TESTIMONY OF LAURIE DROUGHTON MATTHEWS
OF COUNSEL, MORGAN, LEWIS & BOCKIUS
ON BEHALF OF
THE SUPERFUND SETTLEMENTS PROJECT
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT & CLIMATE CHANGE
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

Chairman Tonko, Ranking Member McKinley, and members of the subcommittee, I am Laurie Droughton Matthews, Of Counsel with the law firm Morgan, Lewis & Bockius. I appear today on behalf of the Superfund Settlements Project. Thank you for the opportunity to discuss the Superfund provisions in H.R. 1512, the CLEAN Future Act.

THE SUPERFUND SETTLEMENTS PROJECT

The Superfund Settlements Project ("SSP") is an association of major companies from many different sectors of American industry, including mining, petroleum, chemicals, agriculture, waste management and manufacturing/defense products. SSP was organized in 1986 to help improve the effectiveness of the Superfund program by encouraging settlements, streamlining the settlement process, and focusing on efficient remediation of Superfund sites.

SSP members share in common that they are PRPs at multiple Superfund sites so each has a large remediation portfolio subject to CERCLA and associated EPA oversight. Consequently, the members of SSP share an extraordinary degree of practical, hands-on experience with the Superfund program. SSP shares constructive input to EPA and other federal agencies on critical policy issues affecting the cleanup of contaminated sites, and representatives of the Project have testified before Congress on many occasions regarding various aspects of the Superfund program.

THE SUPERFUND PROGRAM

Superfund today is a mature program that addresses legacy contamination generally dating back many decades from a time when environmental regulation was nonexistent. In contrast, today the gaps or lack of environmental regulation that led to the creation of the large majority of Superfund sites have been filled by, for example, the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act and the Toxic Substances Control Act. With this regulatory framework, we see that, while legacy contamination is still being identified, few sites are being created from today's industrial operations.

Today private parties are cleaning up most (greater than 70%) of the sites on the National Priorities List ("NPL"), working closely and cooperatively with the United States Environmental

Protection Agency ("EPA") and sister state agencies. At these sites, PRPs are paying the full cost of those cleanups, including reimbursement of all of the EPA's direct costs and overhead and covering most orphan shares. Great progress has been made over the last four decades, and PRPs, such as the members of SSP, are dedicated to the efficient remediation of NPL sites for the benefit of the environment and surrounding communities.

SECTION 631 OF THE CLEAN FUTURE ACT

Section 631 of the CLEAN Future Act requires EPA to "promulgate requirements that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with impacts of climate change and extreme weather events on those facilities." Note that these "classes of facilities" are not Superfund sites, for which PRPs already provide financial assurance for response actions, but operating facilities that provide economic benefits to the nation and the communities in which they reside. These proposed financial assurance requirements are poorly targeted, speculative and unnecessary. Section 631 would impose significant costs on industry anticipating releases or other impacts due to climate change but do nothing to avoid those impacts. Addressing the risk of climate change is better done through concrete preparations to avoid impact rather than tying up massive sums to address potential impacts after the fact.

On its face, proposed Section 631 of the CLEAN Future Act would impose financial assurance requirements on risks that are not necessarily related to releases of hazardous substances, going beyond the scope and goals of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The primary purpose of CERCLA is to cleanup facilities at which hazardous substances were released, or are threatened to be released, and to impose liability on those involved in the hazardous substance disposal chain of custody. As drafted, however, Section 631 is untethered to the release or threatened release of hazardous substances so there is potential for regulations that stray beyond CERCLA's purpose and goals. In fact, it would seem an entity may possibly need to provide financial assurance for something that could not be compelled by CERCLA.

Instead of providing financial assurance for damage from potential extreme events that may never occur, it would be more sensible and effective to require companies to spend money to protect their facilities against disaster, which is the result society wants, and is better accomplished through modifying existing permitting programs as necessary.

Industry is now subject to numerous preventative Federal and state regulatory programs including environmental review under NEPA, 42 U.S.C. §§ 4321 et seq., and similar state environmental review laws; media-specific programs addressing hazardous substances and wastes, such as through programs established under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., Clean Air Act, 42 U.S.C. §§ 7401 et seq., and the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 et seq.; operating-specific programs, such as Risk Management Plan and Process Safety Management regulations and storage tank regulations; and general emergency response programs, such as under both CERCLA and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001 et seq. Specifically with regard to releases that could potentially lead to a CERCLA response, these existing laws address the range of risk by

requiring owners and operators to: (1) adopt safe operating practices to avoid releases, (2) implement programs and designs to minimize the scope of releases when they do occur, and (3) address any resulting environmental conditions promptly if they occur and also often at closure and during post-closure. In short, the risks that Proposed Section 631 is targeting – that an operating facility will become a Superfund site – can be addressed by working within the regulatory structure already in place.

A better, simpler and more cost-effective way to address climate risks is for EPA and industry to consider climate change when granting new permits or permit modifications, or when renewing permits, for operating facilities that are not Superfund sites. These are routine activities and anticipated costs of doing business which can be incorporated into the regular business cycle, if the facility has not already done so. For most large companies, this approach is likely already in place.

For Superfund sites, EPA can consider more extreme climate events so that remedies that are resilient to floods, fires, hurricanes and other events are chosen, designed and constructed. EPA can then re-evaluate remedies during the five-year review process and identify any upgrades that might be needed to address climate risks.

Indeed, EPA already has begun addressing climate change impacts throughout its programs, including CERCLA response actions. EPA has a Climate Change Adaptation Plan that addresses risk throughout Agency programs that helps to avoid impacts of climate change. EPA's Office of Land & Emergency Management has implemented that plan by developing its own guidance to identify and address climate change risks at Superfund sites. Key actions identified for Superfund sites include developing criteria to identify the types of remedies for which performance may be affected by climate change; developing a protocol for evaluating and ensuring remedy protectiveness on a site-specific basis; identifying existing Superfund program processes to integrate climate change adaptation measure into to ensure continuing protectiveness of current and future remedies; and training EPA staff and stakeholders. In addition, the statement of work to the model enforcement agreements require remedial actions be conducted in a manner that minimizes environmental impacts in accordance with EPA's *Principles for Greener Cleanups*. EPA's approach which promotes resilience and strength in the face of extreme events is better for society as compared to tying up money to address potential future impacts.

Similar to the analyses done in connection with EPA's decisions regarding CERCLA §108(b) financial assurance, imposing financial assurance requirements on industries that are generally financially sound is unnecessary and unjust. That some small percentage of facilities may be at risk cannot justify significant financial burden on the large majority. The proposed financial assurance provision would prioritize funding for this speculative risk over other important responsibilities that companies have. Those other interests may be equally deserving of funds in an end-state when financial assurance might be drawn-upon. That is a complex analysis and a challenging balancing act that this proposed legislation would be setting aside with unknown consequences. Moreover, the cost of the assurance instruments is not trivial; in contrast, there is real potential the cost could be staggeringly high. Accordingly, a potential consequence of imposing onerous financial assurance requirements on facilities deemed vulnerable to climate

change would be the facilities relocating from the community, disrupting communities and impacting jobs.

In addition, implementing this Section would divert funds from progress protecting the environment. For example, EPA would be required to review the risk calculations for numerous facilities and then routinely ensure that financial assurance is in place, diverting EPA's limited resources from advancing response actions. Corporations would be required to assure a speculative risk, diverting funds to banks and insurance companies that otherwise could be used to, as discussed above, retrofit facilities to address the risks of climate change on the facility.

Importantly, the risk that Section 631 is seeking to address is speculative and would be essentially impossible to value. Climate data is inherently limited, and modeling and scenario analyses involve a heightened degree of uncertainty. Companies that want to understand climate related risk should be encouraged to consider and disclose this risk, and this is in fact occurring at multiple levels of government. Adding a financial assurance aspect to this work will potentially inhibit support for the kinds of projections needed to drive understanding of these potential future impacts. Furthermore, as recognized during the development of the CERCLA §108(b) regulations, there is significant potential that the market would not have the capacity for what would surely be a massive assurance program. The breadth of the Section and what is sure to be an inability to reasonably value a speculative risk would undoubtedly lead to multiple legal challenges.

SECTION 636 OF THE CLEAN FUTURE ACT

Section 636 of the CLEAN Future Act is vague and unrealistic, requiring response actions at certain sites be completed by ten years after the date of enactment. Due to imprecise drafting, it is unclear what is the universe of sites to which Section 636 would apply. Does the phrase "Federal site and facility" mean Federal-lead sites, which would include sites being remediated by PRPs, or only Federally owned or operated facilities, such as, for example, Department of Defense or Department of Energy sites ("Federal Facilities")?

According to EPA's website, approximately 88% of the NPL sites are not Federal Facilities. The Government Accountability Office estimates that greater than 60% of Superfund sites are in areas that may be impacted by climate change. With over 1,300 sites on the NPL, that would mean that remediation would need to be completed at more than 1,150 sites within ten years. Given the rate of site delisting, despite concerted efforts by EPA and PRPs, this goal is clearly unrealistic.

Even if Section 636 is limited to Federal Facilities, the goal of Section 636 is not achievable. Superfund sites are complex. The complexity can result from several issues: the nature of the contamination, the size and location of the site, the nature of the contaminated media, the hydrogeology, or a combination of these and many other factors. Some sites simply need more time to allow for study to understand the nature and extent of contamination so that the appropriate response actions can be determined. Some site conditions will not allow for expeditious cleanup. Some remedies that may be longer term solutions can be the better choice based on numerous factors other than climate change, including environmental justice.

Forcing timelines in site remediation also simply doesn't work and may not be in the best interest even if it did. For example, the State of New Jersey imposed mandatory remediation timeframes that routinely need to be extended, not for lack of progress or will on the part of the agency and responsible parties, but because of the complexity of the work. Another important consideration is how sites should be prioritized. Even if a site may be subject to climate change impacts, risk at another site not vulnerable may pose a greater risk to human health and the environment. Forcing a timeline may, in the end, divert resources from sites with greater risks. Instead of forced timelines that may end up with decisions not based on sound science and not being the best for the environment and/or community, greater efficiency can be achieved by reforms to the program using lessons learned from the 40-year experience with the Superfund program.

CONCLUSION

Section 631 of the CLEAN Future Act is not the way to address risks of climate change at operating facilities. Those communities which are vulnerable to climate change and in which operating facilities reside would be significantly better served by relying on EPA's over 40-year experience implementing a full spectrum environmental framework and its continuing efforts to address climate change and other emerging issues within these programs. Requiring a massive investment in financial assurances instead of investment in real, preventative solutions is ill-conceived. Section 636 is similarly ill-conceived because it fails to address the site-specific complexity of the Superfund process at individual sites located in highly variable settings.