



Hearing
“Oversight of Federal Facility Cleanup under CERCLA”

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
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Testimony of
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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.