be given to authorizing States to directly implement the PA/SI component of the program and the RP-led and RP-funded removal and remedial program components, while removal and remedial actions conducted by EPA using funding from the Superfund Trust Fund should continue to be implemented and conducted directly by EPA

Good morning Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee. Thank you for the opportunity to speak at today's hearing. My name is Stephen Cobb and I am Chief of the Land Division of the Alabama Department of Environmental Management (ADEM). I am also a Past-President of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), of which the ADEM is a member organization. I am here today to testify on behalf of ASTSWMO. ASTSWMO is an association representing the waste management and cleanup programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes managers from the State environmental protection programs, including those responsible for overseeing the cleanup of Superfund sites.

Modernizing the Superfund Cleanup Program

We appreciate the opportunity to present our thoughts on the topic of "Modernizing the Superfund Cleanup Program". Periodic review, reassessment and modernization of our statutory and regulatory authorities is a critical process of government to ensure that we are able to continue to provide the desired protection of human health and the environment for all of our citizens in an efficient and effective manner as we learn from the past and plan for the future. As you are aware, much has changed and many lessons have been learned in the almost 40 years since the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted and we as a nation began in earnest to clean-up hazardous substance sites which pose a threat to human health and the environment. For example:

1) Robust cleanup programs have been developed by the States and EPA, including both mandatory and voluntary programs, under federal cleanup and enforcement authorities including CERCLA, the Resource Conservation and Recovery Act (RCRA), Brownfields and also under various State authorities,

2) Site investigation methods and technologies have expanded and matured,

3) Existing cleanup technologies have improved, and new technologies have been developed,

4) Our understanding of how to assess, investigate, remediate, and monitor contaminated sites has greatly improved,

5) Our understanding of, and the available tools for, the assessment and management of environmental risks from contaminated sites have been substantially expanded,

6) Many lessons have been learned from the thousands of sites which have been assessed, investigated and remediated through these various cleanup programs,

7) The inherent value of early intervention and prevention programs in reducing the need for after-the-fact remediation programs has repeatedly been underscored,

8) The environmental permitting programs of the States and EPA have developed and matured such that permit application requirements are well understood, required environmental permits are reviewed, processed, and issued in a timely and consistent manner, and the permitting processes of the States and EPA have been shown to be an effective management tool for ensuring consistency in the application and enforcement of our various environmental laws and regulations, and

9) States have become key co-regulators and program partners with EPA in protecting human health and the environment through the implementation of our various regulatory and cleanup programs, including the Superfund Cleanup Program.

Given this reflection of history and the growth of our State and federal cleanup programs, I will describe below several recommendations to consider in evaluating the modernization of the Superfund Cleanup Program. Many of these recommendations have been the subject of discussion for years, while others are more recent. Some would require changes to the statute, others to existing regulations, guidance and policy.

CERCLA (aka Superfund) is a vitally important tool in the EPA and State toolboxes for ensuring and implementing needed cleanup at many sites across the country. CERCLA cleanups prevent continued harmful impacts from hazardous substances. However, we must recognize that effective tools must be periodically sharpened and maintained to ensure their continued relevance and effectiveness.

ASTSWMO members have provided testimony to this Subcommittee (see attached testimony by Jeffery Steers, VA on May 17, 2013, Bonnie Buthker, OH on September 16, 2015, and Amy Britton, OK on July 13, 2016) and to the Senate Committee on the Environment and Public Works (EPW) (see attached testimony by Jeffery Steers, VA on August 1, 2017) in previous hearings regarding various aspects of the CERCLA program. The issues, concerns and observations raised in their statements are still relevant and should be addressed in any effort to modernize CERCLA.

ASTSWMO and its member agencies routinely work with our partners at EPA to identify opportunities for improvements in the Superfund Cleanup Program. Examples of this collaboration in recent years include a LEAN process evaluation of various aspects of the program, as participants in a workgroup to develop tools to improve the process of identifying Applicable or Relevant and Appropriate Requirements (ARARs), as part of an effort to evaluate and improve State Superfund Contracts which define the terms and conditions for States and EPA to share remedial action costs at individual Fund-lead National Priorities List (NPL) sites, and a detailed analysis of the Superfund Site Assessment Program which is used to identify releases of hazardous substances, pollutants or contaminants that may endanger human health or the environment and to determine whether those sites qualify for inclusion on the NPL. Our members are currently collaborating with EPA regarding the recommendations of the Superfund Task Force regarding potential improvements to improve the pace and efficiency of the Superfund Cleanup Process. ASTSWMO and its members value this collaborative partnership with EPA, and stand ready to work with EPA to

implement the various streamlining and process improvement recommendations that have resulted from these efforts as well as others that may be identified in the future. As co-regulators working together to clean up contaminated sites, we share common goals and objectives, and it is imperative that we work together to improve the effectiveness and efficiency of the programs and processes through which we accomplish these cleanups.

As a part of any effort to modernize the Superfund Cleanup Program, the National Contingency Plan (NCP) should be updated to reflect important lessons-learned from almost 40 years of environmental cleanup experience by States and EPA under not only CERCLA, but also under the RCRA, Brownfields and State cleanup programs. In order to truly effect streamlining and efficiency improvements for the long-term, any changes to the program must be clearly documented, incorporated into the fabric of the program, and communicated down the chain-of-command to the individuals who conduct the day-to-day implementation of the program. The NCP is the "rulebook" that project managers, supervisors, and legal support refer to on a regular basis for guidance and direction in managing cleanups and decision-making, and the foundation that CERCLA cleanup program guidance is based upon.

For a clear example of the positive effect of modernization and streamlining efforts on a national cleanup program, we should look to the progress of the RCRA Corrective Action program before, as compared to after, the series of RCRA Corrective Action Reforms enacted by EPA and the States in the late 1990's and early 2000's. As a direct result of the policy and procedural changes enacted through these reforms, the RCRA Corrective Action program was transformed into a much more efficient and effective cleanup program, and States and EPA continue to find more efficient and effective ways to speed up the investigation and cleanup process while maintaining stringent and protective cleanup standards. As a part of updating the NCP, consideration should be given to streamlining not only the investigation and remediation processes under

CERCLA, but also the more routine paperwork and documentation processes, such as those for reviewing, approving and amending reports, records of decisions, deferral and delisting petitions.

The NCP should also be updated to provide for a more streamlined and efficient process for managing and implementing Responsible Party (RP) -led and RP-funded cleanups, as compared to cleanups conducted directly by EPA and its contractors using funds from the Superfund Trust Fund where additional documentation may be required to support future cost-recovery efforts and other litigation needs. By providing for a more streamlined process for sites where the RP is funding and implementing the cleanup process, as compared to sites where EPA must conduct the cleanup using Trust Fund monies and then seek to recoup those costs through litigation, a further incentive is created to encourage RPs to step forward and work with EPA and the States to cleanup sites in a more timely, efficient and cost effective manner. An example of the increased cleanup efficiency that can be realized from such a streamlining approach can also be seen from the improvements in pace and effectiveness of cleanups which resulted from EPA's RCRA Corrective Action Reforms of the late 1990's and early 2000's.

States are the primary implementers of the majority of our collective environmental laws and regulations, and we have a vested and important interest in ensuring that our laws and requirements are applied consistently and fairly across all regulated entities within our jurisdictions. As Ms. Brittain testified before this Subcommittee on July 13, 2016 and as Mr. Steers testified before the Senate EPW on August 1, 2017, the process for identifying and selecting ARARs is also an area which should be addressed as a part of modernizing the Superfund Cleanup Program. In addition to clarifying and modernizing the ARARs identification and selection process, the statute and regulations should also be updated to make clear that State environmental covenant and land use control laws and regulations are essential components of many remedial actions, especially those that require longer lasting remediation activities and those which utilize risk management

cleanup approaches to ensure long-term protection of human health and the environment. These laws and regulations, which have generally been developed and implemented in the last twenty years for the express purpose of ensuring that environmental cleanup remedies remain protective for generations to come, have often been challenged as ARARs on the basis that they are viewed as "property laws", as opposed to "environmental laws". Clarification in the statute and regulations that such laws and regulations are indeed ARARs under CERCLA is needed to address repeated issues which the States encounter in ensuring compliance with these requirements as a part of CERCLA remedies, and thus ensuring the continued protectiveness of the selected remedies. As a part of improving the ARARs identification and selection process, and in recognition of the co-regulator role of the States, it is also important that any modernization of CERCLA ensures that the role for State co-regulators in all CERCLA decision-making for sites within their boundaries is enhanced. As a part of the evaluation of the ARARs process, perhaps the long-standing CERCLA exemption from permits should be reconsidered. While this exemption may have been advantageous in the beginning of the program to ensure that cleanups were timely, the States' and EPA's permit programs have matured to the point where this is no longer a benefit. This exemption leads to unnecessary inconsistency and less efficiency in the review and approval of cleanup plans and other actions. The environmental permitting requirements of the States and EPA should be the same to implement remedial actions at a given site, regardless of whether it is conducted under a State-led cleanup program, by a RP as part of a CERCLA cleanup, or by EPA at a Fund-lead site.

As discussed in Ms. Buthker's testimony before this Subcommittee in 2015, modernization of the Superfund Cleanup Program should include strengthening and clarifying the federal facilities compliance provisions of CERCLA in a manner similar to improvements made to the federal Solid Waste Disposal Act (SWDA) through the Federal Facilities Compliance Act of 1992. In implementing the cleanup provisions of CERCLA, it is imperative to ensure that both industry and government RPs are held to the same high standards. And as

the State role in CERCLA cleanups continues to increase through an increased role in the decision-making process, and through the application and utilization of ARARs and other State cleanup programs and authorities, it is important to make clear that federal entities must comply with State environmental laws and regulations to the same extent as non-federal entities when conducting those cleanups.

Recognizing that robust and effective State cleanup programs and authorities have been developed and implemented in the four decades since the initial enactment of CERCLA, and that the vast majority of our nation's contaminated sites are cleaned up under State regulatory oversight using authorities other than CERCLA, the Superfund Cleanup Program should also more clearly recognize and embrace that investigations and cleanups conducted under other cleanup authorities (e.g., RCRA Corrective Action and many State cleanup programs) achieve results at least as protective as CERCLA actions; when such cleanup has occurred or is occurring, CERCLA should more readily defer action under CERCLA to those programs when appropriate. States generally consider the nomination of a site for the NPL a "last resort", and only after exploring and exhausting all other available State and federal programmatic, enforcement, and incentive options to either motivate a recalcitrant potentially responsible party (PRP) or entice a non-liable party interested in taking on the cleanup as part of a redevelopment. It is not correct, productive or wise to create or foster the impression that only CERCLA cleanup actions are protective. Recognizing the protectiveness and value of cleanups conducted under State and federal cleanup programs other than CERCLA expands our capacity as a nation to respond effectively to releases of hazardous substances, and increases our cleanup efficiency by minimizing unnecessary redundancy and duplication of efforts by both regulatory agencies and by the RPs. We must remember that CERCLA is only one of the tools in our environmental cleanup toolbox, it is not the only tool for the job. By ensuring that CERCLA recognizes the merits and effectiveness of similar cleanups conducted under other State and federal authorities, we increase the overall effectiveness and efficiency of needed

environmental cleanups regardless of the program under which they are conducted, and thus enhance and increase our overall protection of human health and the environment.

Mr. Steers and Ms. Brittain have also testified before this Subcommittee and the Senate EPW regarding State's concerns related to the 10% Cost Share and the 100% of operations and maintenance (O&M) costs which States are required to contribute to Fund-lead cleanups. In looking at the modernization of the cleanup program, these issues should be evaluated and addressed, including consideration of greater flexibility and credit for States in providing "in kind" contributions to cleanups which may be used to fulfill these cost contribution obligations.

In conducting cleanups under the Superfund Cleanup Program and other State and federal cleanup authorities, State and federal project managers rely on EPA as a centralized clearinghouse for technical expertise that States and EPA Regions cannot and should not maintain individually, including the development of toxicity and risk information, evaluation of cleanup technologies and analytical methods, and research and information on new threats from, and strategies for addressing, contaminants of emerging concern. Without this critical support and information, and the resulting chemical-specific remediation standards that are derived from it, States and EPA are often unable to satisfactorily address the concerns of the public regarding releases of these emerging contaminants, which currently include well known chemicals of concern such as the perfluorinated compounds (PFAS), perchlorate, 1-4-Dioxane, and others. Therefore, modernization of the Superfund Cleanup Program should also include provisions to ensure that needed regulatory cleanup standards are developed and updated in an expeditious manner using sound science and the best information available.

The Superfund Cleanup Program consists of at least four distinct components: 1) the identification and assessment of releases to determine whether a cleanup under CERCLA is needed, which is often referred to as the Preliminary Assessment and Site Investigation (PA/SI) component, 2) short-term removal actions which are conducted to perform short-term abatement and stabilization of releases and imminent threats of release, 3) long-term remedial actions which are conducted and funded by RPs, and 4) long-term remedial actions which are conducted by EPA and its contractors and funded by the Superfund Trust Fund.

The CERCLA PA/SI program component has historically been largely implemented by States through cooperative agreements with EPA. This program component has been proven to address numerous developing hazardous substance issues and sites before they rise to the level of requiring NPL listing and long-term remedial action under CERCLA. This early intervention is a wise investment in prevention and early action at sites across the country, which greatly reduces future taxpayer funded cleanup needs. Under the PA/SI program component, States assess the vast majority of contaminated sites evaluated under the Superfund Cleanup Program, with fewer than 10% of these sites ultimately requiring listing on the NPL. The balance of those sites requiring remediation are addressed under State cleanup authorities, under voluntary cleanup authorities, or under Brownfields cleanup authorities with State oversight. As a result, the PA/SI program serves as a kind of clearinghouse to evaluate sites and direct them to the authority best suited to address the site-specific situation. ASTSWMO has documented the effectiveness of the PA/SI program in two recent reports, its May 9, 2014 report "Analysis of Superfund Site Assessment Program Cooperative Agreements with States: Benefits of Effective State and Federal Partnerships" and its subsequent "Site Assessment Program Analysis" report dated August 26, 2017.

Many States have the resources, expertise and desire to play a greater role in the Superfund process. When willing and able, those States should be encouraged (and funded) to do so. Given the development and

maturation of State cleanup and authorities which has occurred over the past four decades, consideration should be given as a part of modernizing the Superfund Cleanup Program to establishing a State and Tribal Assistance Grant (STAG) program, and authorizing States to directly implement in lieu of EPA, with appropriate EPA oversight, both the PA/SI component of the program and the RP-led and RP-funded removal and remedial program components. Such authorization, including appropriate provisions for information collection and enforcement (e.g., CERCLA Section 106) authority by the State program, would:

a. add substantial resources and capacity to both the technical project management and oversight component of the Superfund Cleanup Program and to the cleanup decision-making capacity of the program,
b. free up precious federal EPA resources needed to focus on the timely and effective cleanup of Fund-lead sites where there is no viable RP, or where the RP is unwilling or unable to conduct the required cleanup themselves,
c. provide for faster and more efficient cleanups at both RP-lead sites and at Fund-lead sites simultaneously by reducing the competition for limited agency resources for needed regulatory oversight and decision-making,
d. reduce duplication of effort in cases where both EPA and the State are regulating and overseeing the same cleanup,
e. retain overall EPA program oversight of State programs, while removing existing process, capacity, and decision-making bottlenecks, and
f. build on proven State-led cleanup programs and regulatory systems already operating in other federal environmental programs (e.g., RCRA, Clean Water Act, Clean Air Act).

Under this scenario, removal and remedial actions conducted by EPA using funding from the Superfund Trust Fund should continue to be implemented and conducted directly by EPA in order to 1) maintain direct federal

control and management of Trust Fund expenditures for cleanup, 2) enable meaningful prioritization of Trust Fund expenditures for sites in various States, and 3) facilitate subsequent federal legal action necessary to seek re-imbursement of Trust Fund expenditures from RPs.

In conclusion, States consider the Superfund Cleanup Program to be a vitally important tool for cleaning up many of our nations' contaminated sites and for restoring and protecting human health and the environment for all of our citizens and for generations to come. States have positioned themselves to be effective partners and co-regulators with EPA in implementing the Superfund Cleanup Program, and look forward to working with EPA, Congress, and others in our collective efforts to continue to modernize and improve the effectiveness and efficiency of this important program.

Thank you for the opportunity to speak with you today. I would be happy to answer any questions you may have.

Supplemental Information

to

Testimony of Stephen A. Cobb on behalf of the Association of State and Territorial Solid Waste Management Officials

"Modernizing the Superfund Cleanup Program"

Supplemental Information includes the following:

Testimony by Jeffery Steers –August 1, 2017

Testimony by Amy Brittain – July 13, 2016

Testimony by Bonnie Buthker – September 15, 2015

Testimony by Jeffery Steers – May 17, 2013

Supplemental Information

to

Testimony of Stephen A. Cobb on behalf of State and Territorial Solid Waste Management Officials

"Modernizing the Superfund Cleanup Program"

Supplemental Information includes the following:

Testimony by Jeffery Steers –August 1, 2017

Testimony by Amy Britton – July 13, 2016

Testimony by Bonnie Buthker – September 15, 2015

Testimony by Jeffery Steers – May 17, 2013

Supplemental Information

to

Testimony of Stephen A. Cobb on behalf of State and Territorial Solid Waste Management Officials

"Modernizing the Superfund Cleanup Program"

Hearing
U.S. Senate
Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management and Regulatory Oversight
August 1, 2017

Testimony of
Jeffery A. Steers
Former President and Vice-Chair CERCLA Post Construction Focus Group
Association of State and Territorial Solid Waste Management Officials

- States value their relationship with the United States Environmental Protection Agency (EPA) and together through several types of cooperative agreements, both as individual States and ASTSWMO, continue to make great strides in addressing some of the most contaminated land in the United States.
- ASTSWMO supports EPA Administrator Pruitt's May 22, 2017 memo stating that the Superfund program is a vital function of EPA and the Agency cannot have a successful program without substantial State involvement. Furthermore, the States support the input and role of local government in the communities in which contaminated sites exist.

- Opportunities exist for improvements to the program to deal with costly and delayed cleanups that continue to have a negative impact on communities across the nation. While efficiencies can be realized administratively without legislative changes to CERCLA or EPA's authority, there exists an opportunity to modernize certain aspects of the statute to acknowledge the role of States as co-regulators who operate sophisticated programs across the country. Our members, and to some extent our regulated community, continue to be challenged with the skyrocketing financial obligations associated with remediating contaminated lands.

Good morning Chairman Rounds, Ranking Member Harris and Members of the Subcommittee. My name is Jeffery Steers and I am the Director of Regional Operations for the Virginia Department of Environmental Quality. VADEQ is a member of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), of which I previously served as President. ASTSWMO is an association representing the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State program experts with individual responsibility for the regulation or management of wastes and hazardous substances, including overseeing the cleanup of Superfund sites.

ASTSWMO appreciates the opportunity to provide testimony on oversight of EPA's Superfund cleanup program. While States do not assume primary CERCLA authority, we do play a role in its implementation. The decisions made by Congress and those made by EPA can have a profound impact on State resources. States share a common goal with the federal

government in ensuring that risks to human health and the environment are mitigated and appropriately addressed in a financially responsible manner. Our Association is committed to ensuring that this is done in an efficient, cost-effective manner.

We support any legislation that encourages greater State collaboration with our federal partners while ensuring that our voice and opinions are not diminished. ASTSWMO and its member States enjoy a positive working relationship with EPA and does not wish to discount these collaborative efforts. We do wish to offer the Subcommittee the following comments on opportunities to enhance the Superfund program.

This past week, EPA released the recommendations of a task force on Superfund appointed by Administrator Pruitt. ASTSWMO's member States are encouraged that the administration recognizes the need for improvements to a program whose purpose is to ensure American communities are protected from contaminated land. While States are still reviewing this recently released report, we take note of the fact that the schedule for implementation is aggressive given proposed reductions in the EPA's staffing and budget. State experiences in working with EPA regional offices has historically demonstrated inconsistent application of policy and guidance developed by headquarters. One of the task force recommendations states that "Regions are encouraged to consider greater use of early and/or interim actions including use of removal authority or interim remedies, to address immediate risks, prevent source migration, and to return portions of sites to use pending more detailed evaluations on other parts of sites." Regional offices must be held accountable in ensuring that consistent implementation of this and other recommendations is followed.

One area of difficulty for our members is EPA's process to identify State regulations as potential Applicable or Relevant and Appropriate Requirements (ARARs). Our main areas of concern include inconsistent application of ARARs from site to site, documentation of EPA's decisions in these matters and constraints in allowing States' early interaction in development of ARARs on specific sites. ASTSWMO recently participated in a process improvement team with EPA to identify tools that could streamline the process while providing States with meaningful involvement. While the exercise was successful and agreement on the path forward was gained between the Superfund program and State participants, bureaucratic issues raised by EPA's Office of General Counsel prevented the project from being implemented. This is an example of a lost opportunity to improve Federal-State relations.

Another growing concern is the ongoing escalation of costs incurred by States on Fund lead sites listed on the National Priorities List (NPL). As you may be aware, States are required to cost share 10% of the remedy construction while incurring 100% of the Operation and Maintenance (O&M) cost for the life of the remedy. Prior to transfer to States for O&M, EPA should be given the authority to consider evaluating whether the State has sufficient funds to take on O&M obligations. Even though the State agreed to assume O&M obligations, it could be that projected costs haven't been appropriately updated. If the State does not have sufficient funding to take on the O&M at the time of transfer, the statute should allow for a process that identifies options on how to address (and fund) State shortfalls.

The role that communities and local investors may play in the redevelopment of Superfund sites has historically been diminished. States are encouraged that the task force report recommends EPA identify sites for third party investment and to pilot how accelerating the remedy might be accomplished under these circumstances. While not mentioning State involvement in this recommendation, EPA must involve ASTSWMO members in this process as we 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.

With respect to Responsible Party (RP) led cleanups under Superfund, States typically find themselves in a secondary oversight role. It is customary for a State to enter into a Cooperative Agreement which defines our role with EPA while providing a funding mechanism for State oversight. In Virginia, we've recently reached out to four RP's to gage their interest in a pilot program whereby they enter into Cost Oversight Agreements agreeing to pay DEQ's project oversight costs directly, in lieu of funneling the money through EPA that results in administratively-burdensome Cooperative Agreements for both EPA and DEQ. This approach is much more cost effective for the RP, increases DEQ's budget forecasting, positions Virginia to provide better customer service, and helps ensure that we have an opportunity to voice State-specific concerns (cost, etc.) at key decision points.

Another State engagement issue related to RP oversight is where EPA enters into consent decrees or other types of settlement documents with RPs to settle costs of their cleanup. EPA often does not include the State in this settlement process, which can make it difficult for a State to engage the RPs to do additional work that may be needed and recover the State's current and projected oversight costs. This issue can be compounded if the site has the issue of less-stringent or different ARARs than the State would require for the site.

Finally, coordination on locally high profile sites must be a team effort among EPA, the State and local government. Two recent examples in Virginia illustrate this need. In one case, the State had been working closely with the local and State health departments to characterize neighborhood drinking water next to an NPL site that contaminated private wells. The State provided a temporary solution of installing onsite filtration systems while a long term fix was developed. Eventually, all parties agreed that connection to a public water supply would reduce the exposure pathway for neighboring residents. However, there was a delay in getting public water extended to the area despite that being the apparent

intended desire of all parties. This highlights some of the issues that can arise given EPA's long very stepwise process and highlight Superfund's sometimes inherent failure to "keep the end in mind". In another case, the local community worked closely with the State and EPA to address mercury contamination in a river. EPA had originally sought to use CERCLA authority to require remediation of sediments by an RP. Cooperative work with Region 3, DEQ, the RP and the local community resulted in Virginia oversight under RCRA authority to move the project forward faster than through Superfund, resulting in an expedited, efficient and equally protective cleanup.

In conclusion, States have positioned themselves to be effective partners with EPA on Superfund implementation and have developed working relationships with local government and communities that are home to contaminated sites listed on the NPL. We encourage continued federal/State cooperative regulatory oversight as improvements continue to be made to the Superfund program. I would be happy to answer any questions you may have.

Hearing
"Oversight of CERCLA Implementation"

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
July 13, 2016

Testimony of
Amy Brittain
Remedial Action Focus Group Chair
Association of State and Territorial Solid Waste Management Officials

Main Points:

- States should be included early when EPA is determining which State environmental regulations are potential Applicable or Relevant and Appropriate Requirements (ARARs). There needs to be transparency and consistency on these decisions.

- Every Superfund site with complex long term remedies, such as ground water remediation systems, should be evaluated for potential remedy optimization before transfer to 100 percent State funding.

- EPA regions should improve management of Superfund State Contracts to ensure better documentation of EPA costs that States have to match and timeliness of final financial reconciliations.

Good morning Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee. I thank you for the opportunity to speak at today's hearing. My name is Amy Brittain and I am an Environmental Programs Manager at the Oklahoma Department of Environmental Quality. ODEQ is a member organization of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). I am also the Chair of the Remedial Action Focus Group within the Association's CERCLA and Brownfields Subcommittee, and in this capacity I have been asked to represent ASTSWMO at today's hearing. ASTSWMO is an association representing the waste management and cleanup programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes managers from the State environmental protection programs, including those responsible for overseeing the cleanup of Superfund sites.

States play a key role in the Superfund process, and it is only through working closely with the U.S. Environmental Protection Agency (EPA) that risks to human health and the environment are mitigated and appropriately addressed. Our Association is committed to ensuring that this is done in an efficient, cost effective manner. Additionally, the Association works to address inconsistencies on how the program is implemented from EPA region to region.

An ongoing concern for our State members is the process EPA follows to identify State regulations as potential Applicable or Relevant and Appropriate Requirements (ARARs), as well as State guidance that may be included as to-be-considered (TBC) requirements for Superfund remedial actions. States across the country have raised concerns to EPA including: (1) inconsistencies in ARAR determination from one site to another, (2) the lack of written

documentation on the rational used to determine ARARs, and (3) the lack of early opportunities for States to have a say in the ARAR list of a site.

Over the past year, EPA has invited representatives from States to participate as members of a workgroup that is developing tools to improve the ARAR identification process that will help ensure meaningful and substantial State involvement. ASTSWMO appreciates EPA inviting representatives from States to participate in this important effort. As a next step, EPA must continue to engage States in the ARARs process discussions, which includes an open direct dialog with States on policy decisions on whether or not a State regulation is an ARAR.

Another growing concern for States is the financial burden that we face with Operation and Maintenance costs on complex long term remedies such as ground water remediation systems. Now that Superfund has reached the 35 year mark, a significant number of sites are complete and States are required to pay 100 percent of the Operation and Maintenance costs. States are working with EPA to find ways to optimize remedies, increase the effectiveness, and/or reduce the cost without sacrificing long-term protection of human health and the environment. EPA has implemented a remedy optimization program to perform systematic site reviews. It is important for EPA to require that these optimizations be performed as early as possible so that cost saving and efficiencies are realized before the financial burden falls entirely to the States.

Over the past 2 years the ASTSWMO Remedial Action Focus Group has been working with States and EPA to evaluate and improve Superfund State Contracts. A Superfund State Contract is a binding agreement between the EPA and an individual State that defines the terms and

conditions for both parties to share remedial action costs at a specific site. States have concerns with the lack of detailed line-item documentation on what EPA has spent on site remedies. Too often, States get little information on how the cleanup money was spent by EPA, yet are expected to pay for 10% or 50% of the costs incurred. Another issue is the lack of timeliness for final financial reconciliation of these contracts. Many existing contracts have never been reconciled, therefore States have received invoices for EPA expenses that go back 10 or 20 years or find that EPA over invoiced States and owe the States money. Additionally, States have experienced lack of adherence to the contract requirements by EPA.

With input from States, EPA revised the Superfund State Contract model provisions in late 2015. The new model provisions address several concerns from States including the ability to set up payment plans for State match and providing a timeline for final finical reconciliation of the contract. However, many existing contracts already in place will continue to cause problems for States. It is important that EPA make it a priority to provide detailed cost documentation to States and perform final financial reconciliations on open contracts.

Superfund is a very important program that provides a mechanism for cleaning up properties that pose a threat to human health and the environment. In the nearly 36 years since Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) States have worked diligently to develop and implement environmental regulatory programs to investigate and cleanup hazardous substance releases. State participation in this program is critical to its success; States are important stakeholders because of the financial obligations of match and long term operations and maintenance. As co-regulators, States want

to be a real and meaningful partner in this process and will continue to work with EPA to address challenges.

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

Hearing
"Oversight of Federal Facility Cleanup under CERCLA"

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
September 16, 2015

Testimony of
Bonnie Buthker
Vice-President
Association of State and Territorial Solid Waste Management Officials

Main Points:

- States must be involved in the critical decisions related to the environmental response and close-out actions at federal facilities, which includes input into such things as project prioritization, review and approval of proposed remedies, monitoring of remedy performance, ensuring compliance with environmental laws, and long-term stewardship.
- Legislation should be developed and supported to continue to clarify that federal facilities are subject to appropriate State regulations and are not unduly shielded by sovereign immunity and lead agency authority.
- Federal agencies should ensure that State costs for the regulation of federal facilities, including costs associated with State agency oversight, are fully reimbursed to the same extent and in the same manner as other regulated entities.

Good morning 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 on the issues being discussed. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an association representing the waste management and cleanup programs of the 50 States, five Territories and the District of Columbia (States). 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. The decisions made by Congress, the United States Environmental Protection Agency, and other Federal Agencies can have a profound impact on State resources. States share a common goal with the Federal government in ensuring that risks to human health and the environment are mitigated and appropriately addressed. Our Association is committed to ensuring that this is done in an efficient, cost effective manner. ASTSWMO and our members actively engage with representatives from the U.S. Environmental Protection Agency (EPA), Department of Defense (DoD), Department of Energy (DOE), and Federal Land Management agencies (FLMs) on national policy issues. For these partnerships to work and meaningful discussions to occur, 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 an effective working relationship with lead federal agencies, especially DoD

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 has a long history of working collaboratively with DoD that began with our efforts on the Federal Facilities Environmental Restoration Dialogue Committee (FFERDC) in the 1990s. In recent years, DoD and the DoD Military Components have worked closely with ASTSWMO and States to effectively resolve issues concerning the investigation and remediation of their current and former facilities. One such example is the Defense State Memorandum of Agreement (DSMOA) Steering Committee, where DoD, the DoD Military Components, and States have been able to resolve difficult challenges that were ongoing for several years. The DSMOA program provides funding to States for their involvement in the investigation and cleanup of current and former DoD facilities. While there are still DSMOA challenges to address, we have made real progress in improving the DSMOA program, including the release of DSMOA eligibility and dispute resolution clarification memos issued by DoD. Two other examples are the Munitions Response Forum and the Formerly Used Defense Site Steering Committee. Both committees have also provided a successful forum for collaboration among States and federal agencies on several challenging cleanup issues, including remediation 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. Prior to 2008, DoD, the DoD Components, ASTSWMO, and States were not as effective in resolving disputes between the parties. Part of this was due to miscommunication, but part of this was also due to DoD leadership at the time asserting sovereign immunity and unilaterally deciding matters such as what constitutes State Applicable or Relevant and Appropriate Requirements (ARARs), when to comply with State enforcement decisions, when to remove military munitions, and what State activities are reimbursable.[1] Due to these disagreements, ASTSWMO and other State organizations have supported a legislative change to correct some of these issues, especially DoD's previous position that any enforcement action by a State could constitute a breach of the State's DSMOA. We have longstanding policy positions opposing the assertion of sovereign immunity by federal agencies. ASTSWMO's 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 during the investigation and cleanup at federal facilities.[2,3,4] These experiences involve all federal agencies, including DoD, Department of Interior, and the Department of Agriculture. For example, in 2013, ASTSWMO did a survey of State federal facilities managers asking about their experiences since 2008 with federal agencies invoking sovereign immunity during the application, implementation, and/or enforcement of CERCLA and/or State regulations. Of the 19 States that responded, 12 stated

[1] ECOS Green Report: DSMOA Issues and Effects on States, 2007
[2] ASTSWMO Policy Position Paper on Federal Facilities, October 2013.
[3] ECOS Resolution 00-9, Clarification of Sovereign Immunity Waiver for Federal Facilities, March 2012.
[4] National Governors Association (NGA) Policy Position NR-03, Natural Resources, February 2013.

that they had had such experiences. And though federal agencies have accomplished a great deal of investigation and cleanup of their facilities over the last 20 years, there are still difficult issues left to address, including addressing complicated ground water 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 in federal agency decisions concerning such issues.

Federal agencies should reimburse States for their oversight costs

States need funding so they can provide necessary resources to be engaged in federal facility investigations and cleanups. As I discussed previously, DoD has developed the DSMOA program to provide funding to States for their involvement in the investigation and cleanup of current and former DoD facilities. This program has provided numerous benefits to both DoD and the States, including cost savings, reduced litigation, expedited cleanup, reduction in the number of DoD facilities on the National Priorities List, and increased public trust in DoD's investigations and cleanups. DOE has also provided cost reimbursement to States for their oversight costs, with similar successes. ASTSWMO therefore supports legislation that requires federal agencies to reimburse States for costs associated with State involvement and oversight of the investigation and cleanup of their facilities.

Conclusion

Effective cleanup of federal facilities is critical to the health and welfare of the citizens living in the communities near these sites, as well as the environmental health of the sites. State oversight is a key component of the federal facility program. Our citizens look to their States to ensure that the contamination from past federal activities is addressed in a protective, expedited manner. We ask Congress to remove the barriers to effective State

oversight and to provide sufficient funding to meet critical or high priority needs at these sites.

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

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

Hearing
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
May 17, 2013

Testimony of
Jeffery Steers
President
Association of State and Territorial Solid Waste Management Officials

Main Points:

- States value their relationship with US EPA and together through several types of cooperative agreements, both as individual States and ASTSWMO as a whole, continue to make great strides in addressing some of the most contaminated land in the United States.
- ASTSWMO supports the Reducing Deadline Obligations Act of 2013 and views this as a legislative win that ensures individual State financial assurance requirements already in place are not preempted by Federal actions.
- ASTSWMO supports the provisions proposed in the Federal and State Partnership for Environmental Protection Act of 2013. Especially with respect to fund-lead sites placed on the National Priorities List (NPL), our members continue to be challenged with the skyrocketing financial obligations incurred. Modernizing some of the aspects of CERCLA to recognize the sophisticated nature of the States' programs makes sense. EPA must

continue to actively recognize our role in the listing process and selecting a remedy to address contaminated property. Allowing States to offset these obligations with greater use of in-kind contributions where appropriate must be acknowledged and allowed for under Federal law.

- ASTSWMO strongly supports the Federal Facility Accountability Act of 2013. No entity, whether privately or publicly owned, should be given special treatment when it comes to protecting human health and the environment. Federal agencies playing the "sovereign immunity card" only serves to delay cleanup and put citizens in harm's way.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an association representing the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State program experts with individual responsibility for the regulation or management of wastes and hazardous substances, including remediation, tanks, materials management and environmental sustainability programs.

ASTSWMO appreciates the opportunity to provide testimony on the three bills under consideration. While States do not assume primary CERCLA authority, we do play a role in its implementation. The decisions made by Congress and those made by the United States Environmental Protection Agency (EPA) can have a profound impact on State resources. States share a common goal with the Federal government in ensuring that risks to human health and the environment are mitigated and appropriately addressed. Our Association is committed to ensuring that this is done in an efficient, cost-effective manner.

ASTSWMO recently provided testimony to this Subcommittee on the role States play in protecting the environment. We support any legislation that encourages greater State collaboration with our Federal partners while ensuring that our voice and opinions are not diminished. As mentioned in our previous testimony, ASTSWMO enjoys a positive working relationship with EPA and does not wish to discount these collaborative efforts. ASTSWMO offers the following comments on each specific bill.

Reducing Excessive Deadline Obligations Act of 2013

Due to the lengthy delay which has occurred in the establishment of CERCLA Financial Responsibility Requirements required by CERCLA 108(b), many States already have substantial rules and regulations governing various classes of facilities. It would be a very undesirable situation for these established protections to be pre-empted by yet-to-be-determined Federal requirements that may or may not be as robust as the State provisions already in place. Therefore, revisions to 108(b) are needed to ensure that existing programs are not automatically disrupted by the future establishment of Federal requirements. This would then provide the individual States which have such laws and requirements the opportunity to evaluate the new Federal requirements as they are established, and to work with their stakeholders to subsequently determine the fate of the existing State requirements in an informed and strategic manner.

Federal and State Partnership for Environmental Protection Act of 2013

Clarification of the importance of State concurrence in listing sites on the NPL, and the ability of States to periodically propose sites for expedited listing will serve to ensure appropriate State involvement in the process, and will enable States to more effectively and expeditiously address environmental concerns within their borders. EPA generally does a good job of coordinating with States, though our members do report inconsistencies from State-to-State and region-to-region. These changes would also ensure other Federal agencies must closely coordinate with the applicable States.

As State budgets continue to be challenged, closer consultation with EPA on all facets of listings and activities is becoming more imperative than ever before. Our members have numerous examples of skyrocketing costs associated with fund-lead cleanups, whereby individual States are assuming 10% cost share for the remedy implementation with operation and maintenance costs being assumed in perpetuity. EPA offers the opportunity for States to comment on both proposed listings and remedy selection. Oftentimes, however, our concerns or input are not fully utilized in a consistent manner across the country.

Regarding the NPL listing process, States are under significant pressure to "concur" with individual listing decisions. There are many occasions when States are asked for "Governor's concurrence" without even having the benefit of seeing the full Hazard Ranking Scoring (HRS) package. The HRS, while an enforcement sensitive document, helps to provide States a more complete understanding of the risks associated with a site. It should be noted that sharing this information is inconsistent across EPA regions. This issue serves as an example of the need for a transparent process of collaboration between the State and Federal governments.

There are many tools in the toolbox to address contaminated properties. While, there is no one size fits all approach, exerting CERCLA authority is one tool. As States evaluate proposals for listing on the NPL, we look for economic redevelopment opportunities to drive cleanups. Oftentimes there is a prospective purchaser willing to adequately mitigate the environmental and human health risks on a contaminated property. State voluntary programs can, in many circumstances, serve as a substitute for the long and costly CERCLA /Superfund process. States should not be pressured into accepting at face value a listing on the NPL, especially where the fund is being used resulting in the use of significant State resources.

States are best suited in understanding their environmental conditions and should therefore be able to offer priority sites for inclusion on the NPL. Most States have proven and sophisticated Superfund programs and have used their knowledge of local site conditions to assess and prioritize sites in need of remediation. While there may be a perceived notion that there are dozens of State priorities that would be suggested for addition to the NPL, this is simply not the case. States recognize the limited resources and understand the complexities and best opportunities to get the most bang for the buck.

The ability for States to offset its obligations for in-kind services should continue to be expanded into all facets of the CERCLA cleanup process. Some examples reported by our members include such things as residential water line installations and hookups, construction oversight to directly assist EPA oversight at NPL mining sites (with specific cooperative agreements in place) and EPA-approved yard removals at lead sites (with specific cooperative agreements). EPA has started to work with one State on considering in-kind costs for

Institutional Controls (IC); the requirement for an IC is commonly part of the Record of Decision (ROD), and as such should be part of in-kind contributions.

EPA has made it difficult to allow in-kind credit for work performed by States, so we commonly do not offer much assistance. One example cited by a State involved an existing recovery well being pumped at a former electroplating site. The well was installed by the owner of the site before he filed for bankruptcy. The State took over the pumping under an agreement with the city. This was being performed without the State getting credit. Once the well experienced operational problems, it was shut down due to the cost and lack of a cooperative agreement. It would be very helpful if EPA could make it easier to allow the States to get credit for time to inspect, track, and for operation of interim systems (which may likely be part of the final remedy). It is often very difficult to negotiate a cooperative agreement to get credit for in-kind work.

We frequently hear from our members that the requirement for the State to commit to paying 10% of the cost of the remedial action, and 100% of the cost of long term operation and maintenance (O&M), is increasingly preventing States from concurring with listing potential "fund-lead" sites on the NPL. This is a most undesirable and unfortunate situation since often it is the potentially fund-lead sites which are the most environmentally critical to be addressed using CERCLA NPL authorities; however, States must also be realistic about their fiscal solvency. Thus, it is imperative that States be able to get credit for whatever resources they are able to bring to bear.

Federal Facility Accountability Act of 2013

ASTSWMO has had a long-standing position of being in support of an updated standard of federal facility accountability under State and Federal environmental laws similar to the RCRA Federal Facilities Compliance Act. States continue to believe that the Federal government should be accountable to adherence with CERCLA, similar to what is required under the Clean Air Act, Clean Water Act and RCRA. The universe of sites subject to CERCLA includes properties owned by Federal, State and Local Governmental entities as well as private parties. The protection of our citizens should not be seen through the color of ownership. Many States and localities also are limited with the resources that can be used to meet their CERCLA obligations. It is inherently wrong for the Federal government to shirk its responsibilities due to cost considerations. It is important that federal facilities and agencies be accountable to the same requirements as all other regulated entities, including to State-specific requirements, to ensure equal treatment and protection.

As the result of existing delegations of authority, federal facilities under CERCLA are often self-regulating, which presents substantial opportunities for conflicts-of-interest, and inconsistent guidance, application and interpretation of program requirements. Experience with RCRA and other programs with more modern sovereign-immunity waivers show a higher degree of compliance and consistency between Federal agencies, and in comparison with private entity compliance.

Federal facilities are often home to some of the largest, most complex, and most challenging environmental issues in our nation, therefore it is critical that they live up to the same standard as other facilities. Though CERCLA currently provides (in section 120(a)(2)) that

other Federal agencies may not have policies, guidance, or rules which conflict with those established by EPA, there is no current provision for EPA or any other entity to conduct external reviews to ensure this is the case – the proposed change to Section 115 would correct this.

States have numerous examples where long drawn out legal debates have occurred with federal facilities over States' Applicable or Relevant and Appropriate Requirements (ARARs) that should be included during the development and implementation of a remedy or long term care. These debates only lead to prolonged cleanups, kicking the can down the road as it were, that simply allow the public to be potentially exposed to unacceptable human health or environmental risk. The time value of money should also not be discounted; the longer a Federal agency takes to invest in a cleanup, the more expensive it will become.

At the encouragement of EPA and other Federal agencies, many States have adopted laws and regulations based on the Uniform Environmental Covenants Act. However, as States have established those laws and regulations, which serve to enable and ensure the long-term protectiveness of risk-based remedial actions, they have found that, although the Federal agencies want these tools available to use for their advantage when addressing off-site contamination, the same Federal agencies often claim exemption or simply refuse compliance with these requirements when addressing contamination on Federal property. This application of such a double-standard is unacceptable.

Federal agencies use of sovereign immunity may delay cleanup at sites posing a significant threat to human health. Several years ago, a Formerly Used Defense Site (FUD) was the home to a school setting with documented human health issues. A claim of sovereign immunity on portions of school property and other neighboring properties subject to the

CERCLA process had the potential to delay decisions relative to the selection of a remedy and the implementation of long term monitoring and the use of institutional controls.

Summary

In summary, ASTSWMO supports the proposed bills, as we believe these provisions help to modernize an often archaic process aimed at cleaning up some of this country's most contaminated sites while ensuring that States' authorities are not usurped.