AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

LEGISLATION TO IMPROVE THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
FINANCE AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

AUGUST 4, 1999—BROWNFIELDS PROVISIONS OF H.R. 1300, H.R. 1750, and H.R. 2580
SEPTEMBER 22, 1999—H.R. 1300 and H.R. 2580

Serial No. 106–82

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE
58–513CC WASHINGTON : 1999

COMMITTEE ON COMMERCE

TOM BLILEY, Virginia, *Chairman*

W.J. "BILLY" TAUZIN, Louisiana
MICHAEL G. OXLEY, Ohio
MICHAEL BILIRAKIS, Florida
JOE BARTON, Texas
FRED UPTON, Michigan
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
Vice Chairman
JAMES C. GREENWOOD, Pennsylvania
CHRISTOPHER COX, California
NATHAN DEAL, Georgia
STEVE LARGENT, Oklahoma
RICHARD BURR, North Carolina
BRIAN P. BILBRAY, California
ED WHITFIELD, Kentucky
GREG GANSKE, Iowa
CHARLIE NORWOOD, Georgia
TOM A. COBURN, Oklahoma
RICK LAZIO, New York
BARBARA CUBIN, Wyoming
JAMES E. ROGAN, California
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
CHARLES W. "CHIP" PICKERING, Mississippi
VITO FOSSELLA, New York
ROY BLUNT, Missouri
ED BRYANT, Tennessee
ROBERT L. EHRLICH, Jr., Maryland

JOHN D. DINGELL, Michigan
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
RALPH M. HALL, Texas
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
FRANK PALLONE, Jr., New Jersey
SHERROD BROWN, Ohio
BART GORDON, Tennessee
PETER DEUTSCH, Florida
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
RON KLINK, Pennsylvania
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
THOMAS C. SAWYER, Ohio
ALBERT R. WYNN, Maryland
GENE GREEN, Texas
KAREN McCARTHY, Missouri
TED STRICKLAND, Ohio
DIANA DeGETTE, Colorado
THOMAS M. BARRETT, Wisconsin
BILL LUTHER, Minnesota
LOIS CAPPS, California

JAMES E. DERDERIAN, *Chief of Staff*
JAMES D. BARNETTE, *General Counsel*
REID P.F. STUNTZ, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS

MICHAEL G. OXLEY, Ohio, *Chairman*

W.J. "BILLY" TAUZIN, Louisiana
Vice Chairman
PAUL E. GILLMOR, Ohio
JAMES C. GREENWOOD, Pennsylvania
CHRISTOPHER COX, California
STEVE LARGENT, Oklahoma
BRIAN P. BILBRAY, California
GREG GANSKE, Iowa
RICK LAZIO, New York
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
VITO FOSSELLA, New York
ROY BLUNT, Missouri
ROBERT L. EHRLICH, Jr., Maryland
TOM BLILEY, Virginia,
(Ex Officio)

EDOLPHUS TOWNS, New York
PETER DEUTSCH, Florida
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
DIANA DeGETTE, Colorado
THOMAS M. BARRETT, Wisconsin
BILL LUTHER, Minnesota
LOIS CAPPS, California
EDWARD J. MARKEY, Massachusetts
RALPH M. HALL, Texas
FRANK PALLONE, Jr., New Jersey
BOBBY L. RUSH, Illinois
JOHN D. DINGELL, Michigan,
(Ex Officio)

CONTENTS

	Page
Hearings held:	
August 4, 1999	1
September 22, 1999	137
Testimony of:	
Curtis, Jonathan G., President, Environmental Business Action Coalition	78
Fields, Hon. Timothy, Jr., Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency:	
Accompanied by Lois Schiffer, Assistant Attorney General, Department of Justice	19
Accompanied by Steve Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance	150
Florini, Karen, Senior Attorney, Environmental Defense Fund	83
Garczynski, Gary, Treasurer, National Association of Home Builders	92
Helmke, Paul, Mayor of Fort Wayne, Indiana, on behalf of the U.S. Conference of Mayors	54
Jackson, Jeremiah D., President-elect, Environmental Business Action Coalition	221
Jeffers, Christopher, City Manager, Monterey Park, on behalf of the National Association of Counties	193
Johnson, Gordon J., Deputy Bureau Chief, Office of the Attorney General, State of New York, on behalf of the National Association of Attorney's General	201
Kerbawy, Claudia, Section Chief, Superfund, Environmental Response Division, Michigan Department of Environmental Quality, on behalf of Association of State and Territorial Solid Waste Management Officials	69
Mills, Teresa, on behalf of the Buckeye Environmental Network	75
Nobis, Mike, JK Creative Printers, on behalf of National Federation of Independent Business	198
Stypula, Donald J., Manager of Environmental Affairs, Michigan Municipal League, on behalf of National Association of Local Government Environmental Professionals	62
Williams, Jane, Chair, Waste Committee, Sierra Club	215
Material submitted for the record by:	
Association of Metropolitan Water Agencies and the American Water Works Association, letter dated October 8, 1999, to Hon. John Dingell	252
California Environmental Agency, letter dated October 12, 1999, to Hon. Thomas J. Bliley, Jr	277
Campaign for Safe and Affordable Drinking Water, letter dated November 1, 1999	285
Children's Health Environmental Coalition, letter dated November 1, 1999	282
Clean Water Action, letter dated October 26, 1999	284
Curtis, Jonathan G., President, Environmental Business Action Coalition, letter dated September 7, 1999, enclosing response for the record	129
Jennings, Jon P., Acting Assistant Attorney General, U.S. Department of Justice, letter dated October 4, 1999, to Hon. Michael G. Oxley	287
Lew, Jacob, Director, Office of Management and Budget, letter dated October 12, 1999, to Hon. John Dingell	251
Salazar, Ken, Attorney General, State of Colorado, letter dated November 5, 1999, to Hon. Tom Bliley, enclosing material for the record	272
Spitzer, Eliot, Attorney General, State of New York, letter dated October 12, 1999, to Hon. Tom Bliley, enclosing material for the record	256

LEGISLATION TO IMPROVE THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

WEDNESDAY, AUGUST 4, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Greenwood, Largent, Lazio, Shimkus, Wilson, Shadegg, Fossella, Blunt, Ehrlich, Bliley (ex officio), Towns, Stupak, DeGette, Barrett, Luther, Markey, Hall, Pallone, Rush, and Dingell (ex officio).

Staff present: Nandan Kenkeremath, majority counsel; Amit Sachdev, majority counsel; Kristi Gillis, legislative clerk; and Dick Frandsen, minority counsel.

Mr. OXLEY. The subcommittee will come to order. The Chair will recognize himself for an opening statement.

Today we start the first day of a hearing for the 106th Congress on legislation to improve the Comprehensive Environmental Response Compensation and Liability Act. For those who need a reminder, this is the same broken Superfund statute on which we have had over 26 hearings in this committee over the past 7 years. The sad truth is, during the nearly 20 years of CERCLA, we have been cleaning up sites with greater speed and less waste, while protecting people's health and the environment.

Superfund creates disincentives and uncertainty for State and voluntary cleanups, where a lot of the work is getting done these days. As I have stated before, the quality of our Nation's most prominent cleanup program does matter. When sites stay abandoned because of Superfund's vagaries, people suffer. Neighborhoods suffer, cities and towns suffer. The hardest task in politics is fixing a broken environmental program.

Superfund, however, could not be a better case for reform. I still believe there is a bipartisan majority in the house and a broad number of stakeholders for significant changes to the Superfund statute.

Many Members of Congress have worked on a bipartisan basis over the last 6 years with State cleanup agencies, cleanup engineers and dozens of experts to develop statutory changes that would make a real difference. The 105th Congress saw several seri-

ous bipartisan efforts in this regard, including H.R. 3000, which was introduced with 19 original Democrat cosponsors. In this Congress we see that H.R. 1300, the Recycle America's Land Act of 1999, now has 47 Democratic cosponsors and 47 Republican cosponsors.

Mr. Greenwood's bill, the Land Recylcing Act of 1999, is a serious bipartisan effort covering several areas, with 9 Democrat cosponsors and 7 Republican cosponsors. I commend the long and growing list of Democratic and Republicans for their willingness to move forward on a bipartisan basis. It is these efforts that the subcommittee must look to. For the 106th Congress if you cannot work in a bipartisan fashion, it would appear that you do not want any legislation at all. If you are willing, let's start working now and start showing the ability for a bipartisan compromise.

Today we will focus on certain provisions related to brownfields issues. No one should take from this first day that I want to limit the scope of Superfund reform efforts to these topics. To the contrary, Superfund is broken in a number of areas and there have been positive bipartisan proposals in a number of these areas which should be fully considered.

On today's topic I would state that needless uncertainty and counterproductive Federal rules have hurt the effort to clean up brownfields. We must overcome the lack of trust that the administration and the national environmentalist activists continue to carry for State cleanup programs. The record shows that big Federal Government is hurting, not helping; and States like Ohio and Pennsylvania are moving ahead to protect the environment and create jobs.

For example, 83 projects have been undertaken through Ohio's voluntary action program. These are non-NPL lesser contaminated sites that might otherwise have languished and spread blight. Instead properties are being cleaned up and jobs are being created from Cleveland to Columbus to Cincinnati.

I also recall an impressive brownfields project that I saw at the Pfizer plant in Congressman Town's district in New York City. We need to respect the position of the State agencies and cleanup contractors who have the most experience in the brownfields area; otherwise we have just more unworkable prescriptions from Washington, DC.

Again, I will be turning to all of today's witnesses, other stakeholders, on both sides of the Chair, for more information, the right formula and the right opportunity for positive reforms. The Chair is now pleased to recognize the ranking member, the gentleman from New York, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. I want to thank you for holding this hearing. If you recall at the subcommittee's March 23 oversight hearing, many members on both sides of the aisle expressed their interest in working on brownfields legislation. Recently the United States Chamber of Commerce has adopted a policy that urges Congress to focus on brownfields legislation rather than comprehensive Superfund reform.

In early May, I, along with all of my colleagues on this side of the aisle, introduced H.R. 1750, the Community Revitalization and Brownfields Cleanup Act of 1999. It provides liability protection for

the new purchasers and developers, innocent landowners and contiguous property owners. It also provides brownfields funding for local governments and addresses the finality issue of current owners. I am pleased to say that H.R. 1750 has already obtained the strong support of the President of the United States, the only brownfields bill to do so—and I repeat, the only brownfields bill to do so.

The mayors from big cities like Denver, Detroit, St. Louis, Newark, Philadelphia, and Elizabeth, New Jersey and other local government organizations have written to express their support of H.R. 1750. Just this week, the National Association of Counties and National Association of Towns and Townships endorsed H.R. 1750 and expressed their strong interest in legislation ratifying EPA's municipal settlement policy as well.

Finally, H.R. 1750 has received support from the National Realty Committee, a member organization of leading real estate owners, developers, investors and lenders throughout this Nation.

Mr. Chairman, if we keep our aim narrowly focused and targeted, and our approach based on obtaining a broad consensus, I believe brownfields legislation can be signed into law in this Congress. The approaches taken by H.R. 1750 and H.R. 2580 on liability protection for new purchasers, liability clarification for innocent landowners, and funding for site assessment grants and revolving loan funds track very closely the difference in these important brownfields provisions. It should be easily resolvable.

However, on several other provisions, there are significant differences in the bills. These will not be as easily resolvable as we discuss these differences and State authority versus Federal authority. I urge the subcommittee to not forget the needs of citizens and communities throughout this Nation when they fear that contamination at any site may be presenting a risk to their health and welfare. Citizens want to have all of the necessary authorities available to protect their health and the environment.

Mr. Chairman, again I thank you for holding this hearing and I look forward to hearing from the witnesses. I yield back the balance of my time.

Mr. OXLEY. The Chair is now pleased to recognize the gentleman from the full Commerce Committee, the gentleman from Richmond, Mr. Bliley.

Chairman BLILEY. Thank you, Mr. Chairman. Let me commend you for holding this hearing on legislation to improve Superfund. Perhaps one of the hardest tasks in politics is fixing a broken environmental program. Superfund could not be a better case for reform. The statute is excessively litigious, slow, unrealistic, imposes barriers to cleanups all across the Nation.

House Republicans and many Democrats agree on the need for substantial reform. The 105th Congress saw several bipartisan efforts in this regard, including Chairman Oxley's bill, H.R. 3000, which was introduced with 19 original Democrat cosponsors.

Today we are holding a hearing on 3 bills to fix the Superfund program. First we see that H.R., 1300 the Recycle America's Land Act of 1999, now has the same number of Democrat cosponsors as Republicans: 47. Similarly, Mr. Greenwood's bill, the Land Recycling Act of 1999 is a serious bipartisan effort.

This presents us with a gulf that must be bridged. We have a bipartisan group that supports Superfund reform, and, on the other hand, we have the House Democrats and the administration who support partisan legislation. To bridge this gulf and finally enact Superfund legislation, we must address both the substantive and political differences.

On the substance, I see a program that takes 8 years to accomplish the identification and listing of a hazardous waste site, and another 10 years to accomplish remedy selection. While the administration and some of my colleagues call this a satisfactory pace, I see only waves and waves of litigation. Where the administration sees vindication of the "polluter pays" principle, I see needless uncertainty and counterproductive Federal rules. On bipartisanship, I note that it is not alive and well.

So the divide within the Democrat Party remains. There are those who are willing to work on a bipartisan reform and those that have not shown a desire to make Superfund work. It seems to me for the 106th Congress, if you cannot work in a bipartisan fashion, then you do not want change at all. We have a short time to determine whether we will cross this divide. After 5 years, my patience is running thin. If you are willing, let's start working with Chairman Oxley now and start showing the ability for a bipartisan compromise.

Today is the first day of our legislative hearings on Superfund. Today we will focus on the brownfields-related provisions of several bills. I believe we must listen to State cleanup agencies and cleanup contractors who have the expertise to know what it takes to bring life to the cleanup and redevelopment arena by reforming Superfund. After years of trying and negotiating, we have developed workable bipartisan provisions that can make a difference.

I look forward to hearing from today's witnesses and to moving forward on Superfund reform. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the Chair.

[The prepared statement of Hon. Tom Bliley follows:]

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you, Mr. Chairman. Let me commend you for holding this hearing on legislation to improve Superfund.

Perhaps one of the hardest tasks in politics is fixing a broken environmental program. Superfund could not be a better case for reform. The statute is excessively litigious, slow, unrealistic, and poses barriers to cleanups all across the Nation. House Republicans and many Democrats agree on the need for substantial reform.

The 105th Congress saw several bipartisan efforts in this regard, including Chairman Oxley's bill, H.R. 3000, which was introduced with 19 original Democrat cosponsors. Today we are holding a hearing on three bills to fix the Superfund program. First, we see that H.R. 1300, the Recycle America's Land Act of 1999, now has the same number of Democrat cosponsors as Republican: 47. Similarly, Mr. Greenwood's bill, the Land Recycling Act of 1999 is also a serious bipartisan effort.

This presents us with a gulf that must be bridged—on the one hand, we have the bipartisan groups that support Superfund reform, and on the other hand, we have the House Democrats and the Administration who support partisan legislation. To bridge this gulf and finally enact Superfund legislation, we must address both the substantive and political differences.

On the substance, I see a program that takes eight years to accomplish the identification and listing of a hazardous waste site, and another 10 years to accomplish remedy selection. While the Administration and some of my colleagues call this a satisfactory pace, I see only waves and waves of litigation. Where the Administration sees vindication of the "polluter pays" principles, I see needless uncertainty and counterproductive Federal rules.

On bipartisanship, I note that it is not alive and well. So the divide within the Democrat party remains. There are those who are willing to work on bipartisan reform and those who have not shown this desire to make Superfund work. It seems to me that for the 106th Congress, if you cannot work in a bipartisan fashion, then you do not want change at all.

We have a short time to determine whether we will cross this divide. After five years my patience is running thin. If you are willing, lets start working with Chairman Oxley now and start showing the ability for a bipartisan compromise.

Today is the first day of our legislative hearings on Superfund. Today we will focus on the brownfields-related provisions of several bills. I believe we must listen to State cleanup agencies and cleanup contractors who have the expertise to know what it takes to bring life to the cleanup and redevelopment arena by reforming Superfund. After years of trying and negotiating, we have developed workable bipartisan provisions that can make a difference. I look forward to hearing from today's witnesses and to moving forward on Superfund reform.

Mr. OXLEY. The gentleman from New Jersey, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. I want to thank you for holding this hearing on brownfields legislation. With certain Federal protections in place, along with State voluntary programs, we can work to put abandoned or underused contaminated industrial or commercial sites back into use. This not only spurs economic development, but avoids development of greenfields or pristine open spaces.

In Long Branch, New Jersey, we recently received a $200,000 grant to participate in the pilot project that is part of EPA's brownfields initiative; and EPA's national brownfields initiative has already resulted in the assessment of 398 brownfields properties, cleanup of 71 properties and redevelopment of 38 properties.

Mr. Chairman, on the subject of the Superfund program, which I know is not the subject of the hearing today, I just wanted to say that I remain pleased with the direction of progress that EPA is making, particularly in New Jersey and in my district. To try to enact Superfund reforms at this time could delay progress. If anything, we need to ensure that our Federal Superfund program remains strong; that the burden of site cleanups remains with the polluter, the potentially responsible party; that we avoid corporate carveouts and ensure communities' and children's protection and right to know.

I want to mention that I believe we should have a separate hearing on the Superfund right-to-know issue because it has been left out of the Boehlert Superfund bill. In the meantime, we should act to pass sound brownfields legislation.

Mr. Towns' bill, H.R. 1750, is endorsed by President Clinton and the National Association of Attorneys General support the strengthening of State voluntary cleanup and brownfields redevelopment programs. Yet they oppose parts of the Boehlert bill, H.R. 1300, because potentially responsible parties would be able to avoid enforcement too easily under that bill. Many State officials have informed me and other Congress members that the existing Federal framework, with its liability and enforcement mechanisms, provides important incentives for private entities to voluntarily clean up State sites. And I believe we must uphold the imminent and substantial endangerment standard that exists in current Federal and State statutes as well as in the memorandum of agreement between 12 States and the EPA in their State voluntary cleanup programs.

In fact, in my home State of New Jersey, our State environmental or Department of Environmental Protection may direct the discharger to clean up and remove the discharge whenever any hazardous substance is discharged. A substantial threat of endangerment does not have to be proven. And it is important to maintain a Federal safety net for sites where State cleanups failed to adequately protect human health and the environment, as the Environmental Defense Fund points out in its testimony.

The standard should be consistent with Federal enforcement authority to order cleanups under other Federal statutes, including CERCLA, the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, as well as these memoranda of agreement. And I want to say that the Towns bill provides such a safety net. The other bills under consideration do not.

While current law may not adequately address targeted liability relief for qualified parties, we must take care not to create exemptions that are too broad or that enable PRPs to avoid liability. In H.R. 1750 we have carefully defined and provided limited liability relief for innocent landowners, prospective purchasers and contiguous property owners, but only for these categories. The administration supports targeted liability relief for these parties. Other bills under consideration today include inadequate and overly broad exemptions for innocent landlords.

Finally, I would urge my colleagues to join me in passing brownfields legislation that contains provisions that enjoy widespread support and consensus, and I believe and I urge full consideration and ultimate passage of the Towns bill for that reason. Thank you, Mr. Chairman.

[The prepared statement of Hon. Frank Pallone follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Thank you, Mr. Chairman. We need to keep this hearing, and any legislation the Subcommittee and Committee might consider, focused on something we can pass, namely Brownfields. With certain federal protections in place along with state voluntary programs, we can work to put abandoned or underused, contaminated industrial and commercial sites back into use. This not only spurs economic development but avoids development of "greenfields," or pristine, open spaces. In fact, Long Branch, New Jersey, my home town, has received a $200,000 grant to participate in a pilot project that is part of EPA's Brownfields Initiative. This Initiative has already resulted in the assessment of 398 brownfields properties, cleanup of 71 properties and redevelopment of 38 properties.

In addition, I remain pleased with the direction of progress that EPA is making in the Superfund program, particularly in New Jersey and in my district. To try to enact major reforms at this time could delay this progress. If anything, we need to ensure that our federal program remains strong, that the burden of site cleanups remains with the polluter (the Potentially Responsible Party), that we avoid corporate carve-outs, and ensure communities', and particularly children's, protection and right-to-know. I believe that we should have a separate hearing on the right-to-know issue. This issue has been completely left out of the Boehlert bill and the current debate.

In the meantime, we should act to pass sound Brownfields legislation now. The Democrats' bill, H.R. 1750, is endorsed by President Clinton. And, the National Association of Attorneys General support the strengthening of state voluntary cleanup and brownfields redevelopment programs. Yet, they oppose parts of H.R. 1300 because Potentially Responsible Parties would be able to avoid enforcement or listing too easily under the bill. Many state officials have informed me and other Congressmembers that the federal framework, with its liability and enforcement mechanisms, provide important incentives for private entities to voluntarily clean up state sites.

We must uphold the "imminent and substantial endangerment" standard that exists in current federal and state statutes as well as in Memoranda of Agreement between 12 states and the U.S. Environmental Protection Agency (EPA) in their state voluntary cleanup programs. In fact, in my home state of New Jersey, the State Department of Environmental Protection may "...direct the discharger to clean up and remove...the discharge" "*whenever* any hazardous substance is discharged." A substantial threat of endangerment doesn't even need to be proven. It is important to maintain a federal safety net for "sites where state cleanups fail to adequately protect human health and the environment," as the Environmental Defense Fund points out in its testimony. And, the standard should be consistent with federal enforcement authority to order cleanups under other federal statutes, including CERCLA, the Clean Air Act, Clean Water Act, and the Safe Drinking Water Act, as well as these Memoranda of Agreement. H.R. 1750 provides for such a safety net; the other bills under consideration today do not.

While current law may not adequately address targeted liability relief for qualified parties, we must again take care not to create exemptions that are too broad or that enable PRPs to avoid liability. In H.R. 1750, we have carefully defined and provided limited liability relief for innocent landowners, prospective purchasers, and contiguous property owners, but only for these categories. The Administration supports targeted liability relief for these parties. Other bills under consideration today include inadequate and/or overly broad exemptions for innocent landowners.

I urge my colleagues to join me in passing Brownfields legislation that contains provisions that enjoy widespread support and consensus. I urge full consideration and ultimate passage of H.R. 1750. Thank you, Mr. Chairman.

Mr. OXLEY. The Chair now recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. As we know, there seems to a breakthrough in Superfund with the Transportation Committee. While I applaud my colleague's work, I will fight vigorously to preserve the committee's jurisdiction.

With a move of this committee on brownfields and hopefully small business liability protection, I think we will start addressing some of the major concerns of Superfund that the general public understands. They understand that we ought to be able to clean up industrial sites and reuse them for industrial sites and protect liability of future users.

As my colleague from New Jersey said, we ought to hold the primary responsible parties responsible, but we should not hold the small restaurant owners for a million dollars' worth of cleanup costs, as we have seen in Quincy, Illinois.

I look forward to learning more about this entire issue and hopefully moving legislation sometime in this Congress. I appreciate the opportunity to work on this, Mr. Chairman and I yield back the balance of my time.

Mr. OXLEY. The gentleman yields back.

The gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you. As we all know, the Superfund program has been successful in helping to make our environment cleaner in many communities across the country. Michigan has 82 sites on the Superfund national priority list and over 60 percent have effectively completed all necessary construction activity.

By the end of this Congress, approximately 3 of every 4 Superfund sites in Michigan will be completed. In addition, EPA has performed over 150 cleanup actions at Michigan sites that are not on the Superfund list under its removal program. The overall program has made incredible progress, but we should not overlook the opportunity to make targeted changes to enhance and facilitate brownfields cleanup.

The ranking member of this subcommittee has introduced legislation of which I am cosponsor, H.R. 1750. H.R. 1750 addresses many of the same Superfund liability issues which I have worked on in the past. In the last Congress I introduced legislation, along with several Republican colleagues, to provide liability protection for innocent landowners and bona fide prospective purchasers. We have had a bipartisan consensus on these issues for many years, and yet each Congress we are faced with the same debate.

It is time that we move targeted brownfields legislation forward, without getting tied up in the other contentious Superfund issues. But it is also important that any new legislation not construct additional obstacles to protecting health and welfare of our communities over the long term. For example, the use of new statutory language in H.R. 2580 raises serious protection questions. This legislation may unreasonably limit the ability of Federal Superfund enforcement authorities to take action against a responsible party only when the response action is, and I quote, "immediately required to prevent or mitigate a public health emergency and for which the State is not responding in a timely manner."

Twelve States, including Michigan, currently have memorandum of agreement with the EPA regarding their voluntary cleanup programs. However, these agreements use the standard imminent and substantial endangerment language which is found in all Federal environmental laws and many State laws, including Michigan. If these changes were to become law, how would these State agreements be affected? The elimination of a widely recognized environmental standard should be of concern for both those who are concerned about new legislation and citizens who rely on a Federal safety net for protection of their health, safety and welfare.

Mr. Chairman, I look forward to the testimony and I welcome all of our witnesses today. Mr. Chairman, I will be going back and forth between another hearing, and I would ask unanimous consent to enter into the record the opening statement of my colleague, Mr. Hall, and that of Mr. Klink who is also at another Commerce Committee hearing.

Mr. OXLEY. Without objection all of the opening statements will be made a part of the record.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman from Pennsylvania, the sponsor of the aforementioned legislation.

Mr. GREENWOOD. Thank you, Mr. Chairman.

I would like to take this opportunity to thank Chairman Oxley for holding this hearing on my Land Recycling Act, as well as the Towns and the Boehlert bills. While I believe the legislation I have introduced represents a well-balanced approach to the brownfields issue, I still do look forward to continuing to work in a bipartisan manner toward overall reform of the Comprehensive Environmental Response Compensation and Liability Act, better known as Superfund. The Land Recycling Act represents an important first step toward that goal.

On July 21 I, along with a strong bipartisan group of cosponsors, introduced the Land Recycling Act of 1999. The act is intended to remove barriers to the cleanup of brownfields across the country. Accelerating these cleanup efforts will spur investments and pro-

vide tools for State and local governments to tackle this problem. These efforts will provide for more livable, secure neighborhoods. The blight on both urban and rural areas can be cleansed. My bill will bring about aggressive State reclamation and cleanup of brownfields, abandoned or underutilized former industrial properties where actual or potential environmental contamination hinders redevelopment or prevents it altogether. The U.S. Environmental Protection Agency estimates that there may be as many as 500,000 such sites nationwide.

In my Congressional district, the southern portion of Buck's County, Pennsylvania, we have 3 miles of abandoned or underutilized industrial property. Thus, these well-positioned, once productive industrial real estate sites pose continuing risks to human health and the environment, erode State and local tax bases, hinder job growth, and allow existing infrastructure to go to waste.

This subcommittee visited that portion of my district 3 years ago. The Land Recycling Act of 1999 will revitalize these sites and is based on the input of all of the stakeholders in the brownfields debate, the Federal Government, States, local governments, cleanup contractors, sellers, buyers, developers, lenders, environmentalists, community interests and others. And it is particularly based on my own experiences in my district.

Among other things, the bill provides finality for brownfields cleanup done pursuant to and in compliance with State programs releasing buyers and sellers from liability and litigation under Federal law. In today's testimony, the National Governors Association and the State and Territorial Waste Management Association officials testify that H.R. 2580 "satisfies the goal of clarifying which governmental entity is and should be responsible for deciding when a cleanup is complete, and when a party is released from liability."

H.R. 2580 will also provide liability protection under Federal law for a number of nonpolluters, including innocent landowners, prospective purchasers, contiguous landowners and response action contractors, thus removing disincentives to cleanup and reuse. In their May 12, 1999 testimony before the Subcommittee on Water and the Environment, the Honorable Mark Morial, the Mayor of New Orleans; the Honorable Michael Turner, Mayor of Dayton; and the Honorable Jim Marshall, Mayor of Macon, testified that, "it has been shown that Superfund's liability regime unfairly threatens innocent parties and too often drives private sector investors from brownfields to more pristine locations." and we recognize, they went on to say, that "this act helps fuel a development cycle that imposes increasing burdens on all of us."this legislation will streamline the Federal cleanup process and employ sound and objective science.

Finally the Land Recycling Act of 1999 will provide brownfields grants to States, local governments and Indian tribes with the inventory and assessment of brownfield sites and the capitalization of the revolving loan funds for cleanups.

I believe these straightforward solutions will provide an aggressive anecdote to the wasteful burden of brownfields in America, and are part of an overall set of solutions that we must pursue to reform the Nation's broken hazardous waste laws. While I am confident that the Land Recycling Act will go a very long way, we in

Congress have also a larger task at hand, over all of the Superfund program in its entirety, to ensure that we do not perpetuate the brownfields problem across the country.

The Land Recycling Act of 1999 is only a piece of the puzzle. I look forward to the chairman of the Commerce Committee, Mr. Bliley, and the chairman of this subcommittee, Mr. Oxley, for continued leadership on Superfund reform to address the areas that we can and must address.

Thank you for holding this hearing today. I look forward to continuing to work with the committee on this issue.

Mr. OXLEY. The gentleman's time has expired.

The Chair now recognizes the gentleman from Minnesota, Mr. Luther.

Mr. LUTHER. Thank you, Mr. Chairman. I thank you very much for holding the hearing today. This is an issue that I dealt with extensively in Minnesota as a member of the Minnesota legislature, but this will be an opportunity to be directly involved here at the Federal level. And being a new member of this subcommittee, I am very much looking forward to the testimony. Thank you very much.

Mr. OXLEY. Thank you.

The Chair now recognizes the gentleman from New York, Mr. Lazio.

Mr. LAZIO. Thank you, Mr. Chairman. I just want to add my voice of compliments both to you for holding the hearing and to Mr. Greenwood and Mr. Towns and Mr. Boehlert for their work on Superfund reform and on the brownfields issue.

I think the primary reason why we need to address this issue quickly and honestly is because it is a major opportunity for this committee to speak to urban policy and to redevelop areas that have the potential to be areas that can create jobs and be economic magnets. And I think failure to act has the perverse impact of creating continued frustration for communities and continued disinvestments in some of the communities that most need investment. I think this is a great opportunity for this committee to be speaking to an issue that is important to the environment and quality of life of Americans, but, more importantly, speaks very much to the economic quality of life of some of our urban areas. I thank you for your concern in holding the hearings.

Mr. OXLEY. The Chair now recognizes the gentlewoman from Colorado, Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman. I am gratified this committee is addressing a variety of bills that deal with brownfields specifically. When I was elected to Congress I was a little mystified why we didn't pass brownfields legislation, since everybody loves it, particularly the environmentalists in my district and the business communities in my district. I was dismayed to find that the reason, apparently, we had not passed brownfields legislation was that it was all tied up in a ball with Superfund reauthorization and some really knotty Superfund issues like liability.

I have maintained that we need to look at Superfund reform, but we need to pass meaningful brownfields legislation as quickly as possible because it can be helpful not just in urban areas like my district, but also in suburban and rural areas around the country.

Areas that, luckily for the landowners don't warrant Superfund listing, but do need some kind of cleanup, and, frankly, areas where the property owners are often scared to undertake any cleanup because they are afraid of government enforcement actions.

This is an area I have worked on for a long time, as you may know. When I was in the Colorado legislature in the mid-1990's I was the chief sponsor of the Colorado State Voluntary Cleanup Act, which was one of the very first laws in the country that a State passed to do brownfields-type legislation on a State level. I learned a lot through sponsoring that legislation and, frankly, Colorado has learned a lot ever since that was sponsored. We have now had over 70 applications under that State law for redevelopment and cleanup of property in Colorado. This is true even though we don't have Federal legislation providing liability relief, as is contemplated in at least two of these bills.

People still think that it is worthwhile. The State has entered into an agreement with the EPA, for example, that they will hold off on any kind of EPA action while the State voluntary redevelopment and cleanup plan is being executed; and that has been really, really successful for a number of property owners.

When I introduced the legislation in Colorado, I tried to give more incentives to clean up these sites, other than the State restraining itself from any kind of enforcement action. I tried to give tax relief, and I learned that it was unconstitutional under the Colorado Constitution. I tried to do other things and they didn't work, so I felt like we were sort of giving minor relief to these property owners, but they felt that it was a big step out from under government regulation and it has been tremendously successful.

I think this experience gives us some clue as to what we should do in terms of liability relief for bona fide purchasers. I do believe that we should give some liability relief for bona fide purchasers of contaminated properties, for innocent landowners, and for contiguous property owners. And I also support the establishment by some States of voluntary cleanup programs to address sites that don't warrant Federal protection to protect human health and environment. But I am concerned about language that will preclude Federal, State or local governments from taking action at any time after the cleanup is started or completed, especially if new conditions or contamination is found.

And so as these bills go through the process, I look forward to talking with Mr. Greenwood and others about how we can protect the health and the rights of property owners around this property to make sure we give appropriate incentives for cleanup, to make sure that we give appropriate liability protection, but at the same time that we protect the public health from unseen contamination that may crop up during a cleanup.

I look forward to the testimony today. I look forward to hearing how the Federal statute will interact with State statutes. With that, Mr. Chairman, I yield back the balance of my time.

Mr. OXLEY. The gentlewoman yields back.

The gentleman from Illinois, Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman. I am delighted that the committee is holding this very important hearing on select Super-

fund reforms. I believe we should not go into the summer recess without addressing the issue of Superfund, especially as it relates to brownfields.

In my congressional district in Chicago, there are many abandoned areas which once were the source of thriving communities and thriving commerce. Mr. Chairman, there is one area in my district, the Engelwood area, that has the highest concentration of brownfields in the city. But it also has the highest concentration of those who don't own homes in my city, as provided by Fannie Mae, and I have a chart here. It has the lowest median household income, the lowest median home value. Also the lowest—a number of affordable housing in this area, which has the highest concentration of brownfields; the lowest owner-occupied housing units; the highest rental-occupied housing units.

So as you can see, brownfields has a direct impact on the economic worth and survival of communities throughout the Nation, especially in urban areas.

The cleanup of brownfields is not simply cleaning up abandoned areas. However, it is a significant part of the revitalization of blighted urban areas which can provide jobs and recreational opportunities to local residents.

I look forward to hearing the testimony by our distinguished panelists on this important issue of brownfields provisions as it relates to H.R. 2580, H.R. 1300 and H.R. 1750. As you know, these bills address a myriad of issues, including voluntary cleanup, availability of cleanup funds and liability of innocent parties. With that, Mr. Chairman, I yield back the balance of my time.

Mr. OXLEY. The Chair now recognizes the gentleman from Maryland, Mr. Ehrlich.

Mr. EHRLICH. Mr. Chairman, this is an important issue for an awful lot of members, particularly for me representing an area right outside the city of Baltimore. I look forward to working with the members of our subcommittee and the full committee in a bipartisan way to improve a very important piece of legislation. I yield back the balance of my time.

Mr. OXLEY. The gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman. Brownfields tend to be in closer, nearer the inner city areas, because they were the original industrial sites. As we turn the corner from the Industrial Age to the Information Age, many of these sites which were found to be undesirable in the 1950's and 1960's and 1970's because as the high-tech companies were beginning to expand, obviously these sites, the brownfields sites, were still being occupied. And so as a result, the high-tech firms in the fifties and sixties went out to the next beltway, out further. They would have preferred to be in nearer, but they were occupied.

As the sites have been left vacant by that industrial era type of development, we have a responsibility to make sure that they become reusable. If they were reusable, I think many of those corporations that leaped all of the way out would much prefer to be in closer to the universities and the inner city, as would many of the workers. That is, that they would desire to work and live in closer.

So the job that we have is to try to get to a commonsense, quick resolution of this issue. Unfortunately, under H.R. 1300 and H.R. 2580, a current owner who has made a site into a toxic cesspool could participate in a voluntary program, cleaning the surface but leaving an underground mess, cleaning one piece of a large area, and then would be free to walk away. No one, not the Federal Government, not the city or the neighbors, could intervene to make the polluter clean up the rest of the site.

Under H.R. 2580, even if the EPA thought there was an imminent and substantial endangerment to public health or welfare or the environment at an RCRA site, they could not do a thing. And requirements for Federal permits under other laws such as wetlands protection would be waived.

The voluntary State programs were never meant to replace the backstop of Federal action, and in many cases do not include full cleanup requirements.

Finally, H.R. 2580 also seems to seep outside the boundaries of what we usually call brownfields, to limit action on proposed Superfund national priority list sites. Unlike the other major brownfields bills, H.R. 2580 would prohibit Federal action at proposed Superfund sites, and it would require a Governor's concurrence before a proposed site could be designated a Superfund site, even if the contamination affects neighboring States, even if local governments or citizens propose the listing, even if the State itself caused the contamination and would be responsible for the cleanup.

We have a lot of work to do. These bills are a starting point, but they clearly are not the finishing point if we are to be effective in dealing with brownfields. Thank you, Mr. Chairman.

Mr. OXLEY. The Chair is pleased to recognize the ranking member of the full committee, Mr. Dingell.

Mr. DINGELL. First of all, Mr. Chairman, thank you for conducting this hearing on brownfields legislation. This is a subject important to me and most members of the subcommittee. In the Detroit metropolitan area alone, which is home to our country's industrial strength for over 100 years, brownfields cover tens of thousands of acres of lands once occupied by mighty manufacturing facilities and thriving communities.

Today many of these properties are abandoned by once prosperous owners. They have become an eyesore, a threat to the livelihood and health of the citizens in the area. This is the fourth Congress in which we have considered reauthorization to the Superfund statute. In each Congress, among our many disagreements, we have collectively, however, agreed that brownfield legislation is needed. We have gone so far as to agree even on legislative language to clarify the liabilities of lenders, bona fide prospective purchasers, and innocent landowners.

Lender liability relief was enacted into law because we achieved consensus among the stakeholders, the administration and members on both sides of the aisle.

By contrast, the many controversial provisions we have considered in the past Congress have never become close to becoming public law. They have held hostage consensus provisions such as prospective purchaser and innocent landowner relief. As many consensus provisions languish, some members of this body still wish

to tinker, thus sparking controversy where there was need for none.

As the committee with primary jurisdiction over Superfund, it is incumbent upon us to recognize that we have now an opportunity to do something that is meaningful, rather than to tilt at windmills and to fiddle around with Superfund, which has no prospect of enactment during this Congress. It should be noted that great success has been achieved despite an awful lot of trouble with Superfund. About three-quarters of all Superfund sites in Michigan will shortly be completed. A higher percentage of sites in other States have already been completed.

As you know, Mr. Chairman, I have been a frequent critic of Superfund and the program and its administration. Our oversight efforts in the 1980's emptied some people from the EPA and, I would hope, taught the Agency some lasting lessons. At a time when Superfund lawyers have now moved on to other specialties, we do not want to give them reason to flock back to the Superfund practice once again. But some of the legislation that we consider today will create just that incentive by introducing new and vague terms, and repealing well-settled law for no reason that I think makes good sense.

I am pleased to report that brownfields development is occurring as local governments, developers and citizens are finding creative ways to build their own consensus and to rebuild our communities. In Taylor, Michigan, an abandoned eyesore will be replaced by a $9.8 million retail complex that will create 150 jobs. City officials plan to clean up another contaminated site and create 250 jobs, 70 percent of which will be full-time. The city of Monroe is one of the leading communities in redeveloping brownfields properties.

We can build upon this success, then, with carefully targeted consensus legislation. The administration must be a part of this. Of the three bills today, only H.R. 1750 has been endorsed by the President. The bill has 168 cosponsors. It also enjoys the support of mayors of numerous cities, including Mayor Dennis Archer of Detroit and Mayor Wellington Webb, the current president of the Conference of Mayors. The National Realty Committee which testified in Dearborn, Michigan on this subject, supports this bill. I note that the National Association of Counties, with a number of other government organizations, have endorsed H.R. 1750, and I hear that the Chamber of Commerce has suggested that it is important that we should move forward on brownfields and dispense with efforts with regard to Superfund.

I hope that we recognize from these facts that it is urgent for us to commence addressing the problem of brownfields, to abandon a failed tactic of trying to amend Superfund, proceed with that which is possible, achieve a great success in the public interest and move forward. And I thank you for recognizing me.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, I thank you for conducting this hearing on brownfields legislation. This subject is important to me, and to many of the Members of this Subcommittee. In the Detroit metropolitan area alone—home to much of our country's industrial strength for over 100 years—brownfields cover tens of thousands of acres of land

once occupied by mighty manufacturing facilities and thriving communities. Today, many of these properties are abandoned by their once-prosperous owners. They have become an eyesore and, in some instances, a threat to the livelihood and health of the citizens who live around them. This situation is not unique to the Detroit area, nor to urban areas generally.

This is the fourth Congress during which we have considered the reauthorization of the Superfund statute. In each Congress, among our numerous disagreements, we have collectively agreed that brownfields legislation is needed. We have gone so far as to agree on legislative language to clarify liability for lenders, bona fide prospective purchasers and innocent landowners. Lender liability relief was enacted into law because we achieved consensus among stakeholders and the Administration, and Members on both sides of the aisle. By contrast, the many controversial provisions we have considered in the past four Congresses have never come close to becoming public law—and they have held hostage consensus provisions such as prospective purchaser and innocent landowner relief. As these consensus provisions languish, some Members in this body cannot resist the temptation to tinker, thus sparking controversy where there was none.

As the Committee of primary jurisdiction over the Superfund statute, it is incumbent upon us to understand what needs to be done with this statute, and what does not. While we have wasted time trying to build a better mousetrap that effectively guts the Superfund program, the Superfund program itself has progressed substantially, particularly in the past six years. By the end of this Congress, cleanup construction at about three quarters of all the Superfund sites in Michigan will be completed. A higher percentage of sites already have been completed in many other states.

As you know, Mr. Chairman, I have been a frequent critic of the Superfund program. Our oversight efforts in the 1980s taught the Agency some lasting lessons. At a time when Superfund lawyers have moved on to other specialties, we do not want to give them reason to flock to the Superfund practice once again. But, some of the legislation we will consider today will create just that incentive by introducing new and vague terms, and repealing well-settled law, for no good reason.

I am pleased to report that brownfields redevelopment is occurring, as local governments, developers and citizens are finding creative ways to build their own consensus and to rebuild their communities. In Taylor, Michigan an abandoned eyesore will soon be replaced by a $9.8 million retail complex that will create 150 jobs. City officials plan to clean up another contaminated site and to create 250 jobs, 70 percent of which would be full-time. The city of Monroe also has been one of the leading communities in Michigan in redeveloping brownfields properties.

We can build upon this success with targeted, consensus legislation. The Administration must be part of this consensus. Of the three bills we will consider today, only H.R. 1750 has been endorsed by the President. The bill has 168 House cosponsors. It also enjoys the support of the mayors of numerous major cities, including Mayor Dennis Archer and Mayor Wellington Webb, the current President of the Conference of Mayors. The National Realty Committee, which testified in Dearborn, Michigan on this subject back in 1995, also supports this bill. I am also pleased to announce that the National Association of Counties along with a number of other local government organizations have endorsed H.R. 1750 and expressed their strong interest in legislatively ratifying EPA's current municipal settlement policy. I ask unanimous consent that the statements of these supporters of H.R. 1750, and others, be entered into the record.

We must stop holding our communities hostage to the inside-the-beltway poker game that uses brownfields provisions as the "sweetened" for bills containing controversial provisions sought only by the special interests that have not yet met their responsibilities to clean up their mess. The good people outside the beltway deserve better. This Committee, having overseen the implementation of this program since its beginning, is in the best position to identify the areas of agreement and to provide the states and local governments with needed additional tools to strengthen their communities. Mr. Chairman, I thank you again for holding this hearing.

Mr. OXLEY. The gentleman's time has expired.

The Chair would note that there are two votes on the House floor and it would be my desire to recess at this time and return in approximately 20 minutes. The subcommittee stands in recess for 20 minutes.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. VITO FOSSELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

First of all, I'd like to thank the Chairman for having a hearing on such an important and timely issue. Legislation to Improve the Comprehensive Environmental Response, Compensation and Liability Act is much needed. Brownfields are generally accepted to be abandoned or underutilized former industrial properties in which potential or real environmental contamination hinders or prevents redevelopment reuse.

One issue of particular concern to me is that of liability. It makes no sense whatsoever to saddle new owners with liability for pollution they did not cause or create. One area of particular concern in my district is an area called Richmond Terrace. While it has so much property available to potentially develop, business owners are leery to buy the property for fear of being held liable for cleanup and damages and banks and insurance companies are leery of putting any financial backing behind potential investors. Even a GAO report from 1996 on Barriers to Brownfield Redevelopment affirmed this theory:

> Superfund's liability provisions make brownfields more difficult to redevelop, in part, because of the unwillingness of lenders, developers, and property owners to invest in a redevelopment project that could leave them liable for cleanup costs. While brownfields usually are not contaminated seriously enough to become Superfund sites, these parties, still fear that they could be sued for cleanup costs if they become involved with a contaminated site. For example, as a result of the liability problem and the general riskiness of investing in redeveloping brownfields, banks sometimes refuse to lend funds for this purpose. United States General Accounting Office Report to Congressional Requesters, RCED-96-125, *Barriers to Brownfield Redevelopment,* June 1996, Page 2.

In addition, I believe the States should be responsible for overseeing the redevelopment of Brownfields sites and that if a State registers a Voluntary Cleanup Program with the Federal Government, those Brownfields sites should be free of the risk of being looked at by the EPA. As it stands now, businesses, municipalities and potential landowners are fearful of the EPA second guessing the judgments of states and having to face potential insurmountable problems down the road.

I quote again from that same GAO report:

> Although most brownfields are no highly contaminated, cities, lenders, and developers cite the possibility that the liability provisions in CERCLA could be applied to these properties as a major barrier to redeveloping them. United States General Accounting Office Report to Congressional Requesters, RCED-96-125, *Barriers to Brownfield Redevelopment,* June 1996, Page 3.

I strongly believe that we must all work together to foster the redevelopment of Brownfields sites and help small businesses and others utilize these properties and therefore make them once again viable community areas as well as economically productive. Businesses, the financial industry, government and environmentalists have an excellent opportunity to work together to give these properties new leases on life. We all need to strike a balance that safeguards the environment and guarantees that these sites are cleaned up thoroughly, and yet also provides businesses with protection to take them over.

I look forward to working with the Chairman and the rest of the Committee Members on this issue that is not only important to Staten Island and Brooklyn, but to New York City, New York, and every community around the country.

PREPARED STATEMENT OF HON. RALPH M. HALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Mr. Chairman for calling this hearing today. I think it is important that we take this opportunity to closely examine the strengths as well as the possible weaknesses in each of these three bills that address the problems currently associated with clean-up at Brownfields sites. While voluntary actions seem to have worked quite well in my home state of Texas, we have heard a great deal of criticism from other areas of the country where they have not been so fortunate, and the regulations seem to have hindered more than promoted the goal of clean-up and redevelopment.

I am a cosponsor of two of these bills, H.R. 2580, introduced by Representative Greenwood, and H.R. 1750, introduced by Representative Towns. I think all reasonable minds agree that we should encourage property owners and developers to take necessary actions to convert these properties into usable and productive resources for the community. I think all reasonable minds can also agree that currently their is a serious legal and political disincentive for property owners and developers to

initiate appropriate clean-up actions. While these three bills provide for varying degrees of autonomy to property owners in making certain clean-up decisions, they all recognize the fact that if clean-up and redevelopment are to be accomplished, we must move away from the philosophy that erects obstacles and undeserved penalties toward a philosophy that promotes incentives for responsible action.

I think the Brownfields issue really symbolizes the overall inequity that can be so easily perpetrated through unfair regulatory policies that seek to simply catch "the unlucky ones" in a trap. I think instead we must make a more honest effort to attribute responsibility where it is actually due. And when that is not possible, we must provide incentives rather than penalties to the innocent landowners and bonafide purchasers who simply find themselves in the wrong place at the wrong time.

We know that many of these sites serve as major sources of blight and as symbols of hopelessness in urban areas where almost any kind of economic development would be embraced enthusiastically by the residents of those communities. We have a responsibility to encourage rather than penalize those people who would seek to make this kind of redevelopment a possibility. For these reasons I look forward to working in a bipartisan fashion, and where appropriate in concert with our colleagues on the Transportation and Infrastructure Committee, towards the goal of marking up a bill that contains Brownfields provisions that will promote clean-up and redevelopment, at these sites where people have hesitated to act in the past due to unfair, punitive and outdated regulatory structures. Mr. Chairman, I thank you again for scheduling this hearing, and I yield back the balance of my time.

PREPARED STATEMENT OF HON. RON KLINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

I want to thank Subcommittee Chairman Michael Oxley, and Ranking Member Edolphus Towns, for holding this hearing today. It is my hope that the Committee will mark up a brownfields bill during this first session of Congress, and that the provisions of H.R. 1750, the "Community Revitalization and Brownfields Cleanup Act of 1999," will be incorporated into any brownfields bill the Committee sends to the House Floor. I was pleased to be an original co-sponsor of H.R. 1750, which was introduced by Ranking Member Towns, Congressman Robert Borski of the 3rd District of Pennsylvania, and Congressman John Dingell, Ranking Democratic Member of the Committee on Commerce.

The issue of brownfields cleanup is important in all 50 states, and certainly in Pennsylvania, which has a history of heavy industrial production. Pennsylvania is working to revitalize industry while taking a leading role in high tech and medical research. I am pleased that all Democrats in the Pennsylvania congressional delegation have cosponsored H.R. 1750.

I deeply appreciate the endorsements of H.R. 1750 from key government officials in Pennsylvania. We have received endorsement letters from Mayor Ed Rendell of Philadelphia, Mayor Tom Murphy of Pittsburgh, and from several communities in my District, the 4th of Pennsylvania: Mayor James Mansueti of the City of Aliquippa, Mayor William DeMao of the City of Arnold, Mayor Gilmore Hendrickson of the Borough of Brackeridge, City Clerk Ronald Dinsmore of the City of Jeannette, Mayor Dennis Kowalski of the City of Lower Burrell, Mayor William Shovlin of the Borough of Midland, Mayor Timothy Fulkerson of the City of New Castle, Mayor Patrick Petit of the City of New Kensington, and Mayor Matthew Cucinelli of the Borough of Rochester.

These government officials recognize that when brownfields are cleaned up, new businesses come in, jobs are created and the tax base is stimulated. The provisions of H.R. 1750 provide the best chance for this to happen. Under H.R. 1750, brownfield sites may include associated rivers, streams, lakes and mine-scarred land. This is beneficial to Pennsylvania, with its history of coal mining.

I respect the fairness of Chairman Oxley in allowing three bills, with differing viewpoints about brownfields clean up, to be considered at this hearing today: H.R. 1750, which I support, H.R. 2580 introduced by my Committee colleague from Pennsylvania, Jim Greenwood, and H.R. 1300, introduced by Sherwood Boehlert of New York. While I respect the efforts and hard work of my colleagues Jim Greenwood and Sherwood Boehlert, I differ with the provisions of their bills.

Regarding funding, we must recognize that sometimes local governments cannot afford to clean up brownfields and need financial support. H.R. 1750 is the best bill providing federal financial assistance. The authorization provisions of H.R. 1750 are clearly stated.

In order to clean up brownfields, the sites must be assessed to determine the type of contamination, and the level of contamination. H.R. 1750 authorizes $35 million a year from general revenues, for five years, for grants to local governments for site assessment. From these funds, local governments can receive a maximum grant of $500,000 a year, and the local officials oversee the work.

In contrast, both H.R. 1300 and H.R. 2580 cap site assessment grants at $200,000.

In order to capitalize local government revolving loan funds to clean up brownfields properties, H.R. 1750 authorizes $65 million a year from general revenues, for five years. From these funds, local governments can receive $500,000 annually, with the Environmental Protection Agency (EPA) having discretion to increase the grant amount to $1,000,000 if significant economic and environmental benefits would be achieved.

In contrast, H.R. 2580 simply authorizes "such sums as may be necessary."

In order to assist states in developing their voluntary clean up program, where brownfield site owners or developers work cooperatively with the state, as opposed to an enforcement driven program, H.R. 1750 authorizes $15 million a year from general revenues, for five years, for the voluntary clean up program.

In contrast, H.R. 2580 does not authorize funding for voluntary clean up programs.

Regarding liability, H.R. provides liability protection for any person at a brownfields site if the site is undergoing cleanup in a state cleanup program (including a voluntary cleanup program) as long as the program meets basic criteria such as protection of human health and the environment, adequate state oversight, and adequate certification indicating that the cleanup is complete.

In contrast, H.R. 1300 has no qualifying criteria for state cleanup programs.

These are a few instances of the differences that I hope we can iron out in a markup. However, in this statement, I would rather focus on the positive role that brownfields programs play in revitalizing blight, thereby protecting our rapidly disappearing green fields—those green spaces around our cities.

In Pittsburgh, Pennsylvania, we had a case we call "slag to riches." Along the riverfront what used to be 240 acres of land that was considered unusable, because it was a former dumping area for industrial slag, will now be valuable residential property with picturesque views. This is known as Nine Mile Run.

Total private investment in Nine Mile Run is expected to exceed $200 million, which will be used to develop 713 new housing units, 100,000 square feet of new neighborhood commercial retail space, and 80 acres of park land. By the time of the projects's completion, more than $240 million of new housing stock, $10 million in new retail construction and 1,680 temporary and permanent jobs are anticipated. All of this came from revitalizing the abandoned Lectromelt Electroplating plant. The City of Pittsburgh received a $200,000 grant from the federal government to begin site assessment.

However, if H.R. 1750 had been enacted into law, when the Nine Mile Run grant was awarded, the "Slag to Riches" case could have received a $500,000 grant for site assessment, allowing this procedure to begin earlier.

There are other brownfields success stories in Duquesne, McKeesport and Clairton, Pennsylvania, communities which were once the heart of the nation's iron, steel, coke, chemical, glass and electrical manufacturing industries, which experienced traumatic collapses beginning in the late 1970s and extending through the 1980s. This hurt smaller commercial businesses and ruined the communities' prosperity.

The Steel Valley Authority listed 52 brownfields sites in the southwestern Pennsylvania area totaling 1,420 acres. The solid funding provisions of H.R. 1750 are a key aspect in helping to build momentum toward economic development for the entire Monongehela Valley.

In addition, in a survey published in April of 1999 by the U.S. Conference of Mayors, the Mayors of 153 cities across the nation estimated that if brownfields were cleaned up and redeveloped, a conservative estimate of potential tax revenues would total $955 million annually.

In the survey, Mayors from many Pennsylvania cities—Bethlehem, Erie, our Capitol City of Harrisburg, Lancaster, McKeesport, Norristown, Philadelphia, and York responded that a sum total of 38,875 jobs could be created for brownfields redevelopment in their communities.

In summary, H.R. 1750 is the best bill to meet the economic redevelopment potential in states like Pennsylvania, which have been hard hit with dying industries. Not only does H.R. 1750 provide grants to local governments, as well as to site owners and developers, but it authorizes the EPA to provide technical assistance and

training to individuals and organizations to inventory brownfield sites and conduct site assessments or cleanups.

A key feature of H.R. 1750 is that the funds are taken from General Revenues, rather than the Superfund Trust Fund, allowing the Superfund Trust Fund to be used for National Priority Listing sites.

Because H.R. 1750 focuses strictly on brownfields, rather than the all-encompassing Superfund program, it has a much better chance to be enacted, because Superfund reauthorization has been a divisive issue, especially when it comes to reinstating the Superfund taxes, as would be done under the provisions of H.R. 1300.

I fervently hope we can hammer out a bipartisan brownfields bill including the good, solid provisions of H.R. 1750 in the areas of grants, and liability protections for prospective purchasers, innocent landowners, and contiguous property owners, while protecting the environment. H.R. 1750 is the most common-sense brownfields bill, providing the financial assistance and liability protections communities need in order to redevelop brownfields. Thank You.

Mr. OXLEY. The subcommittee will reconvene.

Having completed our opening statements from the members, I now turn to our first panel. Let me invite an old friend and a frequent visitor here, Mr. Tim Fields, Assistant Administrator of the Office of Solid Waste and Emergency Response with the U.S. Environmental Protection Agency.

Mr. Fields, welcome.

Mr. FIELDS. And Lois Schiffer will be joining me.

Mr. OXLEY. Ms. Lois Schiffer from the Justice Department as well.

We are pleased to have you back, Mr. Fields, and you may begin, and don't be too concerned about the 5-minute rule.

STATEMENTS OF HON. TIMOTHY FIELDS, JR., ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY; ACCOMPANIED BY LOIS SCHIFFER, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. FIELDS. I will be very brief, Mr. Congressman. Mr. Chairman, thank you for the time to be here to speak before this subcommittee. I am pleased to be here to offer comments on the three pending bills before this subcommittee, H.R. 1750, H.R. 2580 and H.R. 1300. I appreciate your leadership in having this hearing on the very important topic of brownfields assessment, cleanup, redevelopment.

I am accompanied today by Assistant Attorney General Lois Schiffer, who will be available with me to respond to questions after this testimony.

The administration believes that environmental protection and economic redevelopment can complement one another. We are pleased to see that members of the committee from both sides of the aisle are interested in enacting responsible brownfields legislation. The Clinton administration continues its support for the enactment of responsible brownfields legislation, and EPA Administrator Carol Browner has testified before both the House and the Senate earlier this year in support of legislation that would promote brownfields cleanup and redevelopment through Federal grants and loans, which encourage private sector investment by providing appropriate liability protection to prospective purchasers and contiguous property owners, and would clarify liability protection for innocent landowners.

An enormous amount of bipartisan support has been generated for these brownfields provisions, and I am confident that the President would sign legislation like H.R. 1750.

The administration did not wait for Congress to enact brownfields legislation, however, to implement administrative reforms to encourage brownfields redevelopment. In 1995, EPA announced our brownfields action agenda, which has provided local communities with brownfields assessment grants. It has clarified liability issues. It has encouraged workforce development and job creation. It has provided brownfields cleanup revolving loan funds to communities across the country.

To date, we have awarded more than 300 brownfields assessment grants and 68 revolving loan fund grants for cleanup. We have changed policies for prospective purchasers, innocent landowners, and contiguous property owners. We have created more than 3,000 jobs and allowed private and public sector investment of more than $1.4 billion through based on EPA's investment of roughly $100 million.

EPA and the Department of Justice are committed to removing the barriers to brownfields cleanup and redevelopment. That is why we have worked together on effective policy changes that clarify liability under the current statute.

For example, more than 110 prospective purchaser agreements have been negotiated, resulting in the purchase of more than 1,500 acres of contaminated property and the redevelopment of much more property. We have signed memoranda of agreement with 12 States. Seven more memoranda of agreement under development, like the ones Congresswoman DeGette referred to earlier.

Mr. Chairman, I would hate to see the progress under that brownfields agenda inhibited or curtailed by well-intentioned but ill-conceived legislative proposals. We believe that we should not inappropriately limit Federal response and enforcement authorities or provide broad liability exemptions to owners of contaminated property. We believe that the legislation should not limit EPA's ability to list Superfund sites on the national list, where appropriate.

The administration opposes H.R. 2580 and H.R. 1300 as currently crafted. Both bills go much too far in limiting Federal response and enforcement authorities at non-NPL sites. The American people have come to depend on a nationally consistent public health and environmental safety net provided by Federal environmental laws. Superfund is no different. The Superfund program and State cleanup programs work together hand in hand to clean up waste sites. They are not mutually exclusive.

We sincerely appreciate the leadership of Congressman Greenwood on brownfields legislation. We congratulated him as he celebrated the completion of Superfund site number 600 in his district.

However, we are concerned about elements of H.R. 2580 that we believe would prevent EPA and citizens from using our imminent and substantial endangerment authority to protect public health and the environment from serious risk. H.R. 2580, we believe, would also limit the Federal Government's authority at sites that are proposed for Superfund listing. Coupled with the mandatory Governor's concurrence requirement for NPL listings, H.R. 2580

provides an extremely narrow set of circumstances under which EPA can come back in, even if it is needed, to protect public health and the environment.

H.R. 2580 provides very minimal criteria for a State response program, which we believe is inadequate. There are no State program requirements for public participation or adequacy of cleanup. H.R. 2580 eliminates the requirement to obtain Federal permits and permit revisions, even when the Federal Government is responsible for overseeing the permit.

The liability provisions in the bill, we believe, are better. With some modification they could made acceptable, but we are concerned about the restrictions on Federal enforcement and response capability.

Regarding H.R. 1300, we are concerned with the liability provisions. These provisions allow current owners that purchase property with the knowledge of contamination to avoid liability. This is inconsistent with long-standing principles of common law and creates significant fiscal consequences for the trust fund.

Like H.R. 2580, H.R. 1300 would take away the Federal Government's ability to use the imminent and substantial endangerment standard as a mechanism for protecting public health and the environment. H.R. 1300 has no minimum, qualifying criteria for a State response or voluntary cleanup program.

Mr. Chairman, we believe we can work together to pass a bill that encourages people to redevelop brownfields properties by codifying responsible prospective purchaser liability protection, contiguous property owner protection and innocent landowner clarification, as well as other elements of an effective brownfields program. The administration believes that Congressman Towns' bill, H.R. 1750, has all the necessary elements of brownfields legislation that can generate a broad consensus among a variety of local, State, and private sector stake holders. We remain committed to working with members of this committee and with Congress to enact brownfields legislation that can be signed into law.

In H.R. 1750, funding is provided for State response programs and brownfields grants are provided for assessment and for cleanup revolving loan funds. In H.R. 1750, prospective purchasers, innocent landowners and contiguous property owners are provided with appropriate liability protections. Under H.R. 1750, crucial environmental safeguards for communities are provided by ensuring the EPA has the authority to protect human health and the environment, where appropriate.

Mr. Chairman, we believe that brownfields legislation can be enacted that the President can sign. We believe that these three bills, if modified pursuant to the administration's comments today, would be bills and legislation that we could live with. But right now, we believe H.R. 1750 is the only one that currently meets the minimal criteria that the administration would need.

Thank you, Mr. Chairman, for your time. Assistant Attorney General Schiffer and I will be pleased to answer any questions you and members of the subcommittee may have. Thank you very much.

[The prepared statement of Hon. Timothy Fields, Jr. follows:]

PREPARED STATEMENT OF HON. TIMOTHY FIELDS, JR., ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good morning, Mr. Chairman, and Members of the Committee. I am pleased to have this opportunity to appear before you today to: 1) share with you the substantial accomplishments EPA has achieved since the inception of the Brownfields Economic Redevelopment Initiative in 1995; and 2) address the legislative proposals now before this Committee and the U.S. House of Representatives: H.R. 1300, H.R. 2580 and H.R. 1750.

BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE

Through the Initiative, EPA continues to promote redevelopment of abandoned and contaminated properties across the country that were once used for industrial and commercial purposes ("brownfields"). While the full extent of the brownfields problem is unknown, the United States General Accounting Office (GAO\RCED-95-172, June 1995) estimates that approximately 450,000 brownfield sites exist in the United States. Virtually every community in the country, no matter what the size, is grappling with the challenge of problems associated with recycling older, mostly industrial properties. The presence of these properties fuels urban sprawl, luring investment and job development farther from city centers and inner suburbs.

The Administration believes that environmental protection and economic progress are inextricably linked. The Brownfields Initiative seeks to bring all parties to the table—and to provide a framework for them to seek common ground on a whole range of challenges: environmental, economic, legal and financial. As the former Director of the Portland Oregon Brownfields Initiative said, "brownfields renewal is one of the most important environmental and economic challenges facing our nation's communities, calling for partnership among our federal and local governments, businesses and community and environmental leaders. We must work together to build a national brownfields partnership from the ground up." The Agency's multifaceted initiative represents a significant step forward by the Administration and, according to Renew America, represents "a new paradigm in locally-based environmental protection that forges public-private partnerships, promotes innovation, and relies on market incentives and private sector actions."

The initial Brownfields Action Agenda announced on January 25, 1995, focused on the award of Brownfields Assessment Demonstration Pilots; building partnerships to all brownfields stakeholders; clarifying liability and cleanup issues; and, fostering local workforce development and job training initiatives. By mid-1996, EPA completed all of its commitments on the initial Action Agenda and continues to move forward. Let me briefly describe what we have done in the last four years.

Brownfields Assessment Demonstration Pilots

The Brownfields Assessment Pilots have formed a major component of the Brownfields Initiative since its beginning. To date, EPA has selected 307 pilots in states, communities and tribes, funded at up to $200,000 each. These two-year pilots are intended to generate further interest in Brownfields redevelopment across the country. Many different communities are participating, ranging from small towns to large cities. In charting their own course toward revitalization, we are seeing many positive results. The assessment pilot effort combined with our targeted state and EPA site assessment efforts has resulted in the assessment of 845 brownfields properties. Our assessment pilots have reported the related cleanup of 91 properties, and determined that more than 574 properties do not need additional cleanup. This has led to known redevelopment of 51 properties. The assessment pilots have provided information that they have leveraged more than $1.4 billion in redevelopment funds and have been the catalyst for support for more than 3,000 jobs as a result of the EPA program.

Chosen through a competitive process, these pilots are helping communities articulate a reuse strategy that demonstrates model opportunities to organize public and private sector support, and leverage financing, while actively demonstrating the economic and environmental benefits of reclaiming brownfield contaminated sites. The Brownfield pilots enable recipients to take a unified approach to site assessment, environmental cleanup, and redevelopment, an approach that stimulates economic activity and the creation of jobs.

Stakeholders tell the Agency that many Brownfields redevelopment activities could not have occurred in the absence of EPA efforts. For example:

- On an abandoned, four-acre railroad site, the city of Emeryville, CA. and a development corporation are planning to construct 200 units of residential housing. Approximately 100 construction workers have already been hired to build these housing units. Within the next five years, construction of retail, hotel and office complexes is expected to create as many as 10,600 jobs and nearly 4 million square feet of new facilities, and provide an additional $6.4 million in annual property tax revenues.
- In Shreveport, LA., as a result of $1.3 million in cleanup and redevelopment funding, the former HICA steel foundry and upgrade company has been upgraded and renovated into the new HICA Steel Castings, LLC, with owners committed to running an environmentally safe operation in the Cedar Grove neighborhood of the city.
- In Birmingham, Alabama, efforts are underway to transform a run-down industrial area into a 150-acre industrial park, with 75 acres reserved for heavy industry, a 50-acre distribution center, a business park, and a full-scale retail center. Work on the distribution center is already underway, and by the project's completion, more than 2 million square feet of industrial and commercial facilities could be in place. Planners believe that ultimately the area will see the creation of more than 2,000 jobs.

Brownfields Cleanup Revolving Loan Fund Pilots

EPA is building on its experience with the assessment pilots through a "second stage" brownfields pilot award. These pilots, called Brownfields Cleanup Revolving Loan Fund (BCRLF) pilots, enable communities and coalitions of communities to fundthe safe cleanup and sustainable reuse of brownfields through revolving loan funds that EPA helps to capitalize. Again, EPA's goal through these pilots is to develop revolving loan fund models in communities across the nation that can be used to promote coordinated public and private partnerships for the cleanup and reuse brownfields.

In fiscal year 1997, EPA's used $10 million of its brownfields budget for the award of BCRLF pilots at up to $350,000 each. Twenty-three pilots are now in various stages of development. These early pilots have been the Agency's pioneers of the program, and many are expected to make their first loans soon.

As a result of our early experience with the BCRLF pilots, the Agency has determined that recipient of the most recent pilots would benefit from an increased capitalization of $500,000 each. Representing more than 60 communities as single pilot communities or as coalitions of states and communities, forty-five (45) new BCRLF pilots were announced just this past May. In ten of the new pilots, states like Massachusetts, Illinois, Arizona and California will assist cities in carrying out a variety of activities under the BCRLF. We were extremely pleased to see in their applications an increased level of understanding of program parameters and needs and a sophistication in infrastructure planning. We are confident that the program has caught hold and can move forward to make loans for brownfields cleanups.

Job Training and Development Pilots

EPA initiated a third brownfields demonstration pilot program in 1998 to help local citizens take advantage of new jobs created by assessment and cleanup of brownfields. The Job Training and Development Demonstration Pilot program provides two-year grants of up to $200,000 to applicants located within or near one of the existing assessment pilot communities. Colleges, universities, non-profit training centers, and community job training organizations, as well as states, Tribes and communities, were eligible to apply. Today, 21 job training pilots are in place. The first 11 were awarded last year, and the most recent 10 pilot awards were announced in May.

The goal of these unique pilots is to facilitate cleanup of brownfields sites and prepare trainees for future employment in the environmental field. The pilot projects must prepare trainees in activities that can be usefully applied to cleanup employing an alternative or innovative technology. Among the projects proposed in the first round of pilots, the Jobs for Youth-Boston Brownfields Job Training and Development Pilot, awarded in September, 1998, has already graduated fifteen (15) trainees from a 17-week training program designed to prepare graduates to work as environmental field and lab technicians, hazardous materials handlers and emergency response technicians. Half of the trainees (8) have obtained jobs, and the remainder are currently interviewing for employment. In Clearwater, Florida, Career Options, Inc., awarded a Brownfields Job Training and Development Pilot in September, 1998, graduated 11 trainees from its first class on May 20, 1999.

Brownfields Partnerships Build Future Solutions

The Brownfields Initiative is clearly about partnerships—with other Federal, State, and local agencies, and a diverse array of stakeholders. The EPA has undertaken partnership efforts with individual States as well as through broad organizational structures like the National Association of Development Organizations (NADO), the National Governors Association (NGA), the National Association of Local Government Environmental Professionals (NALGEP), the Conference on Urban Economic Development (CUED) and the U.S. Chamber of Commerce. EPA also forged working relationships with a vast spectrum of other stakeholders, including the Environmental Bankers Association, the Irvine Foundation's Center for Land Recycling, the International City/County Management Association (ICMA), to mention but a few.

EPA continues to work closely with States and Indian Tribes as key partners in the cleanup and redevelopment of contaminated properties. The Administration supports the continued growth of the State and Tribal regulated and voluntary programs which have greatly expanded the number of sites cleaned up to protect human health and the environment. To date, 44 States have established voluntary cleanup programs. Recognizing the important role that State environmental agencies have in encouraging economic redevelopment of brownfields, EPA has provided $28.6 million in funding to States and Tribes to support the development of these programs since FY 1997. EPA has proposed to continue to provide $10 million, in FY00, to encourage the development or enhancement of State programs that encourage private parties to voluntarily undertake early protective cleanups of less seriously contaminated sites, thus accelerating their cleanup and redevelopment. EPA is also pleased with the progress it has made in signing MOAs with States. Twelve States have now signed MOAs with EPA regarding sites to be cleaned up under voluntary cleanup programs. The most recent state to sign an MOA with EPA is Oklahoma in Region 6. Two additional MOAs are now close to signature.

Brownfields National Partnership

Early in the development of EPA's Brownfields Initiative, the Agency realized that it needed to find ways to further identify, strengthen, and improve commitments to brownfields, while continuing efforts toward a comprehensive, community-based approach to clean up and redevelop contaminated property. We recognized the important contribution of many of our Federal partners to brownfields through their participation in the Brownfields National Partnership. Through the partnership Federal departments and agencies can offer special technical, financial, and other assistance that can be of great benefit to brownfields communities. More than 20 national partners are committing resources and assistance to brownfields. The Federal Home Loan Bank System, for example, is exploring ways to bring more private investment to redeveloping brownfields properties and, along with the U.S. Conference of Mayors, has selected 50 cities to participate in a project to research opportunities, impediments, and successes by both cities and lenders to address brownfields.

Many of the commitments by our federal partners were expressed through initial Memoranda of Understanding (MOUs). EPA has signed MOUs with the Economic Development Administration of the Department of Commerce, the Departments of Labor, Housing and Urban Development, and Interior. EPA also is working with the Agency for Toxic Substances and Disease Registry and county health officials to address the health concerns of brownfields communities. Our partnership with HUD has been particularly beneficial for brownfields. The HUD Brownfields Economic Development Initiative (BEDI) grants program is providing $25 million this year in assistance to cities to redevelop contaminated industrial and commercial sites.

Showcase Communities

The Brownfields Showcase Communities project is an outgrowth of those early partnership efforts and now forms an important component of the Brownfields Initiative. It represents a multi-faceted partnership among federal agencies to demonstrate the benefits of coordinated and collaborative activity on brownfields in 16 Brownfields Showcase Communities. For example, through the Showcase Community in Glen Cove, New York, a revitalization plan to convert brownfields and Superfund sites into tourist destinations has been completed. State, Federal, and local agencies have played a crucial role in securing $18 million in grants from various agencies. In addition, a prospective purchaser agreement was signed between EPA and the Glen Cove Industrial Development Corporation for the Li Tungsten and Captain's Cove Superfund sites. Proceeds from selling the property will go toward repaying response costs.

The report, *Building A Brownfields Partnership from the Ground Up,* by the National Association of Local Government Environmental Professionals, (February 13, 1997), presented the views of a network of local government brownfields leaders on the value of EPA's brownfields programs and policies. The report calls local government leaders "a key link in the success of brownfields partnerships, for it is the environmental, health, development and political leaders in our cities, counties and towns who can best build a brownfields partnership 'from the ground up'". EPA has developed its brownfield capacity for outreach through each of its ten regions. Each region has a designated "Brownfields Coordinator" to assist and oversee the brownfields pilots and other actions under the Brownfields Initiative. We believe our Brownfields Coordinators are the most effective link to communities and form the linchpin of success under the Brownfields Initiative.

Brownfields Redevelopment and Environmental Justice

These partnerships and those that we will develop in the future represent new ways of doing business with communities. We are working hard to continue to improve communication and coordination among all stakeholders. In this regard, we are encouraged by the increasing linkage being made between brownfields redevelopment and environmental justice. EPA is working with the National Environmental Justice Advisory Council (NEJAC) to promote meaningful community involvement and environmental justice. This past June, EPA provided support for a program held in South Carolina by the Medical University of South Carolina. The conference, "Environmental Justice: Strengthening the Bridge between Economic Development and Sustainable Communities," sought to bring together stakeholders to explore solutions to the dual achievement of environmental justice and economic development. The conference also gathered findings for a report to be shared with the Congressional Black Caucus.

Most recently, as a follow up to the February 1998 issuance by EPA of its "*Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*" for public comment, the Agency conducted studies to determine whether the guidance would prove to be a barrier to the redevelopment of brownfields if implemented. EPA undertook case studies at six of its Brownfields Assessment Demonstration Pilots. These case studies were recently released, *Brownfields Title VI Case Studies: Summary Report,* June 1999, EPA 500-R-99-003, DRAFT. Title VI complaints, according to the report, have been avoided at brownfields projects because a wide variety of governmental, community and business stakeholders are involved in brownfields cleanup and redevelopment decision-making. These case studies speak to the early and meaningful involvement of communities in the brownfields process, redevelopment plans and activities for the revitalization of blighted property.

Redevelopment Barriers—Addressing Liability Concerns

The Agency also committed to addressing the fear of liability and other barriers impeding the cleanup and redevelopment of brownfields. Over the past several years, EPA has announced a variety of guidance and initiatives that have had a positive impact among Brownfields stakeholders in terms of removing uncertainties often associated with brownfields properties. EPA is promoting redevelopment of brownfields properties by protecting prospective purchasers, lenders, and property owners from incurring Superfund liability.

EPA's *Prospective Purchaser Agreement (PPA)* guidance issued in May 1995 has been used to stimulate the development of sites where parties otherwise may have been reluctant to redevelop due to liability concerns. Through agreements known as "prospective purchaser agreements," EPA clarifies that bona fide prospective purchasers will not be responsible for cleaning up sites, provided they do not further contribute to or worsen contamination. The 1995 guidance expanded the universe of sites eligible for such agreements to include sites where EPA has undertaken, is undertaking, or plans to undertake a response action. Approximately 110 PPAs have been negotiated to date. Environmental justice advocates see these agreements as a tool to promote environmentally sustainable enterprises or green spaces occupying former brownfields sites next to residential areas.

In 1998, EPA undertook a survey effort to gather information on the impacts of the PPA process. Preliminary survey data indicate that redevelopment projects cover over 1252 acres, or 80% of the property secured through PPAs. EPA regional personnel estimate that nearly 1600 short-term jobs (e.g., construction) and over 1700 permanent jobs have resulted from redevelopment projects associated with PPAs. An estimated $2.6 million in local tax revenue for communities nationwide have resulted from these projects. In addition, EPA regional staff estimate that PPAs have resulted in the purchase of over 1500 acres of contaminated property and

have spurred redevelopment of hundreds of thousands of adjacent acres. Using the survey results, EPA continues to develop ways to improve the PPA process. The Agency is pleased to see the inclusion of prospective purchaser relief as a common element of most brownfields legislation being considered by the Congress.

Property Owner Protections

Other guidance issued by the Agency to benefit brownfields assessment, cleanup and redevelopment have included the "*Policy Toward Owners of Property Containing Contaminated Aquifers*." Prior to the issuance of this guidance in July 1995, people owning property under which hazardous substances had migrated through groundwater also feared liability under the statute. EPA responded by announcing that it will not take enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against owners of property situated above contaminated ground water, provided the landowner did not cause or contribute to the contamination. Further, EPA also will consider providing protection to such property owners from third party lawsuits through a settlement that affords contribution protection.

The Agency also is pleased to see the inclusion of innocent and contiguous landowner defenses as common elements of most brownfields legislative proposals. We believe these liability relief provisions—innocent landowner, contiguous landowner and prospective purchaser—will provide a great deal of certainty to homeowners, buyers, and developers involved in the purchase and sale, and cleanup and redevelopment of brownfields properties.

Lender Protections

With respect to the lending industry and to governmental entities who acquire property involuntarily, EPA was pleased to see the 104th Congress enact the "Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, which included provisions to clarify the liability of lenders and fiduciaries under CERCLA and other toxic waste laws. This reform, which was developed through a bipartisan effort, was incorporated into a broader banking reform bill enacted in the final days of the Congress as part of the continuing budget resolution. This change in the law is providing significant relief to banks and lending institutions, expanding the availability of credit for small businesses, and greatly facilitating the assessment, cleanup, and redevelopment of brownfields sites. EPA's lender liability policy clarifies the steps a lender or governmental entity may take after acquiring contaminated property through, for example, foreclosure or involuntary acquisition.

EPA also is providing "comfort/status letters" in appropriate circumstances to requestors, including new owners, lenders, or developers to inform them of EPA's intentions at a site. The *Policy on the Issuance of Comfort/Status Letters* is designed to assist parties who seek to cleanup and reuse brownfields. EPA often receives requests from parties for some level of "comfort" that, if they purchase, develop, or operate on brownfield property, EPA will not pursue them for the costs to clean up any contamination resulting from the previous use. The policy contains four sample comfort/status letters that address the most common inquiries for information EPA receives regarding contaminated or potentially contaminated properties. The policy aims at using such "comfort" toward facilitating the cleanup and redevelopment of brownfields.

Supplemental Environmental Projects

In addition, EPA encourages the use of Supplemental Environmental Projects (SEPs) to facilitate the reuse of brownfields through assessment and cleanup projects at brownfield properties. SEPS are environmentally beneficial projects that a defendant agrees to undertake in settlement of a civil penalty action, but that the defendant is not otherwise legally responsible to perform. SEPs enhance the environmental quality of communities that have been put at risk due to the violation of an environmental law.

Removing Sites From CERCLIS

Finally, EPA believes that the removal of sites from the active Federal inventory, the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS), is having positive repercussions for the Brownfields Initiative. To date, EPA has removed approximately 31,681 sites from CERCLIS. The removal of these sites eliminates the stigma of potential contamination and fear of liability associated with these sites, and allows stakeholders to focus on the future land use and redevelopment of such sites.

Brownfields Tax Incentive

EPA is pleased with the passage of the Brownfields Tax Incentive in the last Congress. Passage of the 1997 Brownfields Tax Incentive has enabled the federal government to level the economic playing field between brownfields and greenfield sites. Under the tax incentive, environmental cleanup costs for properties in designated areas are fully deductible in the year in which they are incurred, rather than capitalized. This incentive can reduce the capital cost for these types of investments by more than one half. We regard this tax provision as an essential element of a complete and comprehensive brownfields program and hope it can be made a continuing and broad tool for brownfields redevelopment in the future. Under current law, the incentive will expire on December 31, 2000. The FY 2000 Budget proposes to make it permanent.

The tax incentive is applicable to properties that meet specified land use, contamination, and geographic requirements. To satisfy the land use requirement, the property must be held by the taxpayer incurring the eligible expenses for use in a trade or business or for the production of income, or the property must be properly included in the taxpayer's inventory. To satisfy the contamination requirement, hazardous substances must be present or potentially present on the property. To meet the geographic requirement, the property must be located in one of the following areas: EPA Brownfields pilot areas designated prior to February 1, 1997; census tracts where 20 percent or more of the population is below the poverty level; census tracts that have a population under 2,000, have 75 percent or more land zoned for industrial or commercial use, and are adjacent to one or more census tracts with a poverty rate of 20 percent or more; and Empowerment Zones and Enterprise Communities. Both rural and urban sites qualify for the proposed incentive. Sites on EPA's National Priorities List are excluded. In West Chester, Pennsylvania, the tax incentive was used to help a demolition and environmental service company relocate its headquarters at a brownfield. This site was in a part of the town suffering a 29.6% poverty rate, well above the 20% poverty rate threshold set in the guidelines. The company estimates that 100-200 jobs could be created.

Better America Bonds

Innovative approaches and solutions to the problems faced by communities are manifested in every aspect of brownfields. Innovative financing efforts are no exception. Just as the federal government has helped the brownfields program through the tax incentive, so, too, will the Clinton Administration's latest effort through the proposed Better America Bonds program. To build healthy, livable communities for the 21st century, the federal government would provide new resources to communities to achieve their "smart growth" objectives. This proposal for FY 2000 seeks to create $9.5 billion in bonding authority to state, local, and tribal governments over 5 years. Communities will have access to zero-interest financing for smart growth projects because investors who buy these fifteen year bonds will receive tax credits in lieu of interest. The tax credits would total approximately $700 million over five years. Communities would pay back the principal at the end of the 15-year term of the bond.

To help communities preserve green space for future generations, protect public health, and provide for greater economic development, Better America Bonds can be used for three purposes:

- Preserve and Enhance Open Space: State, Tribal and local governments can create, restore, or enhance parks, preserve green spaces, and protect threatened farmland and wetlands. Land can be protected either by acquiring title or purchasing permanent easements.
- Protect Water Quality: Rivers, lakes, coastal waters, and wetlands—and drinking water sources—can be restored or protected through reducing polluted runoff, the largest remaining threat to the nations' waterways. Eligible projects to curb runoff include purchase of sensitive lands, wetlands restoration, and the creation of planted or forested buffer strips along waterways.
- **Clean Up Brownfields:** Pressure to develop green space can be eased through cleaning up and reusing brownfields. Communities can acquire and clean up brownfields for use as open space, or for economic redevelopment in cases where abandoned brownfields are acquired by the local government through tax foreclosure.

EPA believes Better America Bonds will further the Brownfields Economic Redevelopment Initiative by providing much needed flexible funding that communities can use for brownfields activities and add an important funding source for site assessments and cleanups.

KEY ELEMENTS OF BROWNFIELDS LEGISLATIVE REFORM

The Brownfields Economic Redevelopment Initiative has achieved much initial success. The continuing value of the Brownfields Initiative is its evolution and promise for the future. To build upon these successful first steps and launch others, we must not lose sight of our overall goal to revitalize communities. With the breadth and variety of activities and stakeholders converging on the brownfields issue, we have tried to establish a framework that articulates a complete and comprehensive brownfields program. It is against this framework that we will measure legislative proposals addressing brownfields.

Address Full Range of Brownfields Reforms

Brownfield reforms made under CERCLA should be codified, and should reaffirm use of the Superfund Trust Fund to address the full range of brownfield issues including: technical assistance funding for brownfields identification, assessment and reuse planning, cooperative agreement funding to capitalize revolving loan funds for brownfields cleanup, support for State development of voluntary cleanup programs, liability protection for bona fide prospective purchasers, innocent landowners of contaminated property and contiguous property owners, support for mechanisms for partnering with Federal, State, local and tribal governments and other non-governmental entities to address Brownfields, and support and long-term planning for fostering training and workforce development.

Support Brownfields FY 2000 Budget Request

The Administration has requested funding for the brownfields program in FY 2000 of $92 million to support additional assessment, cleanup and job training pilot awards, to fund support for targeted brownfields assessments, and to continue support for State Voluntary Cleanup infrastructure and brownfields related job training efforts. The United States Conference of Mayors has recently reiterated it's earlier statement that "the lack of cleanup funds" for brownfields is "the most frequently identified impediment." *Recycling America's Land, Volume II, April 1999.* EPA urges the Committee to support this component of the President's Budget as we work together on other statutory changes that not only will enhance our ability to implement these proposals, but also will enable us to forge stronger partnerships with States, local governments, communities, and private interests that successfully accelerate brownfields revitalization.

LEGISLATION

The Clinton Administration strongly supports the passage of brownfields legislation and views it as an important step toward restoring hope, opportunities, and jobs to local communities and neighborhoods that are being held back by the presence of abandoned industrial sites. Through three rounds of administrative reforms, the Superfund program has made significant progress in cleaning up hazardous waste sites, protecting public health and the environment, as well as in the assessment and cleanup of brownfields sites.

In the past, the Administration supported brownfields legislation within the framework for comprehensive legislative reforms to the Superfund program. In light of the progress being made, the ever increasing need to meet and assist communities in their revitalization, as well as the apparent bi-partisan, and broad-based public support for brownfields reform, the Administration now supports a targeted legislative approach which addresses brownfields cleanup and redevelopment, and specific liability provisions necessary to support brownfields. In addition, EPA strongly supports the legislation that would reinstate the expired Superfund taxes. These funds are needed for the ongoing Superfund cleanup effort and the brownfields program.

EPA is encouraged by the focus that Congress has given to the problems engendered by brownfields and we look forward to working with Congress to enact this very necessary legislation.

H.R. 2580

EPA is encouraged to see in H.R. 2580, the "Land Recycling Act of 1999", a focus on the clean up and return of contaminated sites to productive uses. However, provisions in H.R. 2580 severely restrict EPA's ability to ensure protective cleanups at sites throughout the country. The Administration opposes the bill in its current form.

Enforcement Authority is Severely Restricted.

H.R. 2580 represents the strongest limitations on the Federal "safety net" to date. While other bills, such as H.R. 1300, have reduced EPA's (and other persons) ability to take CERCLA enforcement actions, H.R. 2580 extends these prohibitions to citizens' and EPA's imminent and substantial endangerment enforcement authority under §§ 7002 and 7003 of the Solid Waste Disposal Act. While HR 2580 leaves intact administrative judicial orders or decrees issued or entered into under CERCLA, SWDA, FWPCA, TSCA, and SDWA *before* the commencement of a response action under a state program, H.R. 2580 is ambiguous about the continued viability of those authorities *after* the commencement of a response action under a state program.

Given the patchwork of authorities throughout the 50 states, if federal authorities are eliminated, it is unclear what authorities would be available to protect public health and the environment. For example, neither Arizona nor Idaho have RCRA § 7003-like authorities to address situations that pose an imminent and substantial endangerment. Accordingly, the Administration strongly opposes the enforcement bars present in HR 2580.

Further, the bill prescribes only minimal standards that a state cleanup program must meet in order to trigger the broad prohibitions upon EPA's and citizens' ability to take enforcement actions. In addition, these minimal standards require no demonstration, but instead can be met simply through self-certification. This represents a significant departure from other environmental laws, which envision a role for EPA review, and public comment on, a determination that a state program is adequate, and that a transfer of federal enforcement authority is appropriate.

While the inclusion of criteria is an improvement over H.R. 1300, which contains *no* criteria state programs must meet, we believe the criteria in HR 2580 are inadequate. Notably, while implementation of the program must be in a manner that is protective of human health and the environment, there is no requirement that *response actions* be protective of human health and the environment, as required by H.R. 1750. Further, under H.R. 2580, a state must only certify the adequacy of its financial and personnel resources at the point in time when it submits its certification to EPA. There is no assurance that a state ensure adequate resources in the future, as opposed to H.R. 1750, which requires states to maintain consistency with the program criteria. This requirement is critical, as state cleanup requirements can vary widely, and resources can fluctuate over time. In fact, we are aware of several states whose resources for hazardous waste cleanup programs have been significantly diminished in recent years.

Also of great concern, H.R. 2580's criteria lack any requirement for public involvement in program development or the selection of response actions. The permitting process under environmental statutes triggers public participation requirements. Thus, if an operating facility wants to change their discharge limits under a Clean Water Act NPDES permit or modify their RCRA permit, the public would have an opportunity to participate in that decision. Given that the bill also cuts off citizens' rights under RCRA and CERCLA, H.R. 2580 leaves the citizens most likely to be affected by contamination in their community with no voice, and no assurances of a federal "floor" of protection. Accordingly, the Administration objects to the criteria set forth in HR 2580 as inadequate to ensure protection of human health and the environment.

The exclusion of the public is exacerbated in H.R. 2580 by its elimination of the requirement for any federal permit—including RCRA corrective action permits—or permit revision for the on-site portion of response actions. Although superficially similar to existing language in CERCLA section 121(e)(1), CERCLA's current on-site permit exemption does not negate the role of the public, as the CERCLA remedy selection process, which requires significant public involvement, acts as an equivalent to the role of the public in the permitting process. However, state programs may not provide for public participation. Out of 17 state voluntary cleanup programs it surveyed, GAO found that 8 had no requirements for public participation. GAO/RCED-97-66, Apr. 6, 1997 "Superfund: State Voluntary Programs Provide Incentives to Encourage Cleanups." If the state programs have no public participation requirements, then HR 2580's language rendering federal permits inapplicable represent a further blow to citizen's rights. Taken as a whole, the bill would allow states to operate their cleanup programs without adequate public scrutiny, contrary to the approach taken in all other major federal environmental laws.

In addition to the limitations on public involvement, we are concerned with other negative effects which will result from the permit waiver. The bill would entirely extinguish the applicability of permits in states not authorized to administer federal programs, such as the Clean Water Act NPDES or § 404 permits for dredging and filling wetlands, or RCRA. For example, not all states are authorized for all compo-

nents of RCRA, meaning that federal permits issued in states without their own permitting abilitity will be useless. States and territories not authorized for either the base RCRA program or corrective action include Iowa, Hawaii, Alaska, Puerto Rico, Virgin Islands,American Samoa, and the Northern Mariana Islands. States not authorized for corrective action include Connecticut, Massachusetts, Rhode Island, New Jersey, Maryland, Pennsylvania, Delaware, Virginia, West Virginia, District of Columbia, Florida, Mississippi, Tennessee, Kansas, Nebraska, and Montana. In addition, in many cases, a facility in an authorized state may still require a Federal permit for those aspects of the RCRA program for which the state has not yet been authorized. Thus, Under H.R. 2580, most RCRA permits, as well as any permit modifications, would be invalid.

In addition, H.R. 2580 removes the requirement for federal permits and permit revisions, even when the federal government is responsible for overseeing the permit. H.R. 2580 limits EPA's ability to respond to emergencies that affect the environment and sets a high and unclear standard for EPA emergency response. For example, EPA issued a Section 7003 order at two adjacent facilities (that did not have federal or state permits) to address lead and chrome contamination from Lead Products, a battery reprocessing facility and Dixie Electroplating, a plating facility. The metals from the facility contaminated residential yards. The lead contamination becoming airborne was of particular concern because the citizens' yards did not have grass and the streets were not paved. The state's (Texas) voluntary cleanup program stopped at the facilities' boundaries and would not require off-site cleanup. EPA's federal RCRA authority provided for the coordination of off-site response with the State(of Texas)'s on-site facilities.

Inadequate Reopeners Limit Federal Safety Net and Will Cause Litigation.

The Administration is opposed to the provisions in H.R. 2580 regarding state response/voluntary cleanup programs. The bill would eliminate the authority of EPA and other federal agencies to respond to releases of hazardous substances whenever a state remedial action plan has been prepared, whether under a voluntary response program, or any other state program. It is critical that EPA retain its ability and capacity to respond to threats that may present an imminent and substantial danger to the public health or welfare or the environment.

This federal response ability or federal safety net, has several important aspects. The federal safety net enables EPA, through its emergency response capacity, to quickly mobilize and perform a removal because the state does not have the resources to conduct and/or complete removals. The federal safety net also establishes federal requirements for public participation. These federal requirements offer communities a recourse should a community perceive that the state is excluding the community from meaningful involvement This bill could eliminate community involvement if none is provided at the state level. The federal safety net provides for federal permits, which are important protections to human health, welfare, or the environment. These are important aspects of the federal program that we think should be retained.

Under HR 2580, where a state law or state-lead cleanup falls short, or a local community seeks a federal response, EPA will be unable to address public health or environmental concerns, except under the strictest of circumstances. Unlike other legislative proposals, HR 2580 extinguishes "any authority" of CERCLA. Thus, HR 2580 eliminates EPA's ability to fund-finance a response action when necessary. This is a further departure from H.R. 1300, which would not extinguish EPA's authority under § 104 of CERCLA.

Further, as noted above, HR 2580 extinguishes EPA's (and citizens') imminent and substantial endangerment authority under both CERCLA and RCRA, a standard that has withstood more than 20 years of judicial interpretation in cases occurring under both CERCLA and RCRA. In addition, this standard is common to most other major environmental laws, including the Clean Air Act (§ 303), the Clean Water Act (§ 504), and the Safe Drinking Water Act § 1431. It has been an important attribute in the "federal safety net" that has ensured protection of human health and the environment for all citizens.

As a result in the departure from the current standard of "imminent and substantial endangerment," we have serious concerns with the enforcement bar in both H.R. 2580 and H.R. 1300. While it is important to ensure that federal liability does not inhibit brownfields cleanup and redevelopment, such an inhibition should not come at the expense of protecting human health and the environment. Our concerns are exacerbated by the breadth of sites that may be subject to the enforcement bar. H.R. 2580 excludes from the enforcement bar only sites that are listed on the NPL (as well as federal facilities, and facilities subject to orders or decrees under other environmental statutes). HR 1300, by comparison, at least also excludes sites proposed

for listing on the NPL. When combined with the provision in H.R. 2580 that allows an absolute governor veto on further NPL listings, the bill could include even high-risk sites into the universe of those subject to the enforcement bars. H.R. 2580 is also unclear as to what type of "response action" is sufficient to trigger the enforcement bar. For example, a site at which a surface removal had been done would appear to be sufficient to trigger the enforcement bar, even if extensive underlying groundwater contamination continued to threaten nearby drinking water wells.

Compounding the problems above is the new standard for allowing EPA to take action under H.R. 2580. On those occasions where a state doesn't request EPA assistance, H.R. 2580 would create a new, and burdensome, standard for EPA enforcement action that would require EPA's satisfaction of essentially a three-pronged test: 1) response actions must be immediately required; 2) response action may only be used in the case of a public health emergency; and 3) the State is not responding in a timely manner. This new standard will likely cause significant and contentious litigation. "Public Health Emergency" is not defined in current law nor in H.R. 2580. The term appears only in CERCLA 104(a)(4) in the context of an exception to CERCLA § 104(a)(3), which limits EPA from responding to releases that are naturally occurring; that are from products which are part of a building; or that result from deterioration of a drinking water supply system. EPA has never used 104(a)(4) to justify a response action. As a result, there is no precedent to define the term. Additionally, it is not clear how the word "immediacy" differs from the word "imminence". Finally, it is likely that additional litigation will ensue regarding whether a State is responding in a timely manner. The Administration believes it is inappropriate to risk public health by barring EPA intervention until conditions have become sufficiently (or legally) dangerous enough to lift the enforcement bar.

Targeted Liability Provisions

The Administration generally supports the targeted liability relief provisions of H.R. 2580 for qualified parties that builds upon the current success of the Superfund program. The Administration generally supports the provisions in HR 2580 that address prospective purchasers, innocent landowners and contiguous property owners. While these provisions are close to H.R. 1750, there are concerns with the provisions in H.R. 2580 as written.

We are concerned, for instance, that some of the preferable language in H.R. 1750, was excluded from H.R. 2580. For example, with regard to the bona fide prospective purchaser exemption, HR 1750 provides the United States with the ability to place a lien on other property to recover its costs. Regarding the innocent landowner defense, H.R. 1750 confirms that persons seeking to assert the defense must, in addition to satisfying the requirements of § 107(b)(3) as to care and precautions, must also demonstrate that they performed an appropriate inquiry as described in § 101(35) before buying the property, to demonstrate that they did not know or have reason to know that the property was contaminated when they bought it.

We are concerned with HR 2580's approach towards contiguous landowners. We prefer the approach in HR 1750, which creates an affirmative defense for these parties, whereas HR 2580 gives them an outright exemption. In addition, H.R. 2580's provisions relating to contiguous property owners have been severely weakened, creating the opportunity for parties to "game the system." By removing any requirement for an appropriate inquiry, prospective purchasers can acquire contiguous property at a substantial discount with full knowledge of the contamination and still avoid the potential for a windfall lien. H.R. 2580 also removes any care requirement, due, appropriate, or otherwise, which allows contiguous property owners to turn a "blind eye" to contamination on their property for which they are getting an exemption. Finally, H.R. 2580 omits the requirement that a contiguous property owner not exacerbate the release. Such requirements are appropriate in this context for parties seeking a release from liability under CERCLA.

NPL Listing Is Severely Restricted

We continue to oppose provisions that restrict EPA's ability to list sites on the NPL without a Governor's approval. This approval requirements applies even in situations where Tribal, local community, or interstate impacts exist, or where the State is a PRP. We currently are working with States in a very successful voluntary effort to seek their approval before listing a site on the NPL. In addition, HR 2580 prohibits listing of sites to the NPL if a Governor assures the site is being addressed or will be addressed in the future. The bill has no provision for when in the future a promised action to address contamination might occur.

State Response Program Provisions

See above discussion on federal safety net.

EPA is developing MOAs with concerned States to ensure that its response authorities complement and encourage rather than duplicate or discourage, voluntary cleanups. This approach, we believe, strikes the right balance between Federal and State programs while continuing to provide the needed protection of public health and the environment for our communities.

Brownfields Assessment and Remediation Grant Programs

H.R. 2580 provisions authorizing EPA to issue grants for assessment and to capitalize revolving loan funds is similar to language in H.R. 1300. The bills provide funding for assessment grants ($200,000 per grantee) and for capitalization of revolving loan funds ($1M per grantee). Although EPA supports the grant programs for brownfields, there are several problems we have identified with H.R. 2580 in this regard. Among the concerns identified: (1) ranking criteria for brownfield grant eligibility are onerous and call for information that may not become available until site assessment is completed; (2) the bill requires State matching funds for remediation grants of 50% for receipt of State revolving loan fund grant; (3) political subdivisions of a state could be deemed ineligible to receive loans under remediation grant program as written; (4) eligible entities for brownfield remediation grants may include parties who have caused or contributed to contamination; and (5) references to "remedial actions" preclude removals at brownfields sites. States may receive grants to capitalize revolving loan funds for "remedial actions" but not removals at brownfields sites. In addition, we are concerned about the level of funding that would be provided for the Brownfields grant program since the bill provides for "such sums as are necessary."

Breadth of Current Brownfields Program.

EPA is concerned that H.R. 2580 addresses only portions of the current brownfields program and is limited to the grant program for assessments and revolving loan funds. In particular, the bill omits technical support and funding for job training and workforce development.

Although the Committee did not request specific comment on the remedy provision of H.R. 2580, the Agency has provided a brief summary of concerns on section 9.

Remedies Are Less Protective

Superfund cleanups must be protective of human health and the environment over the long term. H.R. 2580's remedy title weakens current law and could result in a Superfund program that would not adequately protect human health and the environment.

Under the current statute, remedies are required to "utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the **maximum** extent practicable." Under H.R. 2580, the word "maximum" is stricken. This change effectively eliminates the importance of selecting permanent remedies and permanent protection for communities.

Under H.R. 2580 the preference for treatment does not apply to treatment remedial alternatives "that would increase risk to community or to worker's health". Under the current law, protection of community and workers is addressed under: (1) the NCP remedy selection criteria of protection of human health and the environment, and short-term effectiveness; (2) the ARAR waiver of greater risk to human health and the environment; and (3) worker protection standards. The bill's imposition of a separate test for treatment remedies may weaken long-term protection of remedies by reducing treatment, inviting additional litigation, and delaying cleanups.

Groundwater Is Not Protected

Contaminated ground water is a problem at more than 85 percent of Superfund sites. With roughly fifty percent of the U.S. population relying on ground water for their drinking water, the Administration strongly believes that this critical resource must be protected. Legislation should not weaken the goal of restoring ground water to beneficial uses, wherever practicable. H.R. 2580 replaces this goal with a much lower standard. H.R. 2580 creates uncertainty and will cause litigation over what or how contaminated ground water should be restored. By including the term "at reasonable points of compliance," the bill invites disputes over whether drinking water standards should be met in the groundwater or at the tap. The use of "reasonable" will inspire endless arguments, may let polluters off the hook for cleaning up ground water, and will force EPA to determine what groundwater a community will need in the future.

In addition, remedies selected under H.R. 2580 would not keep contaminated ground water from spreading to uncontaminated ground water. Inappropriate use

of land use planning principles "under-protect" ground water resources for the future. In fact, H.R. 2580 creates a bias against protecting uncontaminated ground water and minimizes the need for cleanup because ground water is to be protected only for its "reasonably anticipated" future use. Current practice and proper nomenclature for ground water should be "current or potential beneficial use."

Cleanups May Be Delayed

Under H.R. 2580 new and confusing provisions and terminology regarding risk assessments will delay cleanups and generate costly new litigation. Risk assessments under H.R. 2580 must be based on "best" scientific and technical information, and include site-specific bioavailability data. This new terminology may cause time consuming and costly litigation as the meaning and relevance of new terms are fought over in the courts. The new language will not improve the quality of remedies; rather, parties involved at sites could needlesslyl tie up cleanups by litigating what is meant by the word "best."

H.R. 1750

H.R. 1750, the "Community Revitalization and Brownfields Cleanup Act of 1999," was introduced by Mr. Towns and is co-sponsored by 167 Members. As EPA Administrator Carol Browner stated in her letter of May 10, 1999, "this brownfield redevelopment legislation is an important step toward restoring hope, opportunities and jobs to local communities and neighborhoods that are being held back by the presence of abandoned industrial sites." Accordingly, Administrator Browner expressed the Clinton Administration's strong support for the approach taken in HR 1750, which would promote brownfields cleanup and redevelopment by providing grants and loans, and providing appropriate liability protection to prospective purchasers, contiguous property owners and innocent landowners; and preserves critical safeguards for communities by ensuring EPA has authority to protect human health and the environment.

A June 4, 1999 letter from Bill Clinton to the Hon. Deedee Corradini and the Nation's Mayors echoes the sentiments expressed in Administrator Browner's letter. Administrator Browner's letter notes the broad consensus of Congressional and public support enjoyed by brownfields reform proposals, and requests the opportunity to continue to work with Representative Towns on appropriate resource levels and other refinements to the bill. Mr. Clinton's letter likewise remarks that HR 1750 offers the best prospect for broad public support, because it focuses on those proposals that reflect substantial consensus in Congress and among communities; and confirms his commitment to continue to work with Representatives Boehlert and Borski, as well as senators Chafee and Baucus, to achieve truly bipartisan brownfields legislation.

Many of the provisions in H.R. 1750 find some reflection in those of H.R. 2580 and, as such, both emphasize the appropriateness of targeted legislative solutions for brownfields. H.R. 1750 also provides relief for prospective purchasers of brownfields properties, protection to innocent landowners, and defenses to liability for contiguous landowners, as well as funding brownfields assessment and cleanup grant programs.

EPA has identified several provisions of H.R. 1750 that are of particular merit. The bill provides $500,000 for brownfields assessment grants and $500,000—up to $1million—for grants for the capitalization of revolving loan funds. Unique to the legislation, however, are provisions which (1) ensure grant funding support for local governments, consortiums, and regional councils; (2) provide opportunities to support projects and programs with particular significant environmental and economic benefits; (3) make awards to states as determined necessary to facilitate receipt of funds by one or more local governments and (4) simplify the grant application and review procedures conducted by the Agency.

In the last case, H.R. 2580 so laboriously details the review and ranking process for brownfields grants it is doubtful that either the applicant or the Agency would ever succeed in actually awarding a grant. In many instances, the ranking criteria in these other bills are onerous and would call for information that may not become available until a site assessment is completed. These processes require information like economic projections, employment opportunities, and tax revenue forecasts that neither EPA nor the applicant could make. H.R. 1750, by contrast, avoids this stumbling block by simply recognizing that a grant application procedure is needed, requiring the Agency to establish one and attaching such grant conditions as may be appropriate.

H.R. 1750 also limits the procedural requirements of the NCP in brownfields "to the extent that those requirements are relevant and appropriate to the program..." Refinements to the brownfields program, such as this one, reflect and express the

insights and experience we have gained from our brownfields pilots. H.R. 1750 removes yet another barrier to the redevelopment of properties in distressed urban areas and small towns.

H.R. 1750 provides funding support to states for the development of their voluntary cleanup programs and further clarifies the circumstances under which the EPA may have a role at a brownfields site, while maintaining a "safety net" in the event the Agency must act at a site presenting an imminent and substantial endangerment to the community or the environment. Qualified state programs are ones where the state is ensuring: adequate site assessment and protection of human health and the environment; opportunities for technical assistance; meaningful opportunities for public participation; streamlined procedures for expeditious voluntary response actions; adequate oversight and enforcement; and mechanisms for approval of response action plans. EPA is pleased to see the bill "grandfather" existing memoranda of understanding between states and the Agency. We look forward to working with Representative Towns on appropriate resource levels consistent with the President's Budget and certain refinements to the bill.

H.R. 1300

The Administration has previously commented on HR 1300. EPA Administrator Carol Browner testified on the bill at a hearing before the House Water Resources and Environment Subcommittee, and supplied a May 11, 1999 letter from Jon Jennings, Acting Assistant Attorney General, for the hearing record. For purposes of the present hearing, we will reiterate some of our concerns with HR 1300's brownfield provisions.

With regard to liability relief, HR 1300's treatment of contiguous landowners is problematic, first, because it creates an exemption rather than an affirmative defense, as set forth in HR 1750, and second, because it lacks most of the eligibility requirements contained in HR 1750, indeed, it contains fewer than in HR 2580.

We remain particularly concerned with HR 1300's "innocent landowner" provision, which essentially collapses into one the innocent landowner defense and the bona fide prospective purchaser exemption that have both appeared in numerous legislative proposals. Although we generally support protection for both groups, we are gravely concerned that HR 1300's provision of relief for current owners that knowingly bought contaminated property is inconsistent with longstanding principles of common law. Those principles recognize that owners are often in the best position to address hazardous substances on their property; and that they must take steps to address hazards on their property even if they did not themselves create the condition. In addition, many of these owners acquired the property, not only with knowledge of contamination, but also with knowledge of a responsibility for performing a cleanup. Relieving these parties of this responsibility constitutes an enormous windfall for these parties, and creates significant fiscal consequences for the Trust Fund, especially at sites where the current owner is the only major viable responsible party.

CONCLUSION

The Agency's administrative reforms have fundamentally improved the Superfund program. Brownfields reforms made under CERCLA should be codified, and Congress should reaffirm use of the Superfund Trust Fund to address the full range of brownfield issues. We fully support targeted legislation that will address brownfields and liability relief provisions for qualified parties that builds upon the current success of the Superfund program.

The federal attention directed at brownfields redevelopment over the past four years reflects a growing realization that yesterday's eyesore is today's opportunity. For EPA and the federal government, it is an opportunity to demonstrate that environmental protection can also promote economic development. For communities and cities, it is the opportunity to return a wasted asset to productivity, job creation and revenue generation. For local contractors and developers, brownfields redevelopment is an opportunity to expand their work, to clean up sites and to build new facilities. For local lenders, it is the opportunity to meet their community reinvestment needs, often at much less of a credit risk than they might otherwise anticipate. But the biggest opportunity is for the people who live withbrownfields sites every day. Eyesores are cleaned up. Frequently, potential threats to health are substantially reduced, if not altogether eliminated The value of property increases. And often brownfields redevelopment provides the neighborhood's residents with a new sense of hope.

Thank you. I would be happy to answer any questions on brownfields you may have.

Mr. OXLEY. Thank you, Mr. Fields, once again, for your appearance and for your testimony.

Let me begin with perhaps the mother of all questions in terms of length at least, and so bear with me.

The Governors, States and the State cleanup agencies, the mayors, cleanup contractors and the GAO state that the broad liability and uncertainty from potential second guessing caused by Superfund is and has been part of the brownfields problem for almost 2 decades. We have had that discussion before.

I want to provide you some quotes on the relationship of the Superfund statute to brownfields cleanups. Some of these quotes are from written testimony of witnesses on today's second panel, and other quotes are from witnesses in other hearings or statements in other forums. Without objection, I would like this document placed into the record, and without objection, so ordered.[The information referred to follows:]

QUOTES ON THE BARRIERS SUPERFUND POSES FOR BROWNFIELDS CLEANUPS

Mayors and Municipal Cleanup Agencies

"Most mayors will tell you that the major impediment in securing private capital for the clean up and redevelopment of brownfields is Superfund's liability regime. We believe that . . . [i]t is time to free innocent parties, both public and private entities, from Superfund's unfair liability strictures. Parties that had no part in causing the contamination at individual sites should no longer be held liable under federal law . . . It is time to create more certainty for the current owners of contaminated properties—the hundred of thousands of sites in every place in America that are likely to be brownfields at some time in the future—by providing them certainty in their cleanup costs and liability exposure."

—The Honorable Jim Marshall in testimony before the United States Senate Environment and Public Works Committee, May 25, 1999

"We have been living under a federal statute and its strict liability regime—although well-intended and largely aimed at more contaminated properties posing greater threats to the public—that has dramatically slowed progress by all parties in coming to terms with lesser contaminated properties, sites we generally describe as brownfields . . . It has produced a legacy of inaction by property owners, be they innocent or responsible parties, which we now measure in terms of thousands of properties and millions of acres . . . Rhetoric and political advantage will not cleanup one brownfield, but bipartisan legislative action will . . . "[F]inality" must be provided to prompt current owners to move forward and cleanup contaminated properties . . . The price of keeping EPA over-empowered in this area is simply too high."

—The Honorable Jim Marshall in testimony before the United States Senate Environment and Public Works Committee, May 25, 1999

"It has been shown that Superfund's liability regime unfairly threatens innocent parties and too often drives private sector investors from brownfields to more pristine locations. And, we recognize that this Act helps fuel a development cycle that imposes increasing burdens on all of us."

—The Honorable Marc Morial, Mayor of New Orleans, The Honorable Michael Turner, Mayor of Dayton, The Honorable Jim Marshall, Mayor of Macon, testimony before the Subcommittee on Water and the Environment, May 12, 1999

"We know that Superfund's liability regime too often drives private sector investors from brownfields to more pristine locations. We know these rules punish innocent parties, fueling a development cycle that is unsustainable. We know that current law must be reformed to undo the bias toward new land resources over recycling land that is already urbanized or developed. Mitigating the effects of this nearly twenty-year Superfund policy will require actions on several fronts."

—The Honorable Paul Helmke, Mayor of Fort Wayne, IN, on behalf of the U.S. Conference of Mayors, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

"We have learned that liability under Superfund is their dominant concern. Despite progress in securing "comfort letters" at many sites, lender liability reforms

and growing confidence in state program efforts, there is real anxiety, and we would wish otherwise, among bankers and other lenders on these issues. The specter of Superfund liability severely limits their ability to increase the flow of private capital into these projects."

—The Honorable Paul Helmke, Mayor of Fort Wayne, IN, on behalf of the U.S. Conference of Mayors, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

"We also strongly support liability reforms contained in H.R. 1300 and H.R. 2580 to address the many circumstances whereby cities and other local governments have acquired brownfield properties in the past. Under these provisions, cities and other public agencies are rightly afforded innocent party relief in the performance of local government functions."

"We hope that the legislation that is adopted by this Committee, as provided in H.R. 2580, will encourage states to use these funds to place more priority on efforts to bolster state programs in support of brownfield cleanups."

—The Honorable Paul Helmke, Mayor of Fort Wayne, IN, on behalf of the U.S. Conference of Mayors, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

"Without this certainty on state authority, we can't hope ever to provide the necessary assurances sought by private investors in brownfield sites, let alone secure final decisions on the hundreds of thousands of brownfields sites we are seeking to clean up and redevelop. Mr. Chairman, we also want to indicate our interest in seeing provisions that would help accomplish more cooperation and integration of applicable federal laws and standards. One of the areas that H.R. 1300 does not address is the applicability of RCRA and LUST specifically at brownfield sites. Mayors have been very consistent in urging more attention in federal policies to a 'one-stop' brownfields regulatory program at the state level, where states, which are vested with delegated authority, can provide more coordinated and integrated programs. Such an approach would respond to the realities of the contaminants and types of problems that localities encounter at these sites."

"I would note that H.R. 2580 provides authority for RCRA waivers to allow states to integrate this law's permit requirements with cleanups of brownfields. I understand that this provision does not diminish or alter RCRA requirements, but is intended to give states some flexibility in delivering a more responsive and coordinated regulatory program in addressing brownfields. This or some variant of this provision would be very helpful to those of us at the local level who often find ourselves confronting increased complexity at specific sites as we work to return them to productive use."

—The Honorable Paul Helmke, Mayor of Fort Wayne, IN, on behalf of the U.S. Conference of Mayors, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

"Legal authority for qualified states to play the primary role in liability clarification is critical to the effective redevelopment of local brownfield sites. A state lead will increase local flexibility and provide confidence to developers, lenders, prospective purchasers and other parties that brownfield sites can be revitalized without the specter of Superfund liability or the involvement of federal enforcement personnel. Parties developing brownfields want to know that the state can provide the last word on liability, and that there will be only one "policeman," barring exceptional circumstances."

"Therefore, in delegating brownfields authority for non-NPL caliber sites to the states, NALGEP proposes that: *EPA should provide that it will not plan or anticipate further action at any site unless, at a particular site, there is: (1) an imminent and substantial threat to public health or environment; and (2) either the state response is not adequate or the state requests U.S. EPA assistance."*

—Donald J. Stypula, Manager, Environmental Affairs, National Association of Local Government Environmental Officials, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

The Governors and State Cleanup Agencies

"There is no question that voluntary cleanup programs and brownfields redevelopment are currently hindered by the pervasive fear of federal liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980. Many potential developers of brownfields sites have been deterred because even if a state is completely satisfied that the site has been properly addressed, and even if the site is not on the NPL, there is the potential for EPA to take action against the cooperating party under the CERCLA liability scheme . . . In considering how to restore brownfields sites to productive use, please

remember the importance of state voluntary cleanup programs in contributing to the nation's hazardous waste cleanup goals."

—Tom Curtis, Director of the Natural Resources Group, National Governor's Association, in testimony before the Senate Committee on Environment and Public Works, May 25, 1999

"H.R. 2580 succinctly mandates that U.S. EPA must receive a Governor' concurrence prior to listing a facility on the National Priorities List. We support this provision as it is clear, unambiguous and satisfies our goal of clarifying the role of the federal Superfund program in the future."

"Both the National Governors' Association and ASTSWMO oppose provisions which allow the U.S. EPA to review and approve existing, established State voluntary cleanup programs."

"It is our belief that we can no longer afford to foster the illusion that State authorized cleanups may somehow not be adequate to satisfy federal requirements. The potential for U.S. EPA overfile and for third party lawsuits under CERCLA is beginning to cause many owners of potential Brownfields sites to simply 'mothball' the properties."

"H.R.2580 satisfies the goal of clarifying which governmental entity is and should be responsible for deciding when a cleanup is complete and when a party is released from liability."

—The National Governors Association and the Association of State and Territorial Waste Management Officials in testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999.

"Another provision that is important to the nation's Governors concerns the requirement for a Governor to request the listing of a site before a state's site may be added to the NPL... Because states are currently overseeing most cleanups, listing a site on the NPL when the state is prepared to apply its own programs and authorities is not only wasteful of federal resources, it is very often counterproductive, resulting in increased delays and greater costs. The Governors fear a case where there will be 'two masters' of the cleanup process... To avoid this we advocate that Governors should be given the statutory right to concur with the listing of any new NPL sites in their states."

—Tom Curtis, Director of the Natural Resources Group, National Governor's Association, in testimony before the Senate Committee on Environment and Public Works, May 25, 1999

The Cleanup Contractors

"I am here to tell you that, in actuality, the true Brownfields market has not kept pace with expectations. Why? We have been asking our clients just that. Our clients' responses are fairly unanimous. They fear that EPA will "second guess" Brownfield cleanups, and require costly site rework at a later date to reach a different site cleanup standard so they "hold onto" lightly contaminated parcels instead of turning them over to beneficial reuse. Moreover, there remains potential down-stream liability associated with that reuse which further retards the process. These concerns result in owners of such properties not undertaking redevelopment efforts at viable Brownfields sites. While EPA has indicated a willingness to enter into, on a case-by-case basis, prospective purchaser agreements at Brownfields sites, the process to enter into those agreements is quite time consuming and there is no certainty in the end that EPA will agree to a prospective purchaser agreement.

"H.R. 2580's provisions in Section 3 provide the finality in Brownfields decisions that are truly needed in this market, and the actual cleanups, are to accelerate... This provision is very important to spurring increased voluntary cleanup actions at Brownfields sites across the country and reducing possible risks to nearby populations that are currently not addressed, expressly because of the fear of federal liability."

"The permit waiver for on-site response actions that is contained in H.R. 2580 would remove the barriers to actual on-site cleanup and significantly increase the pace of Brownfields cleanups."

—The Environmental Business Action Coalition in testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999.

Realtors and Property Owners

"One common incentive provided by these programs is liability relief. Typically, the state will provide some form of liability relief once it has approved a cleanup. In Ohio, relief comes in the form of a "No Further Action" letter from the state EPA. Unfortunately, there is no guarantee that the federal EPA will not assert authority at a future date and require additional cleanup. Without the certainty of knowing that they are protected from federal as well as state liability, property owners and

developers are very reluctant to undertake development of a site which is or might be contaminated. Let me illustrate with an example. I recently had a contract as listing agent to sell a large warehouse property. The property was adjacent to a government-owned landfill. There were concerns about contamination on the property due to migration of heavy metals from the landfill. If we only had to comply with Ohio law, the government entities that owned the landfill would have removed the contamination, and the property would have been sold in a reasonable time. However, because of uncertainty over federal liability, the lender and the purchaser were reluctant to go forward. As a result, it took five years to close the deal, and only after we found a new buyer and a new lender willing to face the risk of future liability."

—National Association of Realtors, May 12, 1999

"The Superfund liability scheme has clearly exacerbated the difficulty of bringing brownfields back to productive use. Moreover, that liability scheme itself is responsible for the creation of many brownfields. This system makes the owners of contaminated properties liable for millions of dollars in cleanup costs even if they had nothing to do with contaminating the site and they purchased the property decades after the contamination occurred. It exposes landowners not only to Superfund actions by EPA, but also to lawsuits decades in the future by as-yet unanticipated parties who incur costs to clean up the property. Concerned about this "trailing" liability, owners of the properties that may be contaminated hold these properties back from the market. This practice has been referred to as "mothballing," bringing to mind the useless hulks of rusting ships set aside by the U.S. Navy after World War II. When properties which carry the stigma of contamination become available for sale, most developers avoid them out of concern for exposure to endless uncertainty and undue financial liability."

—Barry J. Trilling, National Association of Industrial and Office Properties, testimony before the Subcommittee on Water Resources and Environment, May 12, 1999

"The example of states like Pennsylvania, Michigan, Indiana, and others with voluntary cleanup programs support this view. In Pennsylvania, for example, NAIOP actively participated in the legislative process that resulted in Act 2, the Land Recycling and Environmental Remediation Standards Act. Under that statute, parties may choose to clean up contaminated properties to one or more of three different levels, after which they receive a release from liability under state environmental laws. The remediation standards of Act 2 apply both to voluntary cleanups and mandatory remedial actions under the state's version of Superfund. The Pennsylvania statute has been adopted as model legislation by the American Legislative Exchange Council, an organization represented by legislators from all 50 states. Under Pennsylvania's program, in effect since July, 1995, 267 sites have already been cleaned up and nearly 500 sites are in the process of remediation. State voluntary remediation and revitalization efforts, such as Pennsylvania's, are significant steps forward, but these state programs do not protect our members from liabilities arising under the federal Superfund statute.

—Barry J. Trilling, National Association of Industrial and Office Properties, testimony before the Subcommittee on Water Resources and Environment, May 12, 1999

The General Accounting Office and Others

"Lenders and developers are wary of investing in such contaminated property because, under the environmental laws, they could be held liable for cleaning up the contamination. They have often cited the liability provisions in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, as one of the major disincentives to redeveloping brownfields."

—United States General Accounting Office Report to Congressional Requesters, RCED-96-125, *Barriers to Brownfield Redevelopment,* June 1996, Page 1.

"Superfund's liability provisions make brownfields more difficult to redevelop, in part, because of the unwillingness of lenders, developers, and property owners to invest in a redevelopment project that could leave them liable for cleanup costs. While brownfields usually are not contaminated seriously enough to become Superfund sites, these parties still fear that they could be sued for cleanup costs if they become involved with a contaminated site. For example, as a result of the liability problem and the general riskiness of investing in redeveloping brownfields, banks sometimes refuse to lend funds for this purpose."

—United States General Accounting Office Report to Congressional Requesters, RCED-96-125, *Barriers to Brownfield Redevelopment,* June 1996, Page 2.

"Although most brownfields are not highly contaminated, cities, lenders, and developers cite the possibility that the liability provisions in CERCLA could be applied to these properties as a major barrier to redeveloping them."

—United States General Accounting Office Report to Congressional Requesters, RCED-96-125, *Barriers to Brownfield Redevelopment,* June 1996, Page 3.

"The liability for the costly cleanup of environmental contamination is a barrier to brownfield redevelopment because it discourages lenders, developers, and property owners from participating in these projects."

—United States General Accounting Office Report to Congressional Requesters, RCED-96-125, *Barriers to Brownfield Redevelopment,* June 1996, Page 7.

"Perhaps the greatest barrier to industrial site reuse, however, is the 1980 Comprehensive Environmental, Response, Compensation, and Liability Act—commonly known as Superfund."

—"Restoring Contaminated Industrial Sites" by Charles Bartsch and Richard Munson, *Issues in Science and Technology,* Spring 1994 Issue.

"Superfund laws actually reduce the reuse, supply of, and demand for brownfield properties."

—*Unlocking the Brownfields: Overcoming Superfund Barriers to Redevelopment,* by Ross Macfarlane, Jennifer Belk and J. Alan Clark, a Report Done By the Law Firm of Preston Gates & Ellis, Seattle, Washington.

Mr. OXLEY. This document sets out a clear and unambiguous point that Superfund creates problems for brownfields and voluntary cleanup programs. Let me read just a few so that the subcommittee can get an understanding of where I am coming from. This is from the cleanup contractors.

Quote, "The true brownfields market has not kept pace with expectations. Why? We have been asking our clients just that. These are the people who are trying to develop these brownfields. Our clients' responses are fairly unanimous. They fear that EPA will second guess brownfields cleanups and require costly site rework at a later date to reach a different site cleanup standard so they hold on to lightly contaminated parcels instead of turning them over to beneficial reuse. Moreover, there remains the potential downstream liability associated with that reuse which further retards the process. These concerns result in owners of such properties not undertaking redevelopment efforts at viable brownfields sites. While EPA has indicated a willingness to enter into on a case-by-case basis prospective purchaser agreements at brownfields sites, the process to enter into these agreements is quite time-consuming, and there is no certainty in the end that EPA will agree to a prospective purchaser agreement.

Continuing to quote, "H.R. 2580's provisions in section 3 provide the finality in brownfields decisions are truly needed if this market and the actual cleanups are to accelerate. This provision is very important to spurring increased voluntary cleanup actions at brownfields sites across the country and reducing possible risk to nearby populations that are currently not addressed expressly because of the fear of Federal liability."

Now, this is what the State cleanup agencies say.

Quote, "It is our belief that we can no longer afford to foster the illusion that State-authorized cleanups may somehow not be adequate to satisfy Federal requirements. The potential for U.S. EPA over-file and for third party lawsuits under CERCLA is beginning to cause many owners of potential brownfields sites to simply mothball the properties."

The State cleanup agencies aalso state: "H.R. 2580 satisfies the goal of clarifying which governmental entity should be responsible

for deciding when a cleanup is complete when a party is released from liability."

Now, do you disagree with the Governors and the State cleanup agencies, the mayors, the cleanup contractors and the GAO that the liability provisions and uncertainty posed by Superfund is inhibiting remediation activities?

Mr. FIELDS. I don't agree with the comments that have been made. I would like to clarify why I don't.

We believe that finality and assurance can be provided if you enact the type of legislation that we support. We believe that finality can be provided for prospective purchasers, for innocent landowners, and contiguous property owners if legislation were enacted like H.R. 1750. We endorse voluntary cleanup program memoranda of agreement with minimal criteria for State programs. We have already signed 12 memorandums of agreement, and we are negotiating with others.

We support liability relief along the lines of Federal legislation that we endorse and memoranda of agreement for signing off and agreeing to an acceptable State program that is managing sites no longer of Federal interest. We believe those are the kind of elements that would provide the kind of the cleanup community, State officials and those who are being regulated.

We believe there needs to be retention of what we call the Federal safety net, the ability to come in, where appropriate, when imminent and substantial endangerment situations do occur.

This is my last point, and Attorney General Schiffer may want to add something. The last point I would like to make is this. Brownfields cleanup and redevelopment are occurring now, even without the legislation that we support. We think the legislation we support would make it go even faster. Right now in communities across the country more than 845 properties have been assessed. Many of them are being cleaned up. Much redevelopment is occurring: 3,000 jobs, $1.4 billion in private sector investment for cleanup. So I don't think brownfields cleanup and development are not occurring. It is occurring in communities across the country, and the type of legislative proposals we are supporting we believe would make that go faster.

Mr. OXLEY. So you don't agree then with the folks who are out in the field trying to make cleanup occur. In fact, there are a lot of these parcels being set aside and warehoused, because of the fear that EPA will come in and second guess the decisions by the local people as well as the State?

Mr. FIELDS. I would just add that my information is also gathered by people in the field, and I have been to many of these cities and communities. Over the last 4 years we have implemented changes to policy, to guidance on prospective purchaser agreements and contiguous properties, and we have tried to make sure we clarify liability so these deals can occur.

We support the types of provisions in both Mr. Towns' bill and Mr. Greenwood's bill to limit liability for those parties. We want to limit liability in the statute so we don't have to worry about working through all the 110 prospective purchaser agreements, through policy and guidance, as we have under the current statute for the last many years. We think that Federal legislation would go a long

way toward alleviating that fear people have about entering into deals for prospective purchaser agreements or comfort letters or other types of comfort that we currently are providing to people who want to get enter into real estate transactions.

Mr. OXLEY. Well, according to the contractors, they don't have a whole lot of comfort, nor do their client.

Let me ask you this. Is there some fear at the EPA that somehow the States will collude with the contractors and the developers in developing a site that is not clean enough for your standards? Is that basically it?

Mr. FIELDS. No. It is very clear that we work real closely with the States. Many of the States have indicated to us they want a strong Federal environmental program. They want that as a backstop when they need to become involved. We have entered into partnerships with 12 States. Seven more are being negotiated. We believe that, with minimum criteria for what a State response program should be, we are willing to sign off and reach an agreement with the State with respect to the sites in that State.

Mr. OXLEY. Right, under the current law. I understand that.

I think we are going to have testimony from the second panel, from at least one of our witnesses from Michigan who will indicate that, given the choice of an agreement with EPA or supporting legislation from Mr. Greenwood, they would support the ability of the State of Michigan to make those decisions. They feel that they are qualified, and they have a distinct interest in not only protecting the public health and the environment but at the same time fostering job creation in Detroit, as the gentleman, Mr. Dingell, mentioned. Is there some disconnect here between the States and the contractors and the EPA?

Mr. FIELDS. I think, Mr. Chairman, the issue is that not all States are created equal. I know the witness——

Mr. OXLEY. You trust some States and don't trust others?

Mr. FIELDS. No. We have entered into agreement with 12 States. Michigan—and the witness that will be testifying is from Michigan—is one of those, and we have a very good partnership. We have agreed to defer on certain sites to that State because we have a memorandum of agreement with an understanding, however, that if there is an imminent and substantial endangerment situation in the State of Michigan, the Federal Government would have the ability to come in and take action if appropriate to protect citizens.

Mr. OXLEY. Isn't the State qualified to determine a substantial endangerment and deal with the issue?

Mr. FIELDS. Not all States are going to be capable.

Mr. OXLEY. Which ones are and which ones aren't? How about Ohio?

Mr. FIELDS. I don't want to name States.

Mr. OXLEY. How about Ohio? Are we capable of doing that?

Mr. FIELDS. We are talking to the State of Ohio about whether we can get a similar agreement. I know you have met with the EPA Regional Administrator alliance recently, and we want to work with the State of Ohio to see if we can come together on an agreement. The State of Ohio is the only one among the region's

five States that we don't currently have a memorandum of agreement with.

Mr. OXLEY. Who has a bigger interest? What entity has a bigger interest in making certain that these sites are cleaned up properly, the State or Washington, DC, Federal Government?

Mr. FIELDS. Well, as overall environmental stewards, we believe this is a shared responsibility. We have a mandate to protect human health and the environment. We want to work with States, with local governments, and with the regulated community to make sure that mandate is carried out. We work very closely with States and agencies to implement all of our environmental statutes, whether it is air, water, toxic waste, or RCRA. They are very important partners in environmental waste management as well as environmental cleanup. But, in some cases, States don't have the requisite staffing, enforcement authorities, or public participation requirements in place to assure that the people in that particular State are going to be protected.

Mr. OXLEY. Do you believe those situations demand that the State provide that kind of ability? If I were living in a State and I were concerned about human health and the environment, wouldn't I, through the electoral process, make certain that the State address those issues?

Mr. FIELDS. That is exactly what is happening in the State of Ohio. As you know, there are citizens in the State of Ohio who have urged us to make sure that, if we negotiate a memorandum of agreement with the State of Ohio, there be an effective process for public involvement.

One of the major issues that has been raised in the discussions with the State of Ohio and Region 5 on negotiating a memorandum of agreement is that there needs to be a better process for public participation around voluntary cleanup in brownfields sites in Ohio. We are trying to work with the State of Ohio to see if we can craft an agreement that will be satisfactory to the citizens in that State. You are right. It is very important the citizens who live in a particular State are comfortable that their environment and their health is going to be protected.

Mr. OXLEY. Right. And who do they hold accountable? You or the State officials, the elected State officials? Who is accountable?

Mr. FIELDS. I don't think we can say it is one or the other. I think we feel some accountability.

Mr. OXLEY. How so?

Mr. FIELDS. If a major public health threat occurs in Ohio, we are often called upon by the State, by the way, to take Federal response action. That is something we do all the time. We have taken a number of Federal emergency response actions in the State of Ohio at the State's request.

Mr. OXLEY. Well, Mr. Greenwood's bill does cover major public health threats, so that is not really an issue. The issue is the day-to-day operations.

Mr. FIELDS. But his bill does not provide for the flexibility to prevent a major emergency from occurring. We believe that the Federal ability, the Federal standard, ought to be imminent and substantial endangerment in terms of the Federal Government's ability to come back in.

Mr. OXLEY. So we have a philosophical difference. Some of us think that the States are accountable and have the ultimate responsibility to protect the citizens of their particular State, and you think that it ought to be the Federal EPA.

Mr. FIELDS. I think it is a shared responsibility but I believe that to assure even-handed and consistent protection for all citizens across the country there needs to be an ability for the Federal Government to come back in if there is an imminent and substantial endangerment situation that is not being addressed.

Mr. OXLEY. Which Mr. Greenwood's bill covers, by the way.

My time has expired. I am sorry.

Let me turn to my friend from New York, the gentleman from Brooklyn.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Let me just say that I think the argument has really been made here very strongly, and you have assisted us, that H.R. 1750 should be the bill that we move forward with, and I think that by now Mr. Greenwood probably also agrees with the fact that because mine will allow them to come back in, and I think that is very, very important. So I want to just make that point before I ask this question.

Mr. Fields, if the Federal EPA is not allowed to act at a site after a State has performed some action there, no matter how complete the State's actions, then the citizens around the site may find themselves without a resource they now rely upon to address their concerns. This could be a step backwards for the communities disproportionately affected by an usually high number of contaminated sites. In other words, it could make environmental justice concerns even worse, to be frank. Where a State may have allowed the disproportionate siting of a number of facilities that polluted the community in the first place, then that same State may not be as responsive to the citizens' request for more cleanup. Does your agency hear directly from citizens about the fears they may have about polluted properties?

Mr. FIELDS. Yes, Congressman. We do hear from citizens who live in States across the country about the need for the Federal Government to make sure that, before they delegate, before they authorize, before they enter into an agreement to transfer responsibility to State programs that environmental justice, community involvement, public participation, and adequacy of cleanup issues be addressed. So that is a concern and one of the reasons we believe that there needs to be an ability for the Federal Government to be able to come back in is to assure that the citizens in the situation that you point to are going to be protected if the State does not do so.

Mr. TOWNS. Thank you very much.

Ms. Schiffer, it appears that the innocent landowner provision of H.R. 2580, section 5, of course in H.R. 1750 which will be section 201, are very similar in providing certainty and clarifying the steps necessary to qualify for liability protection as an innocent landowner. Would you agree?

Ms. SCHIFFER. I do agree that the innocent landowner provisions of your bill, Congressman, and Congressman Greenwood's bill are quite similar, yes.

Mr. TOWNS. However, H.R. 1300 contains a very different innocent landowner provision which the National Association of Attorneys General have commented on, and let me quote. It says it would obliterate the current owner/operator category from CERCLA Superfund liability. The State Attorney General also stated that this would be contrary to one of the important tenets of the CERCLA liability scheme. What is your opinion on the innocent landowner provision of H.R. 1300?

Ms. SCHIFFER. The innocent landowner provision of H.R. 1300, which is really an innocent owner provision, is a very drastic change. And basically what it would have the effect of doing is retroactively repealing owner liability under the Superfund law, rather than focusing on what we are trying to achieve with brownfields, which is to say that if somebody comes in, wants to be a new purchaser of a property, takes reasonable steps and then goes ahead and develops the property, that that is a person who we think shouldn't be liable, which is what your proposed legislation does and Congressman Greenwood's proposed legislation does on notifying a prospective purchaser.

And H.R. 1300 basically says that if people currently own property or in the past owned property and it was contaminated and they were owners of it and they knew perfectly well they were going to have to clean up, now we are going to create an exception for liability. And that is not fashioned in any way to help address any concerns that there might be about brownfields, and it really does completely upset the apple cart on the kinds of payment principles, polluter-based principles that have operated effectively under Superfund.

Mr. TOWNS. Right. Thank you very much.

Let me ask one other question, Mr. Chairman. I think it was on May 24, 1999, the National Association of Attorneys General commented on H.R. 1300 as follows. They said, H.R. 1300 allows a potentially responsible party to deflect enforcement actions, including listing on the NPL, so long as it is merely conducting a response action or engaged in a response action that is under way pursuant to the identified undefined concept of a State response program. Such provisions allow PRP many easy routes to avoid enforcement of listings.

Do you agree with that?

Mr. FIELDS. Well, we are very concerned about that provision, and we do believe it could interfere with the ability of EPA to list sites. We are concerned particularly about the requirements for governor commerce on listing.

Mr. TOWNS. Thank you very much.

Mr. Chairman, I yield back.

Mr. OXLEY. The gentleman yields back.

The Chair now recognizes the sponsor of one of the pieces of legislation before us, Mr. Greenwood.

Mr. GREENWOOD. Thank you, Mr. Chairman.

And let me say to my friend Mr. Towns that I am leaning a little bit your way on some of this testimony right now, but I suspect when the next panel gets up you will start leaning my way, and my bill is going to start looking good.

Mr. Fields, in response to Chairman Oxley's question where he basically laid out the concerns by a variety of groups about the fact of the liability and the uncertainty posed by Superfund does inhibit remediation, your response was twofold. You said essentially that the Towns' bill would fix that, and then you also pointed to your ability to do prospective purchaser agreements, and I think EPA has done 85 of those and comfort status letters, which I think you have done 250 or something like that.

Two concerns about that in terms of the adequacy of the comfort status letters and the prospective purchase agreements. One of them is that they don't prevent third parties from intervening under Federal law, isn't that right? I mean, that gets EPA off my back, but it doesn't give me certainty that other entities won't use the statute to come and expose me to liability; is that not correct?

Ms. SCHIFFER. In general, the Superfund statute is one that is very focused on EPA being the entity that tries to get people to undertake the cleanups, and so we are not aware of a lot of instances where when there has been no EPA cleanup and the site isn't contaminated at the level where there would be EPA involvement that there nevertheless are third parties who are trying to get other people to cause problems for other people.

Mr. FIELDS. And when these 110 prospective purchaser agreements and 250 comfort letters have been signed, we are not aware of situations where people have been affected by third party litigation. Most of the time they have been very effective. They have resulted in major redevelopment at these sites. And because of the due diligence requirements and the requirements that they contribute and be part of the cleanup, we don't think litigation is a big issue.

The problem is trying to make sure that prospective purchaser agreements are being signed and processed in a timely way. It has taken us, historically, 9 months on the average to effectuate one. We are doing it faster now because of efforts by Lois Schiffer and the EPA staff, but we want to make sure it does go faster. We don't think litigation has been a major concern, once an agreement is signed.

Mr. GREENWOOD. I think one of the intangibles about this whole issue is what we cannot measure, is the number of property owners who don't go that route because they are concerned about litigation, and it is somewhat of an imponderable.

The other concern I have is simply that if we have 500,000 of these sites and you have 250, 300 agreements out there, that that order of magnitude, at the pace we are going, that would take thousands of years to get such an agreement on each one of these, which is why in our legislation we try to shift some of the responsibilities to the States because we think it is a volume question, that the EPA cannot possibly get through 500,000 sites using that fairly slow and tedious, one-at-a-time Federal nexus in each instance.

Mr. FIELDS. We should just clarify that the prospective purchaser agreements are not for brownfields sites. These agreements are mostly sites that are on the Superfund toxic waste list. You are not going to go the prospective purchaser agreements route for the typical brownfields site.

Mr. GREENWOOD. You just use comfort status letters in that?

Mr. FIELDS. Okay.

Mr. GREENWOOD. You are employing the comfort status letters?

Mr. FIELDS. We use comfort letters, status letters and memoranda of agreement between the State and EPA to provide the kind of comfort that the developers and others need for those types of sites. They don't need a PPA for those brownfields sites.

Mr. GREENWOOD. How many EPA employees are involved in reviewing State cleanup decisions, and how many hours does it take, and how does EPA select which sites it will perform such a review for?

Mr. FIELDS. Well, it is difficult to give you a quick answer. I will respond more fully for the record.

Just put in place, for example, that many of these cleanups are, for example, RCRA, corrective action, 32 States, one territory has the authority. We have 18 States that we have the authority to provide oversight for a RCRA cleanup. Forty-four States have voluntary cleanup programs that are being overseen primarily by State officials. There are several hundred, but we will get back to you with more precise numbers. But we have got to keep in mind there is a shared responsibility between EPA and the States in terms of the oversight, whether you are talking Superfund, RCRA, or voluntary cleanup programs.

Mr. GREENWOOD. I see my time has expired.

It points to the fact that we have got to somehow get to a bipartisan solution on this because EPA cannot possibly deal with these hundreds of thousands of sites in our lifetime using those methodologies. I yield back.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman.

Ms. Schiffer, it appears that both H.R. 1300 and H.R. 2580 restrict the Federal Government's ability to respond to the needs of citizens when a site, even after some type of voluntary cleanup, when a site may present an imminent and substantial endangerment to human health or the environment.

In my opening, I cite the State of Michigan which uses the same imminent and substantial endangerment standard as contained in H.R. 1750, and Michigan has signed an agreement with the EPA in June 1996 that clearly reserves Federal authority over brownfields sites where an imminent and substantial endangerment to human health is present or an emergency situation. My question is this, is the imminent and substantial endangerment an appropriate standard to preserve for Federal action? And, if so, explain why is it important to use this standard rather than what I believe to be the more narrowly focused standard of immediately required to prevent or mitigate a public health emergency as set forth in section 3 of H.R. 2580 and a similar provision found in section 104 of H.R. 1300. Can you explain why it is important to keep that standard?

Ms. SCHIFFER. Yes, Congressman Stupak.

What the "imminent and substantial endangerment" authorities to protect public health and the environment do is mean that the Federal Government can come in and stop an accident before it

happens, that it doesn't have to wait until the barrels that may appear to be leaking actually spill, until an explosion actually occurs, until a fire actually happens before it can go in and use authorities to stop the problem and get the polluter to pay to fix the problem. It is a tried and true standard. It has been in the laws for 20 years. It has been tested in court. People know what it means.

What it is important for and why it is so important to have that authority is it means that we can go and see that there is a problem and stop the problem before the accident happens.

The emergency standard—by saying that the Federal Government can't come in and reopen, that federal authorities are not triggered until there is an emergency—that is in Congressman Greenwood's legislation and Congressman Boehlert's legislation, may well mean that, basically, the government would have to wait until the accident happened before it could go in, and that just seems to be very bad public policy if what you are trying to do is protect public health and the environment. It is unfortunately the difference between saying somebody has to commit the violation before you can go after them and that we have laws that prevent the attempt to commit it so that you can go in and stop it before the real problem occurs.

Mr. STUPAK. Well, if we are looking to reopen this standard, it is my understanding that the State of Texas has agreed to a Federal safety net reopener with the EPA that is actually broader than Michigan's. It has three circumstances where the State acknowledged that it is proper for the EPA to take action, and they were, No. 1, where it is determined that the site poses a threat to human health or the environment; No. 2, or the site poses an imminent and substantial endangerment; or No. 3, in an emergency situation.

Now, this seems a little broader perhaps, this compassionate conservative Texas reopener. Would that be a basis to look at it, as opposed to the standards we see proposed in other pieces?

Ms. SCHIFFER. We certainly think that a standard that includes imminent and substantial endangerment for the Federal Government to go back in, and that includes the other two circumstances you outlined, is vastly preferable to saying that there has to be an actual emergency before the bar drops and lets the Federal Government come back in and do the cleanup.

I might add also, Congressman, a response to some of the earlier questions about "do we not trust the States." We certainly trust the States; and, as Mr. Field said, it is a Federal-State partnership that does it in terms of getting sites cleaned up. But what is really the keystone is to be sure what we are doing collectively, Federal Government and State government together, is protecting public health and the environment; and what we really don't want is a system where, because we focused on who has the responsibility between the governments so much, what happens is the public health gets adversely affected and we don't have tools to go in and clean it up.

Mr. STUPAK. You indicated, if I may, Mr. Chairman, the imminent substantial endangerment standard has been litigated, it has been around for a number of years. If we used a different standard set forth in H.R. 2580 or H.R. 1300, would that probably open the door to litigation to determine what this standard is, how it is

going to be applied? It seems to me if we have 25 years of case law and application that has been successfully used, why would we go to another standard that would be challenged probably in court and where we really would delay, would we not, cleanups?

Ms. SCHIFFER. I, of course, love lawyers, but I do have to say that when you have a standard that is pretty well settled in the law, it does reduce litigation because people know what it means, and they can go ahead and apply it and lawyers can sort of settle their cases. But, if you put in place a new standard, you are opening the doors to lawyers arguing about what it means and leaving it to the courts to develop law for a while. So, it certainly will be one more step to putting the lawyers back in Superfund, which we have made major efforts to take out.

Mr. OXLEY. The gentleman's time has expired.

Mr. GREENWOOD. I would ask unanimous consent that the gentleman be granted an additional minute and ask if he would yield to me on this very narrow point.

Mr. OXLEY. Without objection.

Mr. STUPAK. If I could, the standards of the State statutory authority to order cleanups just make it part of the record, the 12 States that I had mentioned, and we have them mentioned right here, if I may.

Mr. OXLEY. Without objection.

Mr. STUPAK. And then I would yield to Mr. Greenwood.

Mr. GREENWOOD. Thank you for yielding.

Let me just clarify something if I may.

First off, the standard is not that there is an imminent and substantial endangerment. It is that there may—that the threat of release may present, and the problem that some on this side of the aisle have is that we think that that is big enough to drive a very wide truck through. And given the fact that Mr. Towns' bill reiterates the existing standard, we don't see it as making a difference at all in being any assistance to the States in getting finality. Would you respond to that?

Ms. SCHIFFER. I think "it may present an imminent and substantial endangerment" is the phrase both in the Superfund law and in the Resource Conservation and Recovery Act, which is the hazardous waste regulatory statute; and it is a standard in other statutes as well. So it is a tried and true standard. And while one might set forth a parade of horribles that might suggest it is a very wide-open standard, as you say, the truth of it is that it has been applied in a way that gives the government—and I will say this is also State governments who have similar provisions and have the same provisions in their laws—the ability to go in and stop the accident from happening, to see the drums that are likely to leak and to get them cleaned up before they actually leak.

The problem with the standard of an actual emergency, which is what is proposed in your legislation and Congressman Boehlert's legislation, is that we may well have to wait until the drums leak, until the fire happens, until the explosion occurs, before we can use authorities to go in and clean it up, and that isn't very protective of public health and the environment. That is preventing the problem from happening rather than stopping it before it actually happens.

Mr. GREENWOOD. Well, I don't want to abuse my time here, but there certainly is a difference between imminent and may present imminent, and I think that is a difference that needs some further discussion.

Mr. OXLEY. The gentleman's time has expired.

The Chair now recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I am going to follow the same line of comments, and if the gentleman from Pennsylvania wants to jump in, please do.

I guess the question that will come up in the next panel is that the phrase "may" and "endangerment" is actually used to basically run an ordinary cleanup program and that the States and the cleanup contractors and the State legislators and the local government entities are saying that that is the big truck that my colleague Mr. Greenwood is saying that needs to be tightened up. So if it is a regular cleanup program, that the "may" and the "endangerment" aspects of this do not close down the possibility of cleanup, and I will throw that out for comment.

Mr. FIELDS. I think we have to look at the track record here. As Lois has said, this has been used in many environmental statutes for a number years. In implementing this provision, all of the 12 memoranda of agreement that we have signed with State officials and State agencies include language that says that we may come back in if there is a situation involving imminent and substantial endangerment. We have never done that in the more than 6 years we have had memoranda of agreement in place. We have never intervened in a State program inappropriately where we have had a memorandum of agreement and that State is overseeing cleanup.

So the practice is such that people should not fear Federal interaction. As we sign a memorandum of agreement, we make it very clear which sites in the State are of Federal interest and which sites are not of Federal interest, and we operate in a partnership with the State. But we believe that the imminent and substantial endangerment language is critical to maintain environmental protection for all American citizens, particularly where you don't have an effective State program in place to provide and assure that protection. States need the backstop of the Federal Government with the ability to come in when these situations do occur, when we see a threat about to occur.

Mr. SHIMKUS. And you refused to address a question earlier. I would like to know, one, which States want a strong Federal backup, as you have used numerous times, and you have mentioned that there are 12 States that have signed memorandums of agreement. Are those the 12 States? And, if not, are those 12 States that have memorandums of agreement, are they in support of a strong Federal backup, and—you know, just kind of connecting back with the comments from my colleague from the State of Ohio. I would like to know the facts. I would like to know. We have got 50 States. Which States have come to you and have stated on record that they want a strong Federal backup and that they need you and they cannot do the job themselves?

Mr. FIELDS. Well, actually, the information was given to the General Accounting Office in the study commissioned by Congress.

That General Accounting Office study, which was completed in December, 1998, is what I was referring to or what Ms. Schiffer was referring to when we said that State officials commented to the General Accounting Office that they wanted a strong Federal backup.

Mr. SHIMKUS. So if I go to that GAO report, that is going to tell me which State officials said that on the record?

Mr. FIELDS. It will tell you some of the States that indicated they wanted a Federal backup, yes.

Mr. SHIMKUS. You don't know the number?

Mr. FIELDS. We don't know the number of States or which States specifically. I understand we can provide for the record.

Mr. SHIMKUS. I will have the staff pull up that report.

Mr. FIELDS. I can read them off if you want me to.

Mr. SHIMKUS. Is it 10 percent of the States, 50 percent of the States, 100 percent of the States?

Mr. FIELDS. I don't know the precise number of the States.

Quickly, on your second question, we have the list of the 12 States that have signed memoranda of agreement with EPA. I will be happy to give them to you for the record or read them to you now if you wish.

Mr. SHIMKUS. Are those the similar—that want the strong Federal backup and feel they cannot do the job without it?

Mr. FIELDS. I don't know how this set of States correlates with the States that are in the GAO study. I would have to go back and compare that study with this list of 12 States that we have entered into memoranda of agreement for.

Mr. SHIMKUS. Okay. Thank you, Mr. Fields. My time has expired.

Mr. OXLEY. The gentlewoman from Colorado, Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman.

You know, frankly, I think that Mr. Greenwood's point about property owners being concerned about cleaning up, if they think that the EPA is going to come in, is a good one. I would like you to comment, if you can, about the effect that you have seen in the 12 States that have signed the memoranda of agreement versus the States that haven't. Have you seen more cleanup activities under the State plans in those States?

Mr. FIELDS. Right. One of those States is Colorado, where we have signed a memoranda of agreement. We have never overfiled or intervened in a State cleanup program that has a memorandum of agreement. Congressman Greenwood's legislation and Congressman Towns' legislation on liability for prospective purchasers, innocent landowners, contiguous property owners is very similar in many respects.

So we support that kind of liability relief. But our history, Congresswoman DeGette, has not been that people should fear the EPA is going to come back in and take further action when a cleanup is being done pursuant to a State voluntary cleanup program, as in the State of Colorado. Our history has not been to come back in.

Ms. DEGETTE. Following up on the previous question, it seemed to me in Colorado people wanted to do this memorandum of agreement, not because they wanted strong Federal backup, but to get

the EPA threat out of their hair. So I think these memoranda of agreement can work both ways. They can work to give property owners an assurance that the EPA is not going to come tromping in and, at the same time, it can give the States that kind of backup that they want to get. I think it can be a win/win.

Mr. FIELDS. But we don't sign the memorandum of agreement unless they satisfy 6 criteria. Those criteria are similar to what is in H.R. 1750. We believe before we sign a memorandum of agreement, a State ought to meet certain minimum criteria in terms of involvement and cleanup, et cetera.

Ms. DEGETTE. It is my understanding from looking at these bills that while these criteria are enunciated in 1750, they are not enunciated in 1300 or 2850; is that right?

Mr. FIELDS. That is correct.

Ms. DEGETTE. The National Association of Local Government Environmental Professionals called for qualifying criteria under State voluntary cleanup programs to be established before Federal authority could be limited or restricted. Have these criteria ever been promulgated by NALGEP? And, similarly, are they roughly similar to the criteria you folks use?

Mr. FIELDS. NALGEP, which is a great organization, has recommended that there be qualifying criteria for State programs that enter into a memorandum of agreement with EPA. They never promulgated that. They did publish a report that contained those criteria, and those criteria are the kinds of criteria that we support and have been utilizing for State memoranda of agreement. We think that recommendation by NALGEP is consistent with what is in H.R. 1750.

Ms. DEGETTE. It seems to me, and Mr. Greenwood and I are going to talk about this later, but it seems to me that it wouldn't be too hard to come up with some criteria that both the locals and the States and the Federal Government would all like.

Let me just follow up on one point, a confusion that I think we have had in this hearing. The prospective purchaser and innocent landowner provisions are the same in the Towns bill and the Greenwood bill, essentially; would that be correct?

Ms. SCHIFFER. They are similar. There are some differences, particularly in the contiguous landowner provisions. We can probably bridge the gap with discussions. We have some concerns about that being created as an exception in Congressman Greenwood's bill rather than being a defense; but, in general, they are in the same direction and we think that the differences could be bridged.

Ms. DEGETTE. Mr. Chairman, may I have another minute?

Mr. OXLEY. Without objection.

Ms. DEGETTE. Thank you.

So we are really not talking about prospective purchasers being chilled from buying land under this. What we are really talking about is who maintains the ultimate liability: Is it the polluter, the original person who put the contamination on the property, or is it the public who would pay for it—isn't that the real issue that we are talking about here?

Ms. SCHIFFER. Yes, that is the real issue; that is, if the site has not been effectively cleaned up and it is a seriously contaminated

site, who is going to bear the obligation to clean it up and who is going to have to pay for it?

Ms. DEGETTE. No one thinks that it should be an innocent purchaser or some adjoining landowner or somebody like that; right?

Mr. FIELDS. We agree that liability relief ought to be provided to those people. We support that kind of liability protection.

Ms. DEGETTE. Thank you. Thank you, Mr. Chairman.

Mr. OXLEY. The gentlewoman from New Mexico, Mrs. Wilson.

Mrs. WILSON. Thank you. I want to explore the Federal and State responsibilities a little bit and this concept of safety net. Is it your belief under your approach to this that States should have the authority to reopen Federal selection decisions when the States believe that they have a better plan? Does it work both ways?

Mr. FIELDS. Well, under the Superfund statute under which both our Superfund and the brownfields programs are administered, Congress has clearly defined that the Federal Government is the lead decisionmaker regarding cleanup decisionmaking. But the law that Congress gave us to administer does very clearly make State acceptance——

Mrs. WILSON. We are talking about making some amendments to that law, and I am trying to figure out what the philosophical point of view is here. If the issue is a safety net and protection of public health, if your agency is inadequate at protecting that health, can the States intervene and override your decisions?

Mr. FIELDS. You are talking about brownfields, the 500,000-plus low-to-moderate contaminated properties across the country. For brownfields, as a policy matter, we are trying to give as much authority and responsibility and support to State programs. We fund these programs at $10 million to $15 million a year.

We support voluntary cleanup programs. We believe the best way to deal with this is for States to enter into a memorandum of agreement with EPA that clearly says the sites covered by the memorandum of agreement are those that the States are going to take the lead on and that we, the Federal Government, will only get involved if there is an imminent endangerment situation where, to protect public health, the Federal Government's resources need to be provided to do so.

Ms. SCHIFFER. And under existing laws that affect brownfields, States can have more stringent remedies at sites if they want. All of the environmental laws are set up so that if States want to have standards that are more stringent, they are certainly welcome to put those into place.

Mrs. WILSON. Let's talk about that question of imminent and substantial endangerment and particularly as it relates to Superfund. And, Mr. Fields, we have had discussion about Superfund, and after 7 years of inaction, that site in Albuquerque is being cleaned up, an action which you admit was inadequate; the response should have gone much faster.

Mr. FIELDS. I would agree with that, yes.

Mrs. WILSON. I take that from your testimony, so I assume that you will agree with it.

Is it your view, should we change the Superfund law so when the EPA fails to act on its responsibilities to clean up these sites, that States can assume the authority for doing so? It is really a question

of federalism? Your attitude seems to be that the Federal Government can override the States. Should the States also have the authority to override failure to protect public safety by the Federal Government?

Ms. SCHIFFER. Maybe we can take a step back for a moment, because I don't think that what we are saying is that the Federal Government should be able to override the States. What we are talking about is when a person wants to buy or work on a brownfields site which, as Mr. Fields has said, are not the seriously contaminated sites, what assurance are they going to have if they go in and effectively clean up that site—and the State says it is an effective cleanup—that the Federal Government is not going to come back and say it was not an adequate cleanup?

I might point out if the person cleans up the site to the adequate level for its use, we haven't come back, and we don't come back into it because we want the site cleaned up, not a Federal role. But what we are talking about is not overriding the State but, rather, if the site continues to present an imminent and substantial endangerment so there is a serious threat to public health and the environment, giving the Federal Government the authority to go in and get that site cleaned up so the public health is protected, and then having the person who caused the contamination pay for it. It is not the Federal Government overriding the State; it is looking to be sure that there is a way to get that site cleaned up.

Mrs. WILSON. The question of liability is a different one, but I think this exchange shows just how far apart we are on a philosophical basis of the relationship between Federal authority and State authority, and that I am not even able to communicate conceptually that there is a federalism question here, and that if the Federal Government and the all-powerful EPA comes down with a decision about what the site cleanup should be, it doesn't seem—I don't seem to be able to communicate to you that perhaps a State should have the authority to override a Federal decision, because this pyramid seems to go only in one way. That is one of the fundamental differences that makes it difficult to come up with legislation that will work.

Thank you, Mr. Chairman.

Mr. FIELDS. Just to add one thing to what Ms. Schiffer indicated. To further address this issue, I think this ought to be a partnership. I don't think it ought to be an issue of one level of government overriding the other. I think the Federal Government and the State government ought to sit down together and decide jointly how they will address the universe of sites.

As you said, Mr. Chairman, there are 500,000-plus of these brownfields sites across the country. It ought to be a partnership between the Federal and the State Government where we decide together what is the best delineation of responsibilities for the sites. We have been able to do that in many States, and I believe we can continue to do that in many more States through entering into a memorandum of agreement which clearly demarcates responsibilities in the State. It ought to be working together in partnership.

Mr. OXLEY. Mr. Fields and Ms. Schiffer, we thank you for your testimony. Members may submit questions in writing. Without ob-

jection, the hearing record will remain open for 60 days for members to submit written questions and provide extraneous material for the record. Without objection, so ordered.

Thank you for your participation.

Mr. FIELDS. Thank you.

Ms. SCHIFFER. Thank you.

Mr. OXLEY. The Chair will now call the second panel. On the second panel we have the Honorable Paul Helmke, Mayor of Fort Wayne, Indiana, on behalf of the U.S. Conference of Mayors; Mr. Don Stypula, Manager of Environmental Affairs, Michigan Municipal League, on behalf of the National Association of Local Government Environmental Professionals; Claudia Kerbawy, Section Chief, Superfund, Environmental Response Division, Michigan Department of Environmental Quality, on behalf of the Association of State and Territorial Solid Waste Management Officials here in Washington, DC; Teresa Mills, on behalf of the Buckeye Environmental Network, Grove City, Ohio; Jonathan Curtis, President, Environmental Business Action Coalition Washington, DC; Ms. Karen Florini, Senior Attorney, Environmental Defense Fund, Washington, DC; and Mr. Gary Garczynski, Treasurer, National Association of Home Builders, Washington, DC.

STATEMENTS OF PAUL HELMKE, MAYOR OF FORT WAYNE, INDIANA, ON BEHALF OF THE U.S. CONFERENCE OF MAYORS; DONALD J. STYPULA, MANAGER OF ENVIRONMENTAL AFFAIRS, MICHIGAN MUNICIPAL LEAGUE, ON BEHALF OF NATIONAL ASSOCIATION OF LOCAL GOVERNMENT ENVIRONMENTAL PROFESSIONALS; CLAUDIA KERBAWY, SECTION CHIEF, SUPERFUND, ENVIRONMENTAL RESPONSE DIVISION, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, ON BEHALF OF ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS; TERESA MILLS, ON BEHALF OF THE BUCKEYE ENVIRONMENTAL NETWORK; JONATHAN G. CURTIS, PRESIDENT, ENVIRONMENTAL BUSINESS ACTION COALITION; KAREN FLORINI, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND; AND GARY GARCZYNSKI, TREASURER, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. HELMKE. Thank you, my name is Paul Helmke. I am the Mayor of Fort Wayne, Indiana. I am appearing on behalf of the United States Conference of Mayors. I am the past president of the Conference of Mayors and I am the present and co-chair of our Conference's Mayors and Bankers Task Force dealing particularly with the brownfields issue.

You have got my full statement. Let me touch on a few issues. First of all, Chairman Oxley, I want to thank you for your leadership on the brownfields issues; and Mr. Towns and Mr. Greenwood, your bills, we appreciate the discussion that is going on today. We share a common view that our older industrial communities are struggling to recycle these sites. We know the value and the importance of the farmland that is often needlessly placed at risk.

As spokesperson for the Nation's mayors and other community leaders, I hope we can have some legislation successfully enacted this year. Our communities need help. These are dead zones. These

brownfields sites exist everywhere and cause problems. Securing bipartisan consensus on the legislation is a top priority for the Conference of Mayors. We feel that we are making some progress, thanks to the efforts of this committee, Mr. Greenwood, you and others in Congress.

I also want to recognize EPA Administrator Browner and other members of the administration for their efforts in this area as well.

As a Nation we are making progress, but we don't feel that it is quick enough or substantial enough. The problem of brownfields lying fallow, coupled with our Nation's appetite for use of greenfields, is epidemic proportions. We think the answer lies in getting a bipartisan agreement moving through this Congress.

This effort will be advanced later today when the bipartisan leadership of the House Transportation and Infrastructure Committee announce their agreement which has been referred to already tomorrow. That committee will act on a very broad, consensus-based bipartisan agreement: H.R. 1300, the Recycle America's Land Act. This was the legislative effort led by Sherry Boehlert. There is a lot at stake for all of us in recycling these sites. Each of the bills is intended to move the Nation forward. Representative Greenwood and Towns, thank you for your efforts. Let me make a couple of important points.

The time has come to stop punishing innocent parties under Superfund. And the time has come to undo the bias in favor of open space that we have in current law and start recycling brownfields. The time has come to take seriously the unnecessary consumption of our open spaces, be it farms, forests or other lands. The time has come to help us level the playing field between greenfields and brownfields. The time has come to help us redeploy properties that take fuller advantage of taxpayers' prior investments, the road and street networks, the public transit and rail capacities, the water and sewer systems, the existing housing stock and the like. The time has come to help us make welfare reform really work by recycling properties and creating jobs close by the neighborhoods where the people are living and having the business districts there. The time has come to change policies that drive businesses to look first for greenfields, not brownfields. I know you are all aware of these efforts.

The Conference of Mayors recently released our second annual brownfields survey which shows part of the problems that are here today. One hundred eighty cities reported more than 19,000 brownfields sites representing more than 178,000 acres. This is larger than the cities of Seattle, San Francisco and Atlanta combined.

We feel that there are close to 500,000 sites nationwide. Cities were asked to provide estimates of how many people they could absorb if we redeveloped brownfields. One hundred fifteen cities reported they could absorb more than 3.4 million people without appreciably adding to the infrastructure. That is equal to the population of the city of Los Angeles. It is equal to 16 months of our Nation's population growth.

In the area of job creation, the 168 cities responding estimated that reuse of brownfields cogenerate more than 675,000 jobs. It is important to get something done and get something done now. We

have got a partnership with bankers, but they have told us that they are not willing to move forward on brownfields, on lending to brownfields, unless there is legislative effort. They are concerned about the liability issue. They are willing to put the investment in if the liability issue and some of the other brownfields issues that we are discussing are taken care of.

Let me comment on the legislation. We want to emphasize, first of all, the importance of liability reforms. In addition to the prospective purchaser provisions, which is a common element in the pending bills and absolutely crucial, we strongly support the liability provisions contained in H.R. 1300 and 2580 to address the circumstances where cities and other local governments have acquired brownfields in the performance of their legislative functions, our government functions. We need the funding for cleanup. We need to strengthen the voluntary cleanup programs and clarify the balance between State and Federal authority. And you might want to look at the Transportation Committee's agreements on these issues to see the balance. We need some sense of finality.

We have urged more attention to Federal policies that provide for a one-stop brownfields office. The basic problem that we face, and I have listened to the debate earlier today on liability, is that these brownfields sites are staying in our cities. They are dead zones. They become cancer zones and take down our neighborhoods. And while folks are arguing at the Federal level or other levels about who is responsible, basically people are not coming in to develop these properties because they are not getting finality and they are concerned about liability.

If we can get some help on liability and finality, we feel in H.R. 1300 we can help redevelop these properties and strengthen our neighborhoods and cities and stop eating up our farmland. Thank you for the opportunity to testify.

[The prepared statement of Paul Helmke follows:]

PREPARED STATEMENT OF HON. PAUL HELMKE ON BEHALF OF THE U.S. CONFERENCE OF MAYORS

Mr. Chairman, I am Paul Helmke, Mayor of Fort Wayne, Indiana.

I am pleased to appear today on behalf of The U.S. Conference of Mayors, a national organization that represents more than 1,050 U.S. cities with a population of 30,000 or more.

The Conference and its member mayors have been involved extensively in the legislative debate on brownfields redevelopment and related efforts to enact much needed reforms to the nation's "Superfund" law.

I presently serve as a as co-chair of the Conference's Mayors and Bankers Task Force which is focusing on financing brownfield redevelopment deals. I am also a Past President of the Conference of Mayors.

Mr. Chairman, the Conference's statement addresses a number of areas pertaining to the legislation before this Subcommittee today.

- First, it discusses why we believe Congress needs to act on legislation to further the efforts of cities and other communities in recycling brownfield properties.
- It presents new information documenting the scale of the brownfields problem and the many benefits that can be achieved by federal policy changes in support of our efforts.
- It explains what mayors have been learning in our continuing work with bankers and other financial interests, particularly how legislative reforms can help stimulate additional private sector investment in these sites.
- Finally, it reviews how pending legislation responds to the many issues raised by mayors and others who are seeking to redevelop these sites.

WHY CONGRESS NEEDS TO ACT ON LEGISLATION

Mr. Chairman, I would like to begin by acknowledging your continuing efforts, and those of others on this Committee, to address the many issues pertaining to brownfields redevelopment and selected reforms to the nation's Superfund law.

Securing bipartisan consensus on legislation on these matters is a top priority for The U.S. Conference of Mayors. Mr. Chairman, we believe the time has come to act decisively and promptly on brownfields and selected Superfund reforms.

Mr. Chairman, the Conference also acknowledges and appreciates the many efforts by the Administration, particularly U.S. EPA Administrator Carol Browner, and those of you in Congress who have supported policies and initiatives, such as funding for local brownfield programs, to further our efforts to recycle America's land. These programs and policies have certainly helped, and again let us underscore that we are very appreciative of these efforts. But, as a nation, we are not making progress at a rate that is quick enough or substantial enough given other considerations, which we discuss further in this statement.

The problem of brownfields lying fallow, coupled with our nation's appetite for open space, is of epidemic proportions. To date, our collective actions are inadequate in meeting these and other challenges before the nation.

Anyone who examines the brownfields issue acknowledges the need for broader strategies to promote the redevelopment of these sites. They also share a sense of urgency in acting promptly to address this national problem.

Need for Bipartisan Action

For our part, we have tried to articulate why bipartisan action and leadership by the Congress and the Administration are needed. The Conference has also focused its efforts in support of broad, bipartisan legislative initiatives.

Since I served as Conference President, the nation's mayors have worked with Representative Sherwood Boehlert to support his efforts to secure bipartisan agreement on these issues. It now appears that these efforts have helped produce a consensus-based bipartisan agreement. Tomorrow, the House Transportation and Infrastructure Committee is expected to act decisively on its pending legislation, H.R. 1300, the "Recycle America's Land Act."

The agreement that will come before that committee affirms our view that a national strategy to deal brownfields necessarily requires broad consensus among Democrats and Republicans. We believe that such a consensus needs to be enduring over time, because the nature of this problem does not lend itself to a one-time legislative correction.

Each of the bills before you today is intended to move the nation forward in dealing with brownfields. We know that this legislation is not an endpoint. We anticipate working with you and future Congress' on redirecting the tax code, infrastructure investment patterns particularly in transportation, and other policies in the environmental and housing arenas, to make recycling our nation's land part of the nation's development life cycle.

We also envision an enduring bipartisan commitment by the Congress to challenge investment practices and public, private and individual decision-making that unnecessarily consume our precious greenfields as brownfields are discarded.

Effects of Current Policy

We know that Superfund's liability regime too often drives private sector investors from brownfields to more pristine locations. We know these rules punish innocent parties, fueling a development cycle that is unsustainable. We know that current law must be reformed to undo the bias toward new land resources over recycling land that is already urbanized or developed.

Mitigating the effects of this nearly twenty-year Superfund policy will require actions on several fronts. The legislation before you today is the first step in reversing or slowing down our predisposition for pristine land. Foremost among these provisions are protections for innocent party developers and others as well as resources and other incentives to help us undo the stigma on these properties and begin to reshape investment decisions by the private sector.

We also share the view that the problem of brownfields is national in scope and transcends more localized interests in reusing these properties.

Let us explain further. As I have so often discussed in my speeches on this subject, we see a nation where our open spaces—farms, forests and other lands—are being consumed at an alarming rate. At the same time, we know that the nation's already substantial and growing inventories of previously developed lands, most notably brownfields, are vast and can be tapped to slow our nation's demand for open space.

We see a nation where existing communities, particularly our older industrial centers, suffer unreasonably from the lingering effects of economic shifts and prior land uses. Once-productive lands lay fallow or underutilized, as inventories of brownfields grow relentlessly all across the nation. And, adding Superfund to the mix is one more burden added on. All of us know that this cycle—abandoning used properties in favor of pristine greenfields—can't be sustained without serious consequences for the nation.

At the same time, with your support in the Congress and in the Administration, mayors are dealing with public education and public safety, updating their infrastructure, initiating other investments and improvements to make our cities more attractive to private investors, families and individuals.

All of us increasingly understand that our patterns of urbanization are already saddling our citizens and our nation with unanticipated and unacceptable burdens, promising only more of the same in the not too distant future. Shrinking open spaces in areas where most Americans live and work is just one symptom of the many ills brought about by this cycle of using and disposing of our land.

Consider some examples of this such as declining air and water quality, escalating flood control and transportation investment needs, and threats to drinking water supplies. As one indicator, consider that of the more than 1,050 U.S. cities with a population of 30,000 or more, nearly two-thirds of them are in areas that exceed national air quality standards for ozone. We know our development patterns are aggravating efforts to combat air pollution in areas where so many Americans now live and work. And, such patterns challenge us in other important areas, such as in the transportation arena where we are working to increase mobility, improve air quality and grow the economy.

To illustrate this point further with brownfields, we have sites that are already situated to take advantage of road and street networks, public transit and rail capacities, as well as other assets that come with reusing properties in existing communities. At the same time, we are investing at a feverish pace to build new roads, new streets, new schools and other new systems to serve fewer people living farther away from existing and established communities.

We all know where this development cycle is taking us and the stresses it continues to place on existing communities, our natural resources and available public and private capital resources. How we consume the nation's land resources, including our failure to effectively recycle brownfields, is at the core of this.

We also see a nation where existing communities which are repositories for so much of our nation's human, economic, environmental and cultural resources needlessly placed at risk, as we, collectively, turn a blind eye to the wasteful use of our nation's land.

Each of us here today, and mayors and local officials across this country, can testify to these realities and offer perspectives on the broader challenges before the nation. For most of us, it is about renewal and the sustainability of existing communities, where so many Americans now live and work and upon which all of us depend. It is where we have invested generations of the taxpayers dollars and where we continue to extract so much of the wealth that keeps the national, state and regional economies growing.

It is also about meeting the challenge of making welfare reform work where jobs are being created and retained in close-by neighborhoods and business districts, not just an exercise in terminating public assistance and sentencing our most vulnerable citizens to endless bus trips elsewhere in search of jobs and income.

For many mayors, redevelopment of these sites is about securing a fairer share of state and federal resources to upgrade infrastructures—water, sewer, roads and streets, school buildings—to make their communities more competitive in the marketplace. This is about leveling the playing field, offering some comparability in the quality of public facilities and infrastructures. We now offer modern and new infrastructures in our growing areas, but we do so by directing substantial shares of the public's capital to these areas, while depleting the asset base of our existing communities.

Just to cite a few examples of many. We would point out how Clean Air standards are now applied to the established and denser, closer-in areas of the non-attainment areas, not the outlying and developing areas which have gone unnoticed in air models. Or, consider the application of municipal stormwater requirements to the preponderance of larger and established communities, like cities with a population of 100,000 or more, not the faster growing and newer developing areas where options are more plentiful and can be deployed more readily at less cost. These are examples of federal policies which further motivate businesses to look for greenfields, where too often our transportation and other infrastructure investment dollars are more plentiful or soon will be captured.

For our discussion this morning, consider what we know about Superfund and how its liability provisions have scared private sector investors away from already urbanized lands, much of which is viewed as "tainted" property or brownfields, and toward our greenfields.

Yet, despite this record before the Congress and this Committee, and the acknowledgement by so many policy-makers of the effects of brownfields on the nation, we continue to search for ways to break out of the Congressional impasse. We are very hopeful that the House Transportation and Infrastructure Committee's agreement on H.R. 1300 will demonstrate that there is a way out of this impasse.

Mr. Chairman, we know that you and the Members of this Subcommittee are well attuned to these issues, as evidenced by the very important provisions included in the legislation before you today. We believe it is crucial that you act, and act in a bipartisan way, to help change the way we use land in America.

We must adopt these reforms, and do so this year, to provide more parity for decisions affecting how our land resources are used. Such reforms will help us to grow smarter in the future.

These reasons explain why the nation's mayors are so strongly in support of bipartisan legislative efforts to redirect federal policies and further engage with our communities in tackling the brownfields problem.

NEW INFORMATION ON SCOPE OF BROWNFIELDS PROBLEMS AND BENEFITS OF POSITIVE POLICY REFORMS

Mr. Chairman, I am pleased to report to you and this Subcommittee on the findings of the Conference's Second Annual Brownfields Survey. Information from this report supports many of our statements about why legislation is needed. It also substantiates many of the key provisions of the pending legislation, be it H.R. 1300, H.R. 1750 or H.R. 2580, before the Subcommittee today.

Mr. Chairman, let me now provide you with some of the key findings to amplify further what we believe are some of the key issues before this Subcommittee today as you prepare for action on pending legislation.

First, the findings confirm that brownfields are a national problem and broad in scope. Our results are drawn from more than 220 cities, a sample of cities, both large and small, in 39 states and Puerto Rico.

In our survey, 180 cities, collectively, reported more than 19,000 brownfields sites totaling more than 178,000 acres, a land area that is larger than the cities of Seattle, San Francisco and Atlanta combined. This sample size represents a relatively small universe of the nation's more than 28,000 municipalities, suggesting a scale to the problem that is disturbing at best.

Cities were asked to identify obstacles to redeveloping brownfields in their communities. Of the top three responses, the need for cleanup funds was identified as the number one obstacle, followed by liability issues and the need for environmental assessments. The relative ranking of obstacles is the same as last year's survey of about 140 cities.

Mr. Chairman, we note that the pending legislation deals directly with the top three issues that were identified in our survey. Each of the bills address a range of liability issues affecting innocent public and private parties and they also authorize funding for assessment of these sites and to clean up brownfields.

We also found that three out of every four cities expressed the view that their communities will need additional resources beyond cleanup funds and assessment funds in support of their efforts to redevelop brownfields. This finding underscores earlier points in our testimony about the need to look at the tax code and incentives here as well as how infrastructure investment dollars are being deployed.

The survey also documented the substantial benefits that can be realized for cities and the nation through the redevelopment of these sites. About two-thirds of the respondents provided estimates of local revenue gains which could be realized through redevelopment of brownfields. Collectively, they estimated the potential local revenue gains of nearly $1 billion annually under a conservative estimate and about $2.7 billion annually under an optimistic estimate.

In a related area of inquiry, cities were asked to provide estimates of how many new people they could absorb without adding appreciably to their existing infrastructure. While 180 of the respondents indicated they could absorb more people, only 115 provided actual numbers.

Astoundingly, these 115 cities reported that they could absorb more than 3.4 million without adding appreciably to their infrastructure, a population about equal to the City of Los Angeles, our nation's second largest city. To put these numbers in context, this capacity is equal to about 16 months of the nation's population growth.

In a relatively small sample of municipalities nationwide, albeit generally larger ones, the survey provides clear evidence of the substantial, incumbent carrying capacity of existing communities. If we can find ways to tap these capacities, and we believe that brownfields redevelopment is a key piece to this equation, we can realize substantial savings for all of the nation's taxpayers. Consider the potential savings to the nation if we can minimize the public and private costs of building the equivalent of one new Los Angeles City every 16 months over the next decade.

And, consider the implications of this in terms of our consumption of land. If we pursue policies, like an expanded commitment to brownfields redevelopment and other means to reinforce existing communities, we can slow the nation's consumption of farmlands and open spaces. Today, the nation is growing in ways that uses more and more land to serve fewer and fewer people.

In the area of job creation, 168 cities estimated that reuse of these brownfields could generate more than 675,000 jobs. This supports our claims that there are vast opportunities to develop jobs in existing urban areas and neighborhoods, a particularly important finding as we continue to implement welfare reforms emphasizing welfare to work.

Finally, in our findings on the status of state voluntary cleanup programs, cities reported that where such programs were in effect, a sizable majority indicated that these programs were at least satisfactory, if not better.

Alternatively, you can describe these results more negatively by combining cities that indicated the questions on state voluntary programs were not applicable with those giving their state a "not very good" or "poor" ranking. Under this method, more than one-half of the respondents indicated that voluntary cleanup programs didn't apply or they were ranked poorly. This assessment suggests the need for further investment in state voluntary cleanup programs, as provided in the pending legislation before you.

PERSPECTIVES ON BANKING AND LENDERS SUPPORT FOR BROWNFIELDS

Mr. Chairman, as you know, the Conference has been working extensively with bankers and other financial interests to explore ways to increase investment in brownfields redevelopment.

Last year the Conference formed a Mayors and Bankers Task Force to work with representatives of the Federal Home Bank System and others to examine ways to facilitate investment by member banks in brownfields.

We have learned that liability under Superfund is their dominant concern. Despite progress in securing "comfort letters" at many sites, lender liability reforms and growing confidence in state program efforts, there is real anxiety, and we would wish otherwise, among bankers and other lenders on these issues. The specter of Superfund liability severely limits their ability to increase the flow of private capital into these projects.

We have heard repeatedly—in our work with members of the Federal Home Loan Bank System through our Task Force and in our other efforts with financial interests—that lenders are not willing to move aggressively on brownfields until there are legislative reforms to Superfund. They have told us that the private sector is prepared to substantially increase capital flows to projects on brownfield sites as soon as Congress enacts legislation that explicitly shields innocent parties from Superfund's liability scheme.

Today, we are enjoying the benefits of one of the longest economic expansions in our nation's history. If there is a time to enact changes to stimulate private sector investment in these sites, it is now. This is the time to demonstrate to investors and others—when private capital is plentiful and available for new investment opportunities—that brownfields redevelopment can be successful. Such successes will help carry our future efforts to attract investment in brownfields during the leaner times which will inevitable come as the economy moves to other cycles.

Mr. Chairman, when mayors talk about brownfields, our federal partners sometimes only hear us asking for federal partnership resources in support of brownfields redevelopment, as if mayors are suggesting that public resources alone will solve the brownfields problem. As you know, mayors are fairly attuned to the realities of our market economy. We know that the private sector is the dominant investor and the pivotal actor in determining how successful we, as a nation, will be in recycling brownfields. It also explains the particular priority we place on ensuring that any legislation include liability protections for innocent third parties.

However, conversely, we also know that a market economy, fueled by liability reforms, doesn't respond fully to the problem either. There are many types of brownfields in all circumstances and locations. For these reasons, we also know that public investment is crucial in defining our success in recycling these sites. Again,

Mr. Chairman, the bills before you account for these realities by providing resources directly to communities to help us assess and clean up these sites, providing us with added resources and capacities to partner with the private sector.

PERSPECTIVES ON THE LEGISLATION

Mr. Chairman, finally, we want to amplify further some of our views on specific provisions of the legislation before this Committee.

We have described throughout this testimony why legislative action is needed. The following further describes some of the priority issues of concern to the mayors in acting on legislation affecting brownfields.

First, we want to reemphasize the importance of liability reforms, an area that was just discussed in this statement. These provisions address a number of circumstances where cities and other public agencies unfairly find themselves subject potentially to Superfund's strict liability standards.

In addition to the prospective purchaser provisions, which is a common element in each of the pending bills and an absolutely critical element of any package of reforms, we also strongly support liability reforms contained in H.R. 1300 and H.R. 2580 to address the many circumstances whereby cities and other local governments have acquired brownfield properties in the past. Under these provisions, cities and other public agencies are rightly afforded innocent party relief in the performance of local government functions.

Local governments routinely acquire such properties through condemnation proceedings to protect public health and safety or in settling tax disputes. There are also circumstances whereby their economic development functions result in taking title to these properties. These are important provisions that should be included in any legislation you adopt.

The pending bills also authorize funding for both assessment efforts and local cleanup programs, providing criteria to help U.S. EPA determine how to provide these funds in support of local programs. Provisions of H.R. 1300, which we support, place no limit on future federal funding for either purpose, providing Congressional appropriators with flexibility in future years to increase commitments to these activities.

We are pleased that each of the bills authorize resources to help states further strengthen their voluntary cleanup programs. We hope that the legislation that is adopted by this Committee, as provided in H.R. 2580, will encourage states to use these funds to place more priority on efforts to bolster state programs in support of brownfield cleanups. Considering the many thousands of such sites all across the country, we are hopeful that these funds will help states move to address brownfields more responsively.

We are also pleased that this legislation clarifies the balance between state and federal program authority, providing more certainty for the private sector and local officials about the state's authority to make final decisions affecting brownfields. We need to concentrate U.S. EPA's efforts on sites where the level of contamination rises to a federal interest. Without this certainty on state authority, we can't hope ever to provide the necessary assurances sought by private investors in brownfield sites, let alone secure final decisions on the hundreds of thousands of brownfields sites we are seeking to clean up and redevelop.

This issue, known as "finality," is particularly important to local officials seeking to redevelop these sites. The mayors and others continue to emphasize that for virtually every non-NPL site, there is no real federal presence today, other than the perceived "potential" of federal interest or action. In taking action on legislation to deal with finality, these provisions must be clear and decisive so that the private investors, local officials and others understand that the state can act. This was among the most challenging issues for the Transportation and Infrastructure Committee in structuring its broad, bipartisan agreement on H.R. 1300. We would encourage panel members to examine how this Committee balanced state and federal authority in this area, providing a balanced and bipartisan approach to this issue.

Mr. Chairman, we also want to indicate our interest in seeing provisions that would help accomplish more cooperation and integration of applicable federal laws and standards. One of the areas that H.R. 1300 does not address is the applicability of RCRA and LUST specifically at brownfield sites. Mayors have been very consistent in urging more attention in federal policies to a "one-stop" brownfields regulatory program at the state level, where states, which are vested with delegated authority, can provide more coordinated and integrated programs. Such an approach would respond to the realities of the contaminants and types of problems that localities encounter at these sites.

I would note that H.R. 2580 provides authority for RCRA waivers to allow states to integrate this law's permit requirements with cleanups of brownfields. I understand that this provision does not diminish or alter RCRA requirements, but is intended to give states some flexibility in delivering a more responsive and coordinated regulatory program in addressing brownfields. This or some variant of this provision would be very helpful to those of us at the local level who often find ourselves confronting increased complexity at specific sites as we work to return them to productive use.

While the focus of this hearing is on brownfields-related provisions, I wanted to note particularly our support for liability reforms that limit municipal liability at Superfund sites where municipal solid waste was disposed and for transporters and generators of municipal solid waste (MSW). We also have an interest in securing liability relief for wastewater treatment operations.

Finally, we want to note our support for provisions in H.R. 1300 that extend the Superfund taxes as part of the legislation. Meaningful reform is dependent upon a reliable revenue stream to ensure that highly contaminated sites are cleaned up and the land is restored to productive uses.

CLOSING COMMENTS

Mr. Chairman, we want to express again our thanks to you and Members of this Subcommittee for holding this hearing today and your continuing efforts to move this important legislation during the First Session of the 106th Congress.

The nation's mayors believe that the time has come for bipartisan action on brownfields and selected Superfund reforms. In moving broad bipartisan legislation forward, you can count on the support of the nation's mayors in this regard.

On behalf of The U.S. Conference of Mayors, we appreciate this opportunity to share the view of the nation's mayors on these important issues.

Mr. GREENWOOD [presiding]. Thank you very much.

Mr. Stypula.

STATEMENT OF DONALD J. STYPULA

Mr. STYPULA. Representative Greenwood and Representative Towns, my name is Donald Stypula. I am the Manager of Environmental Affairs for the Michigan Municipal League which represents all 534 cities and villages in the State of Michigan. One of my prime responsibilities in that capacity is to help communities across the State deal with the brownfields issues, and we have done that quite successfully.

I am pleased to testify here today on behalf of the National Association of Local Government Environmental Professionals, or NALGEP. We represent city and county environmental managers and more than 120 local government entities across the country. NALGEP members include many of the leading brownfields communities, including many that are represented by members of this subcommittee, such as Baltimore; Chicago; Lima, Ohio; San Diego; Des Moines, Dade County, Florida; Milwaukee; Boston; and Los Angeles.

NALGEP has been working actively with local governments since 1995 when we began a project which led to the publication of our first report which was referenced earlier. It was entitled "Building a Brownfields Partnership from the Ground Up: Local Government Views on the Value and Promise of National Brownfields Initiatives." and the organization continues to work on brownfields, Smart Growth and other environmental projects.

Today I will offer comments about how local governments need Federal brownfields legislation and additional Federal funding for the assessment, cleanup, and development of brownfields across the Nation. The cleanup and redevelopment of brownfields is one of the most exciting and challenging opportunities facing the Na-

tion, and I would like to compliment the members of this subcommittee and the full committee for their leadership in promoting legislative solutions to this important issue.

Virtually every community in this Nation faces a brownfields challenge. There has also been tremendous progress at the State and local level to remove the barriers to brownfields revitalization. My own State of Michigan provides an example of how State leadership, in cooperation with Federal incentives and local coordination, can make a difference in brownfields redevelopment.

Michigan has one of the Nation's best voluntary cleanup programs, and in cities—like my hometown of Lansing—Marquette and Detroit, brownfields projects have revitalized entire sections of those communities. A survey of just 33 of our communities across the State shows that our brownfields program in Michigan has already resulted in more than $1 billion of private investment and the creation of more than 5,000 new jobs across the State.

However, despite countless examples of brownfields success, local communities across the Nation still need Federal legislation to clarify the continuing spectrum of Superfund liability, to authorize more State leadership on voluntary brownfields cleanup in cooperation with the Federal Government, and to provide additional Federal resources for the assessment, remediation and redevelopment of these blighted sites.

Certainly, brownfields leaders in this Congress, including a member of this subcommittee, have reached a consensus on most of the important brownfields issues. NALGEP and its local government members hope that the remaining bridges can be gapped and that progress can be made on this critical issue in this Congress.

There are two points that I wish to emphasize. First, local communities badly need additional Federal resources to support the assessment, cleanup and redevelopment of brownfields. Brownfields are a smart investment by the Federal Government in partnership with local and State governments and the private sector. Brownfields investment can yield a bountiful harvest of revitalized neighborhoods, new jobs, economic development, increased tax base, the protection of public health and the avoidance of sprawling development on the fringe of our cities, as the mayor noted.

NALGEP has found a need for Federal resources to continue local site assessment activities, to support the capitalization of local brownfields remediation revolving loan funds, to bring Federal agencies together to support infrastructure and economic development in brownfields, and to provide remediation grants to local governments for brownfields cleanup. NALGEP emphasizes the need for brownfields remediation grants to local governments to help fill the well-known gap in remediation funding at the local level.

We emphasize that in the Senate, both Republicans and Democrats have developed solid, much-needed proposals for cleanup grants.

Second, there is a clear need for Federal legislation to clarify and promote the critical role that States play in the voluntary remediation of brownfields properties. NALGEP has found that States with effective voluntary cleanup programs, like my own, and the ability to resolve liability issues at these sites is necessary to give

confidence to purchasers, lenders, developers, and municipalities in brownfields revitalization. Thus, we believe there is a need for Congress to further clarify and limit liability for nonresponsible parties such as innocent landowners, prospective purchasers and owners of contiguous properties.

There is also a need for Congress to allow qualified States that meet minimum requirements to take the lead in clarifying brownfields liability and issuing no further action decisions for local or for non-NPL sites, and we believe that there is a need for Congress to provide a continued safety net of Federal authority for those exceptional circumstances in which a voluntary cleanup is not sufficient to protect public health and the environment, and the State is not willing nor is it able to ensure adequate remediation. EPA would——

Mr. GREENWOOD. I am going to have to ask you to summarize.

Mr. STYPULA. We also believe that EPA should have the ability to retain its ability to reopen its involvement in a particular brownfields site under some very exceptional circumstances. Anyone who has watched this program, who has followed the program of the brownfields issue in this Nation, knows that the opportunity for us to achieve great environmental economic and community benefits from revitalization of brownfields exists, and the time is now in this Congress to get the work done.

NALGEP and local governments across the Nation thank you for the opportunity to talk with this subcommittee on this important issue. Together we should be able to help things get better in our Nation's brownfields in a manner consistent with the goals of this committee and this Congress. I will be happy to answer any questions.

[The prepared statement of Donald J. Stypula follows:]

PREPARED STATEMENT OF DONALD J. STYPULA, MANAGER OF ENVIRONMENTAL AFFAIRS, MICHIGAN MUNICIPAL LEAGUE, ON BEHALF OF THE NATIONAL ASSOCIATION OF LOCAL GOVERNMENT ENVIRONMENTAL PROFESSIONALS

Mr. Chairman and distinguished members of the Subcommittee, my name is Donald Stypula, and I am the Manager of Environmental Affairs for the Michigan Municipal League, which proudly represents 534 cities and villages across the State of Michigan. I am here today to testify on behalf of the National Association of Local Government Environmental Professionals. or "NALGEP." NALGEP appreciates the opportunity to present this testimony on the views of local government officials from across the nation on the need for additional federal incentives to promote the cleanup, redevelopment and productive reuse of brownfields sites in local communities.

NALGEP represents local government officials responsible for ensuring environmental compliance, and developing and implementing environmental policies and programs. NALGEP's membership consists of more than 120 local government entities located throughout the United States, and includes environmental managers, solid waste coordinators, public works directors and attorneys, all working on behalf of cities, towns, counties and municipal associations. Our members include many of the leading brownfields communities in the country such as Portland, Salt Lake City, Dallas, Cuyahoga County and others. NALGEP members also include communities represented by distinguished members of this Subcommittee that are engaged in brownfields revitalization initiatives, including Baltimore; Chicago; Lima, Ohio; San Diego; Des Moines; Dade County, Florida; Denver; Milwaukee; Boston; and Los Angeles. In Michigan, NALGEP members include 12 municipalities, including Bangor, Bay City, Detroit, Escanaba, Farmington Hills, Grand Rapids, Hudsonville, Ionia, Lansing, Troy, Washtenaw County and Wayne County.

In 1995, NALGEP initiated a brownfields project to determine local government views on national brownfields initiatives such as the EPA Brownfields Action Agenda. The NALGEP Brownfields Project culminated in a report entitled *Building a Brownfields Partnership from the Ground Up: Local Government Views on the Value*

and Promise of National Brownfields Initiatives, which was issued in February, 1997. Since that time, NALGEP has testified on brownfields issues to this Committee as well as to the House Transportation and Infrastructure Committee and the Senate Environment and Public Works Committee.

During the past two years, NALGEP has continued its work on brownfields through coordinating work groups of local officials to address the following issues: (1) Brownfields Cleanup Revolving Loan Funds; (2) use of HUD Community Development Block Grants for Brownfields; (3) building partnerships between business and local government officials to reduce spill and promote smart growth; and (4) implementing the Administration's Brownfields Showcase Community initiative. As a result of these efforts, NALGEP is well qualified to provide the Committee with a representative view of how local governments, and their environmental and development professionals, believe the nation must move ahead to create long-term success in the revitalization of brownfields properties.

NALGEP's testimony today will focus on the following areas: (1) the continued need for federal funding to support the cleanup and redevelopment of brownfields sites across the country; (2) the need for further liability clarification, including for State leadership on the voluntary remediation of brownfields, to encourage the private sector to step forward and revitalize more sites; and (3) the need to facilitate the participation of other federal agencies (e.g., Army Corps of Engineers, Department of Transportation, HUD) in supporting local brownfields initiatives.

The cleanup and revitalization of brownfields represents one of the most exciting, and most challenging, environmental and economic initiatives in the nation. Brownfields are abandoned, idled, or under-used industrial and commercial properties where expansion or redevelopment is hindered by real or perceived contamination. The brownfields challenge faces virtually every community; experts estimate that there may be as many as 500,000 brownfields sites throughout the country.

The brownfields issue illustrates the connection among environmental, economic and community goals that can be simultaneously fostered through a combination of national leadership, state incentives, and the innovation of local and private sector leaders. Cleaning up and redeveloping brownfields provides many environmental, economic and community benefits including:

- expediting the cleanup of thousands of contaminated sites;
- renewing local economies by stimulating redevelopment, creating jobs and enhancing the vitality of communities; and
- limiting sprawl and its associated environmental problems such as air pollution, traffic and the development of rapidly disappearing open spaces.

MICHIGAN'S BROWNFIELDS INITIATIVES

The Michigan brownfields program is one of the most active and successful in the nation, demonstrating the value of coordinated state, local and federal regulatory incentives. In 1995, at the request of the Michigan Municipal League and the state's mayors, the Michigan Legislature adopted sweeping amendments to the state's contaminated site cleanup law that have accelerated the identification, assessment and cleanup of environmentally impacted properties and fostered the reuse and redevelopment of those parcels for job-producing enterprises.

The new Part 201 of our state environmental code clarifies liability to ensure that those responsible for contamination are liable for its cleanup. The 1995 amendments also yielded a more common sense approach to cleanup criteria and gave municipalities and redevelopers an expanded menu of cleanup remedies that tailor site cleanups to zoning and land uses.

The results of these changes to Michigan's law were stunning and immediate. Within hours of the Governor's signature on the package of bills, the City of Ionia, Michigan signed an agreement to remediate and redevelop a parcel of abandoned industrial property considered the "gateway" to the city. Where once visitors were greeted by a contaminated and rusting industrial eyesore, they now lodge at a new hotel and dine at new restaurants.

In 1996, again at the urging of the state's mayors, the Legislature enacted a unique brownfields financing mechanism that allows municipalities to create brownfields redevelopment authorities to "capture" property tax revenues on targeted parcels for up to five years and use that revenue to finance remediation and redevelopment activities. Finally, in November, 1998, Michigan voters overwhelmingly approved a $675 million, six-year bonding program that funnels more than $300 million into brownfields remediation and redevelopment activities.

Over the past four years, a large number of Michigan's 534 cities and villages and 83 counties have taken advantage of one of more of these new tools to identify, investigate, remediate and spur the redevelopment of abandoned industrial complexes,

auto repair shops and dry cleaners. For example, in 1996, the City of Lansing used the new Michigan law to investigate and remediate a collection of contaminated parcels and developed a new minor league baseball stadium that draws more than 6,000 spectators to nightly games. Earlier this year, the City of Marquette partnered with redevelopers to convert a long-abandoned and contaminated industrial complex into new upscale housing, shops and restaurants on the shores of Lake Superior. And, as I present this testimony, the City of Detroit is using Michigan's Part 201 cleanup program to remediate a large parcel of property in the heart of downtown that will soon be home to more than 6,000 new, highly-paid employees of a global computer software firm relocating from the western suburbs.

According to survey data from just 33 Michigan cities, compiled by the Michigan Department of Environmental Quality (MDEQ), the state's brownfields program has channeled significant levels of private investment into Michigan's core cities. Projected development in the 33 cities surveyed in 1999 totaled $1,024,988,000 in private investment, an increase of 223 percent over 1997. More importantly, this private investment on brownfields sites led to the creation of 4,796 jobs, an increase of 40 percent over the projected 1997 job creation numbers.

Despite these dramatic gains, however, some urban redevelopment projects ranging from large factory sites in Detroit to corner gas stations in small Upper Peninsula towns, are still hampered by a lack of financial resources and the fear of Superfund liability.

As a founding member of NALGEP, the Michigan Municipal League strongly supports NALGEP's view on the need to clarify Superfund liability for state-administered brownfields programs, facilitate participation of and coordination with other federal agencies in brownfields revitalization efforts, and provide federal financial resources to communities across the nation that seek to remediate and encourage redevelopment of brownfields sites.

BROWNFIELDS LEGISLATIVE NEEDS

I. Ensuring Adequate Resources for Brownfields Revitalization

NALGEP finds that to ensure long-term success on brownfields, local governments need additional federal funding for site assessment, remediation and economic redevelopment. The costs of site assessment and remediation can create a significant barrier to the redevelopment of brownfields sites. In particular, the costs of site assessment can pose an initial barrier that drives development away from brownfields sites. With this initial barrier removed, localities are much better able to put sites into a development track. In addition, the allocation of public resources for site assessment can provide a signal to the development community that the public sector is serious about resolving liability issues at a site and putting it back into productive reuse.

The use of public funds for the assessment and cleanup of brownfields sites is a smart investment. Public funding can be leveraged into substantial private sector resources. Investments in brownfields yield the economic fruit of increased jobs, expanded tax bases for cities, and urban revitalization. And the investment of public resources in brownfields areas will help defer the environmental and economic costs that can result from unwise, sprawling development outside of our urban centers.

The following types of federal funding would go a long way toward helping local communities continue to make progress in revitalizing our brownfields sites:

- **Grants for Site Assessments and Investigation:** EPA's Brownfields Assessment Pilot grants have been extremely effective in helping localities to establish local brownfields programs, inventory sites in their communities, investigate the potential contamination at specific sites, and educate key stakeholders and the general public about overcoming the obstacles to brownfields redevelopment. Additional funding for site assessments and investigation is needed to help more communities establish local brownfields programs and begin the process of revitalizing these sites in their communities.
- **Grants for Cleanup of Brownfields Sites:** There is a strong need for federal grants to support the cleanup of brownfields sites across the country. The U.S. Conference of Mayors' recent report on the status of brownfields sites in 223 cities nationwide indicates that the lack of cleanup funds is the major obstacle to reusing these properties. For many brownfields sites, a modest grant targeted for cleanup can make the critical difference in determining whether a site is redeveloped, creating new jobs and tax revenues, or whether the site remains polluted, dangerous and abandoned.
- **Grants to Capitalize Brownfields Cleanup Revolving Loan Funds:** In addition to grants, federal funding to help localities and states to establish revolving loan funds (RLFs) for brownfields cleanup is another effective mechanism to le-

verage public and private resources for redevelopment. EPA deserves credit for championing brownfields RLFs as a mechanism for helping communities fill a critical gap in cleanup funding. Unfortunately, the effectiveness of the EPA's current brownfields cleanup RLF program is severely undermined by the lack of new federal brownfields legislation. Under current law, localities are required to jump through and over numerous National Contingency Plan (NCP) bureaucratic hoops and hurdles to establish their local RLFs. These NCP requirements were originally established for Superfund NPL sites and not for brownfields sites. Consequently, we strongly recommend that any new legislation make it clear that local brownfields RLFs are not required to meet the NCP requirements established for Superfund sites.

II. State Leadership on Liability Clarification at Brownfields Sites

On the issue of federal Superfund liability associated with brownfields sites, NALGEP has found that the Environmental Protection Agency's overall leadership and its package of liability clarification policies have helped establish a climate conducive to brownfields renewal, and have contributed to the cleanup of specific sites throughout the nation. It is clear that these EPA policies, and brownfields redevelopment in general, are most effective in states with effective voluntary cleanup programs. Congress can enhance these liability reforms by further clarifying in legislation that Superfund liability does not apply to certain "non-responsible" parties such as innocent landowners, prospective purchasers and contiguous property owners.

NALGEP has also found that States are playing a critical lead role in promoting the revitalization of brownfields. More than forty states, like Michigan, have established voluntary or independent cleanup programs that have been a primary factor in successful brownfields cleanup. The federal government should further encourage States to take the lead at brownfields sites. States are more familiar with the circumstances and needs at individual sites. Moreover, it is clear that U.S. EPA lacks the resources or ability to provide the assistance necessary to remediate and redevelopment the hundreds of thousands of brownfields sites in our communities.

The effectiveness of state leadership in brownfields is demonstrated by those states that have taken primary responsibility for brownfields liability clarification pursuant to "Superfund Memoranda of Agreement" (MOAs) with U.S. EPA. These MOAs defer liability clarification authority to those states. In order to further facilitate brownfields cleanups across the country, NALGEP finds that Congress should create clear legal standards under which States that meet minimum criteria can assume the primary role for resolving liability and issuing no further action decisions for brownfield sites.

Legal authority for qualified states to play the primary role in liability clarification is critical to the effective redevelopment of local brownfields sites. A state lead will increase local flexibility and provide confidence to developers, lenders, prospective purchasers and other parties that brownfields sites can be revitalized without the specter of Superfund liability or the involvement of federal enforcement personnel. Parties developing brownfields want to know that the state can provide the last word on liability, and that there will be only one "policeman," barring exceptional circumstances.

At the same time, local officials are also concerned about too much cleanup authority too fast to states that have not clearly demonstrated the ability to play a primary role. States vary widely in the technical expertise, resources, staffing, statutory authority and commitment necessary to ensure that brownfields cleanups are adequately protective of public health and the environment. If brownfields sites are improperly assessed, remediated or put into reuse, it is most likely that the *local government* will bear the largest impact from any public health emergency or contamination of the environment. NALGEP believes that the U.S. EPA has a role to play in ensuring that liability authority over brownfields sites should only be delegated to states that demonstrate an ability and commitment to ensure protection of public health and the environment in the brownfields redevelopment process.

To foster expanded redevelopment of brownfields sites while ensuring the protection of public health and the environment, NALGEP finds that there should be three components to federal law giving States the ability to play the lead role in brownfields liability clarification. First, the law should clearly distinguish between Superfund NPL sites and other sites subject to enforcement under CERCLA or RCRA on one hand, and the remaining sites that can be put on a "brownfields track." The delegation of liability authority to states should focus on these "brownfields track" sites. Putting sites on a brownfields track will allow the application of policy tools specifically designed to foster expedited, cost-effective brownfields redevelopment.

Second, NALGEP finds that liability authority over brownfields sites should be granted only to state cleanup programs that can ensure protection of public health and the environment. NALGEP suggests the following types of criteria that should be demonstrated by states desiring to play the lead role in brownfields liability clarification:

1. **Mechanisms to ensure adequate site assessments early in the process.** Good site assessments will help prevent unanticipated problems from surfacing, and facilitate efforts to direct particular sites into a "brownfields track."
2. Adequate state **technical expertise, staff and enforcement authority** to ensure effective implementation of cleanup activities.
3. Use of **risk-based cleanup standards**, that can be tied to **reasonably anticipated land use**, established through an adequate public approval process.
4. **Institutional controls** such as deed restrictions, zoning requirements or other mechanisms that are enforceable over time to ensure that future land uses tied to certain cleanup standards are maintained.
5. Commitment to **establish community information and involvement processes.**
6. Commitment to build the capacity, through training and technical assistance, of **local government health and environmental agencies** to effectively participate in the brownfields development process and ensure protection of public health and environment.
7. **Adequate mechanisms** to address unanticipated cleanups or orphaned sites where liability has been eliminated.

NALGEP believes that it is appropriate for legislation to require U.S. EPA to review and approve the certification of qualified states for lead brownfields authority. However, such an EPA approval process should not have the effect of delaying qualified states from stepping forward, nor impose "one-size-fits-all" requirements on states with different needs and different effective approaches to brownfields redevelopment.

Finally, NALGEP believes that EPA's ability to reopen its involvement at a particular brownfields site in a certified state should be limited to situations where there are exceptional circumstances and the state is not effectively addressing the problem. An EPA reopener for particular sites is necessary to ensure that EPA can become involved at any sites at which the state is unable or unwilling to adequately respond to a substantial and imminent threat to public health or the environment. At the same time, the reopener must be sufficiently limited to permit the state to take the lead role at brownfields sites, and to give confidence to developers, prospective purchasers, lenders and local governments that EPA will not improperly hinder or interfere in state liability decisions.

Therefore, in delegating brownfields authority for non-NPL caliber sites to the states, NALGEP proposes that: *EPA should provide that it will not plan or anticipate further action at any sites unless, at a particular site, there is: (1) an imminent and substantial threat to public health or the environment; and (2) either the state response is not adequate or the state requests US EPA assistance.*

III. Facilitating the Participation of Other Federal Agencies in Brownfields Revitalization

The cleanup and redevelopment of a brownfields site is often a challenging task that requires coordinated efforts among different government agencies at the local, state and national levels, public-private partnerships, the leveraging of financial resources from diverse sources, and the participation of many different stakeholders. Many different federal agencies can play a valuable role in providing funding, technical expertise, regulatory flexibility, and incentives to facilitate brownfields revitalization. For example, HUD, the Economic Development Administration, the Department of Transportation, and the Army Corps of Engineers have all contributed important resources to expedite local brownfields projects. The U.S. EPA and the Administration have provided strong leadership through the Brownfields Showcase Community project that is demonstrating how the federal government can coordinate and leverage resources from many different federal agencies to help localities solve their brownfields problems.

Congress can help strengthen the national brownfields partnership by further clarifying that the various federal partners play a critical role in redeveloping brownfields and by encouraging the agencies to work cooperatively to meet local needs. For example, Congress should be commended for legislation passed last year to clarify that HUD Community Development Block Grant funds can be used for all aspects of brownfields projects including site assessments, cleanup and redevelopment. This simple step has cleared the way for communities across the country to use these funds in a flexible fashion to meet their specific local needs. Similarly,

Congress should consider clarifying that it is appropriate and desirable for the Army Corps of Engineers to use its resources and substantial technical expertise for local brownfields projects. In addition, Congress should consider clarifying that Department of Transportation funds can be used for cleanup activities associated with various transportation projects. Congress also should work with EPA to determine how other agencies can help facilitate more brownfields revitalization. By taking these steps, Congress can give communities additional tools, resources, and flexibility to overcome the many obstacles to brownfields redevelopment.

CONCLUSION

In conclusion, local governments are excited to work with the federal government to promote the revitalization of brownfields, through a combination of increased federal investment in community revitalization, further liability clarification and authority for qualified States, and other mechanisms to strengthen the national partnership to cleanup and redevelop our communities. It is clear that there is substantial agreement among the parties and the many stakeholders seeking further brownfields revitalization in our communities. NALGEP thanks the Committee for this opportunity to testify, and looks forward to working with you as the process moves forward.

Mr. GREENWOOD. Thank you, Mr. Stypula.

Ms. Kerbawy, please proceed.

STATEMENT OF CLAUDIA KERBAWY

Ms. KERBAWY. Good morning, members of the subcommittee. I am Claudia Kerbawy. I am chief of the Michigan Superfund program, and I am also primary spokesperson for reauthorization issues for ASTSWMO. I am here today representing both ASTSWMO and NGA.

State regulatory agencies have the primary responsibility for ensuring the remediation of the vast majority of brownfields. Our goal here today is to ensure that Federal legislation is enacted which will help facilitate, not complicate or impede the cleanup of non-NPL universe of sites.

We believe this goal can be achieved by clearly defining the role of the Federal Superfund program in the future, clearly defining which governmental agency will be given the responsibility for determining when a site is fully remediated and providing the means for State agencies to maintain the role of primacy of brownfields sites.

It is ASTSWMO and the NGA's position that Governors should be given the statutory right to concur with any new NPL listing in their State. A recent ASTSWMO survey found that more than 90 percent of an identified universe of over 27,000 sites were being addressed under 33 State programs. States today employ a triage system whereby the worst sites are addressed first, and most sites that could qualify for listing on the NPL are already being worked on.

The question before the subcommittee is what should be the appropriate role of the Federal Superfund program in the future. Although more than 40 States have State Superfund or voluntary cleanup programs, Federal Government assistance will still be warranted in situations where States choose not to develop a program or where there are sites that, due to either technical or legal complexity or cost, a State cannot or would prefer to have the Federal Government address. In addition, there will always be the need for the Federal Government to serve as the gorilla in the closet.

With the current status of State programs, the choice as to whether a site is addressed by the Federal Government or the State government should be determined by the State. While it is current U.S. EPA policy to routinely seek concurrence from the Governor before a site is listed on the NPL, it is not mandatory that that concurrence be received. Although it is rare when a dispute does occur, cleanup of the site gets delayed and both the State and Federal Government can lose credibility.

H.R. 2580 succinctly mandates that U.S. EPA must receive a Governors' concurrence prior to listing a facility on the NPL. We support this provision as it is clear, unambiguous, and satisfies our goal of clarifying the role of the Federal Superfund program in the future.

On the other hand, ASTSWMO and NGA do not support the NPL listing provisions of H.R. 1300 and 1750, which both contain more cumbersome and intrusive mechanisms for addressing this issue that do not accommodate the variety of successful State cleanup program provisions.

Today the Federal Superfund statute technically applies to any site where a release occurs. However, the reality is that the States are responsible for ensuring the remediation of all the sites that do not score above 28.5 under the hazard ranking system. Congress needs to decide definitely whether U.S. EPA should retain a role in the remediation of non-NPL sites. Although the majority of these typically brownfields sites will never be placed on the NPL, they are still subject to CERCLA liability even after a site has been cleaned to State standards. States should be able to be released from both Federal and State liability once a site has been cleaned to State standards. Emergency actions should be the only exceptions from any releases from Federal liability.

It appears to States that both H.R. 1300 and H.R. 2580 satisfy the goal of clarifying which governmental entity is and should be responsible for deciding when a cleanup is complete and when a party is released from liability. H.R. 1750's provisions regarding finality are not satisfactory to the States. ASTSWMO and NGA do not support the provisions requiring State voluntary cleanup programs to be approved by the U.S. EPA. In addition, the exceptions provided for by the language in 1750 are not clear or precise.

If a State agency can effectively address the contamination from a non-NPL site, that is one less site that will require Federal resources. The results of a recent ASTSWMO survey indicate that 33 responding States alone have completed 6,768 sites in just the last 4 years, and that they are working on approximately 4,700 sites at any given time. Clearly, providing Federal resources to State agencies to maintain their infrastructure will ultimately save Federal resources and ensure that sites are returned to productive use in an efficient manner.

Both H.R. 1300 and 2580 provide grants to States for brownfields site assessments and for establishing revolving loan funds for response actions. H.R. 1750 does award grants to States, but only if the administrator determines that a grant to the State is necessary in order to facilitate receipt of funds by one or more local units of government. We do agree that local units of government should be allowed funding. That should be provided. However, we don't think

that Congress should overlook the efficiency factor in using well-established programs at the State level.

ASTSWMO and NGA appreciate the opportunity to testify today on a topic of extreme importance to the States. We are encouraged that the subcommittee is examining these issues and look forward to working with you as you continue in the process of developing brownfields legislation. I would be happy to answer any questions you may have.

[The prepared statement of Claudia Kerbawy follows:]

PREPARED STATEMENT OF CLAUDIA KERBAWY, CHIEF, ENVIRONMENTAL RESPONSE DIVISION, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY ON BEHALF OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS

Good morning Mr. Chairman and members of the Subcommittee. I am Claudia Kerbawy and I am the Chief of the Michigan Superfund program. I am also the primary spokesperson on reauthorization issues for the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and am here today representing both ASTSWMO and the National Governors' Association (NGA) with whom this statement was jointly prepared. ASTSWMO is a non-profit association which represents the collective interests of waste program directors of the nation's States and Territories. Besides the State cleanup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs. Our membership is drawn exclusively from State employees who deal daily with the many management and resource implications of the State waste management programs they direct. As the day-to-day implementors of the State and Federal cleanup programs, we believe we can offer a unique perspective to this dialogue and thank you for recognizing the importance of the State perspective.

We understand that the subject of today's hearing is Brownfields. State regulatory agencies are responsible for ensuring the remediation of the vast majority of Brownfield sites, therefore, our primary goal is to ensure that federal legislation is enacted which will help facilitate the cleanup of the non-NPL universe of sites. We believe this goal can be achieved by 1) clearly defining the role of the federal Superfund program in the future; 2) clearly defining which governmental entity will be given the responsibility for determining when a site is fully remediated; and 3) providing the means for State agencies to maintain a role of primacy at brownfield sites. I will focus my testimony on these three issues and examine how they are addressed in H.R. 2580, "The Land Recycling Act"; H.R. 1300, " Recycle America"s Land Act of 1999"; and H.R. 1750, "The Community Revitalization and Brownfield Cleanup Act of 1999."

The Future Role of the Federal Superfund Program:

ASTSWMO supports the National Governors' Association position that Governors should be given the statutory right to concur with any new National Priority Listing (NPL) in their State. We believe the facts support that position. States today employ a triage system whereby the worst sites are addressed first. For example, only 8.9 percent (2,426) of the total sites (27,235) identified by a recent ASTSWMO survey were classified as inactive. (Summary of results contained in Attachment A). It is, therefore, the strong belief of the ASTSWMO membership that most sites that have been identified within a State that could qualify for listing on the NPL are already being worked on by the State.

We believe the views of our membership were also validated by the recent U.S. General Accounting Office (GAO) Report entitled, "Hazardous Waste: Unaddressed Risks at Many Potential Superfund Sites." In this report the GAO reviewed the status of 3,036 sites that had pre-scored above 28.5 but for a variety of reasons, had not been placed on the NPL. Out of a total of 3,036, sites only 7.6 percent (232) were estimated by both the U.S. Environmental Protection Agency (U.S. EPA) and State officials to potentially warrant listing on the NPL. This confirms that the U.S. EPA regional staff had utilized good judgment in not placing the vast majority of these sites on the NPL; it also confirms that the hazard ranking system could be improved.

Therefore, the question before this Subcommittee is what should be the appropriate role of the federal Superfund program in the future? While there may be forty-plus States with State Superfund programs and Voluntary Cleanup programs,

there will always be States that choose not to develop a program and federal government assistance may be warranted. There will also be sites that due to either technical or legal complexity or cost, a State either cannot address or may prefer to have the federal government address, and there will always be the need for the federal government to serve as the "gorilla in the closet." The point I wish to stress is that with the current status of State programs the choice as to whether a site is addressed by the federal government or State government should be determined by the State. A Governor should be able to make the determination of whether a site will be listed on the NPL. While it is U.S. EPA policy to routinely seek concurrence from the Governor before a site is listed on the NPL, it is not mandatory that the concurrence be received. If a dispute should arise between U.S. EPA and a Governor, the process within U.S. EPA is to have the Assistant Administrator for OSWER make the final determination. Frankly, that is not a satisfactory policy.

Fortunately, there are very few sites where the States and U.S. EPA disagree; however, when a dispute does occur the site quickly becomes high profile and both the State and federal government can lose credibility. As indicated by the ASTSWMO survey and GAO survey, the States have clearly become the primary regulators for overseeing site remediation. The NPL should be reserved for those sites that both the State and federal governments believe warrant expenditure of federal resources. The NPL is no longer reserved for the "worst of the worst" sites; rather the NPL has shifted to a venue for remediating sites which require federal resources. The criteria for listing sites on the NPL may quickly shift from one based solely on risk determinations to one that considers resource needs.

H.R. 2580: H.R. 2580 succinctly mandates that U.S. EPA must receive a Governor's concurrence prior to listing a facility on the National Priorities List. We support this provision as it is clear, unambiguous and satisfies our goal of clarifying the role of the federal Superfund program in the future.

H.R. 1300: H.R. 1300 requires the President to generally defer listing on the National Priorities List facilities at which a cleanup that provides "long-term protection of human health and the environment is underway at that facility under a State response program." H.R. 1300 also allows the President to defer listing of "a facility on the National Priorities List if the State is attempting to obtain an agreement from a person or persons to perform a remedial action that will provide long-term protection . . ." Unlike the language in H.R. 2580, this provision does not clearly address the future role of the federal Superfund program. For example, we question what the terms "underway" and "attempting" actually mean? Must the "agreement" in the State Voluntary Cleanup program be enforceable? Many State Voluntary Cleanup programs enter into agreements that are non-binding on either party; in other words, either the State or voluntary party can exit the site from the State voluntary cleanup program and the site will then be subject to traditional State Superfund enforcement. H.R. 1300 also allows the President to place the site on the NPL if, after a one-year time deferral, the State has not made reasonable progress in obtaining an "agreement". States routinely perform work on a site, including completion of the remedial investigation/feasibility study, without responsible party involvement. States are reimbursed for their costs once the responsible party enters into an agreement with the State. This arbitrary one year period does not account for work completed by the State, and we cannot support this provision.

H.R. 1750: H.R. 1750 states the President shall not list "a portion of a facility subject to a response action plan approved under a State program qualified under subsection (i)" while "substantial and continuous voluntary response actions are being conducted in compliance with the plan at that portion of the facility; or after response activities conducted in compliance with the plan at that portion of the facility have been certified by the State as complete." Again, this provision is not as clear as H.R. 2580. For example, this provision states that States must approve a response action plan. Many States approve response action plans prior to commencement of work, and many merely review the plans but provide certifications upon completion. As we read this language, only a site at which a response action plan has been approved could be remediated free of U.S. EPA interference. A State that only certifies a cleanup is complete could be subject to having its sites listed on the NPL during remediation activities. Also, this provision is only available to States that have had their voluntary cleanup programs approved by the U.S. EPA. Both the National Governors' Association and ASTSWMO oppose provisions which allow the U.S. EPA to review and approve existing, established State voluntary cleanup programs. There is no comparable voluntary cleanup program model at the federal level and we question why programs which were developed without federal government interference and with local stakeholder involvement should be subject to federal approval? We cannot support this provision.

The Issue of "Finality"

Today the federal Superfund statute technically applies to any site where a release occurs. However, the *reality* is that States are responsible for ensuring the remediation of all sites that do not score above 28.5 using U.S. EPA's Hazard Ranking System (HRS)—the cutoff for federal listing on the NPL. The U.S. EPA removal program is able to address some sites that are not listed on the NPL, but the program is designed to stabilize a site, not to ensure its full remediation. The U.S. EPA can not expend fund money for remediating a site not listed on the NPL. Consequently, the State is often still responsible for completing the remediation of a site even after an U.S. EPA removal action has been performed at a site.

It is our belief that Congress needs to decide definitively whether U.S. EPA should retain a role in the remediation of non-NPL sites. While in practicality U.S. EPA has little or no role at these sites and as our survey indicated, the States are addressing the large universe of non-NPL sites, the statute still maintains a role for U.S. EPA in theory. Although the majority of these sites (typically brownfield sites) will never be placed on the NPL, they are still subject to CERCLA liability even after the site has been cleaned up to State standards. It is our belief that we can no longer afford to foster the illusion that State authorized cleanups may somehow not be adequate to satisfy federal requirements. The potential for U.S. EPA overfile and for third-party lawsuits under CERCLA is beginning to cause many owners of potential Brownfields sites to simply "mothball" the properties. We believe it is imperative that Congress seek to clarify the State-Federal roles and potential liability consequences under the federal Superfund program. States should be able to release sites from both federal and State liability once a site has been cleaned up to State standards. In situations that are deemed emergencies *and* in which the State requests assistance, we believe the federal government should be able to address the site and, if necessary, hold the responsible party liable consistent with liability assigned under State cleanup law. Emergency actions should be the only exceptions to such releases from federal liability.

This has been a very contentious issue and we understand that objections have been raised to provisions of this nature. We do not agree with the basis for these objections for several reasons. First, U.S. EPA does not have the ability to compel parties to take remedial actions at sites not listed on the NPL, except for removal actions. Second, the majority of these sites will never be listed on the NPL; therefore, U.S. EPA does not have authority to spend fund money at these sites to perform the necessary remedial actions. Third, if a State should release a site from State liability (of course, all States have standard reopener provisions contained in their liability releases), and a situation should develop that warrants federal attention, the State can be trusted to act responsibly and contact U.S. EPA. It is in the State's financial interest to contact U.S. EPA should a situation develop that exceeds the State's financial or technical capabilities. While it is clear in emergency situations that U.S. EPA should have the ability to enter a site, we believe the second prong of the condition must also be met, i.e., the State must concur, similar to our recommendation for listing sites on the NPL. We wish to avoid duplication as much as possible and therefore believe that if a State is capable of addressing the emergency then there is no need to utilize U.S. EPA's resources. The States have proven they act responsibly in these situations, *and* it is to the State's advantage to notify U.S. EPA when either the State's financial, legal or technical resources are not sufficient to adequately address the problem.

We believe the universe of sites to be addressed by State Cleanup (State Superfund and State Voluntary Cleanup) programs and the sites eligible for releases from federal liability is the non-NPL universe of sites. It seems only practical to officially exclude proposed and listed NPL sites simply for the fact that much work has already ensued in order to place these sites on the NPL. Some suggest that the non-NPL universe can be divided into two categories, NPL-caliber and low risk sites. We are the primary regulators for non-NPL sites and we can assure you that there is no clear line that differentiates such categories of sites. Many would suggest the bright line should be a score of 28.5 (as determined by the HRS), but there are two problems with using this arbitrary cutoff. First, 28.5 is the quantitative scoring factor used to determine if a site qualifies for placement on the NPL. However, this figure is based on an arcane hazard ranking system which many U.S. EPA and State managers admit is flawed, so much so, that U.S. EPA and State managers in the GAO study identified only 7.9 percent of the 3036 pre-scored universe of sites for potential listing on the NPL. Second, in order to use the quantitative NPL-caliber designation, States would have to score sites prior to admitting them to a voluntary cleanup program (a suggestion we understand one U.S. EPA Region has made to a State). Clearly, the pre-scoring of a site as a condition for entering a State Voluntary Cleanup program would be a huge disincentive for marketing a State Vol-

untary Cleanup program and would not serve to move this large universe of sites to cleanup nor to facilitate economic redevelopment of brownfields. Essentially, the program has operated for years on a "you know it when you see it basis" in identifying NPL-caliber sites. This is bad public policy and should not be acceptable for differentiating State and U.S. EPA roles and for providing certainty to the process. If a site is not to be listed or proposed for listing on the NPL, then the State should be free to address the site without U.S. EPA interference and the site should be eligible for the same benefits as any other site, such as liability releases. We believe legislation is needed and hope that Congress chooses to recognize the benefits of State programs which have had over 18 years to grow and mature and which clearly have become the leaders in site remediation today.

H.R. 2580: It appears to States that H.R. 2580 satisfies the goal of clarifying which governmental entity is and should be responsible for deciding when a cleanup is complete and when a party is released from liability.

H.R. 1300: It appears to States that H.R. 1300 satisfies the goal of clarifying which governmental entity is and should be responsible for deciding when a cleanup is complete and when a party is release from liability.

H.R. 1750: H.R. 1750's provisions regarding "finality" are not satisfactory to States for the following reasons. First, as indicated in our previous comment, ASTSWMO and NGA do not support any provision requiring State Voluntary Cleanup programs to be approved by the U.S. EPA. Second, the exceptions provided for by this language are not clear or precise. For example, in both exceptions (C) and (D), either the Administrator or the State may determine that, due to the conditions, the response action does not protect human health or the environment. Our goal is to achieve finality and to expressly decide once and for all which governmental entity will be vested with the authority to determine a cleanup is complete. The language in H.R. 1750 will not resolve this issue or achieve true finality. For example, what will happen in situations in which the State and U.S. EPA disagree? Lastly, H.R. 1750 will exclude "NPL-Caliber" facilities from being eligible to receive finality determinations. In this case, NPL-Caliber is defined as "a facility for which the President, in consultation with the State concerned, has prepared or is preparing a hazardous ranking system scoring package or that satisfies such other definition as the Administrator may promulgate by regulation." In 1997, U.S. EPA proposed federal guidance on developing memorandum of agreements between State Voluntary Cleanup programs and the U.S. EPA. To determine NPL-Caliber sites, the Agency proposed a tiering system for sites. ASTSWMO, the Environmental Council of States and the National Governors Association strongly opposed the provisions in this guidance, particularly the proposed tiering system of categorizing sites and the guidance was ultimately withdrawn. We have no reason to believe that under the language provided for in H.R. 1750 that U.S. EPA would not seek to repropose the same language.

Funding for State Programs addressing Brownfields:

From our perspective as State Waste Managers and Governors, we view State programs as effective "NPL prevention" programs. If a State agency can effectively address the contamination from a non-NPL site, that is one less site that will require federal resources. The results of a recent ASTSWMO survey of 33 States indicated that States have completed 6,768 sites in the last four years alone (1993-1997) and that they are working on approximately 4,700 sites at any given time. We conclude from these results that providing federal resources to State agencies to maintain their infrastructures will ultimately save federal resources and ensure that sites are returned to productive use in an efficient manner.

H.R. 2580: H.R. 2580 provides grants to States for Brownfield site assessments and for establishing revolving loan funds for response actions. We concur with these provisions.

H.R. 1300: H.R. 1300 provides grants to States for Brownfield site assessments and for establishing revolving loan funds for response actions. We concur with these provisions.

H.R. 1750: H.R. 1750 only awards grants to State governments for site assessments if "the Administrator determines that a grant to the State is necessary in order to facilitate the receipt of funds by one or more local governments that otherwise do not have the capabilities, such as personnel and other resources, to manage grants under the program." U.S. EPA should receive credit for assisting the majority of States (40+) in establishing effective site assessment programs. These programs are limited in their ability to perform work only by a lack of resources. It does not make sense that Congress would propose to fund States for site assessments only if a local unit of government could not perform the task. State programs have been established and should be utilized to their maximum potential. We agree that local

units of government should be provided funding, but Congress should not overlook the efficiency factor in using well established programs. For these reasons, we do not support the funding provisions contained in H.R. 1750.

CONCLUSION:

ASTSWMO and NGA appreciate the opportunity to testify today on a topic of extreme importance to States. We are encouraged that the Subcommittee is examining these issues and look forward to working with you as you continue the process of developing Brownfields legislation.

Mr. GREENWOOD. Thank you for your testimony.

Mr. Towns said he is beginning to see the wisdom of my legislation.

For the benefit of the members, I think we can allow Ms. Mills to complete her testimony, and then we will break for the vote and return as soon as the vote is over. Ms. Mills, please proceed.

STATEMENT OF TERESA MILLS

Ms. MILLS. Thank you to the committee for the opportunity given to me today. My name is Teresa Mills. I represent the Buckeye Environmental Network. We are a network of grassroots groups across the State of Ohio working with other citizens to address their environmental concerns.

Our experience with the Ohio Voluntary Action Program has been very discouraging for the citizens of Ohio. I am here to ask that you maintain a strong Federal oversight role in these programs to prevent the breakdown in the public confidence that the citizens of Ohio have had to endure.

Ohio's VAP program is completely unbalanced in favor of corporations hoping to avoid their cleanup responsibilities as cheaply and as secretly as possible. It is a nightmare program for the neighborhoods around these facilities, with their dubious cleanup options, lack cleanup standards, negligible State oversight, lack of public notice and participation, and extensive secrecy provisions provide no reasonable confidence that a site addressed by these programs will not continue to be a health or environmental danger. The program is dangerous and badly needs to be overhauled from top to bottom.

The Ohio program authorizes private contractors working solely for the polluters to design and implement both the site investigation and the remedy, with no involvement by the State. To keep the secrecy privilege, the facts discovered must be kept secret from both the government and the neighborhood. At the conclusion of the site work, the contractor is simply to file a brief document with the State, certifying that he has followed the State's broad regulations on the site and that no further action is needed. Based only on this letter, the Ohio EPA is then required to issue an order granting a covenant not to sue to the contractor's employer within 30 days. The only oversight of this program is a random audit system where the Ohio EPA is to review 1 site out of 4. There IS minimal funding for this oversight and, at best, it is a review of the contractor's paperwork.

There is no provision whatsoever for the community surrounding the site to be made aware of the cleanup or its long-term impact on their neighborhood. There is no public notice, no provision for a public hearing, and no provision for comment from local govern-

ments, health professional or individual citizens. The affected citizens are left out of this process.

Over the past 7 years, I have asked both the Ohio EPA and the U.S. EPA the same question on several occasions. My question has been: Name me one site in the State of Ohio that has been cleaned up that was not prompted by a citizen. To date, my question remains unanswered. The Ohio program gives the party conducting the cleanup a right to keep all information and documents generated completely secret even in court proceedings. This is true even if the "no further action letter or covenant" are not issued. The surrounding community will never know what contaminants were at the site, the extent of the contamination, or the amount of contamination that remains after the remedy is complete.

In short, the Ohio program purposely keeps the public in the dark about critical issues regarding their own health, and their rights as State citizens are voided. I do not remember ever giving up my right to know what was in my community or what my family was exposed to. When did this happen? You can see why some citizens in the State of Ohio consider this program to be sinister and ethically perverse.

In 1989 the Ohio EPA created the Division of Emergency and Remedial Response. Our State lawmakers agreed to add a $1 tax per every ton of waste generated in the State of Ohio. This was to go into a quick cleanup fund. Our State legislature took $11 million from the fund and never replaced it. The citizens of Ohio know all too well when a good idea goes bad. When State agencies put the interest of the polluter over the interest of the public, it is the same as a law enforcement officer taking the word of a mugger over the word of a victim.

I still have more of my testimony, but I see my time is running short.

Scores of sites in Ohio have now received release of liability under the State law. You have it in your power to protect the families who live around these sites by ensuring that Federal law will stay securely in place, not only for protecting the public health from environmental contamination, but also to ensure that the right of Americans to participate in the public decisions where they have a vital personal interest will be honored by the State legislatures.

I believe that Ohio's sorry experience with VAP proves that minimum Federal standards for public participation, openness of information, protective cleanup standards, reliability of remedy, adequacy of Federal and State oversight, must be guaranteed to all Americans. We do not support the restrictions on citizens or the Federal Government's enforcement authority that are contained in any of the bills being considered by the subcommittee. We pray that the Members of Congress will keep our health and welfare in mind when considering legislation. Thank you.

[The prepared statement of Teresa Mills follows:]

PREPARED STATEMENT OF TERESA B. MILLS, BUCKEYE ENVIRONMENTAL NETWORK

Thank you Mr. Chairman for the opportunity to address this committee. My name is Teresa Mills, I represent the Buckeye Environmental Network. We are a network of grassroots groups across the state of Ohio working to assist citizens with their environmental concerns.

Our experience with the Ohio Voluntary Action Program (VAP) has been very discouraging for citizens of Ohio. I am here to ask that you maintain a strong federal oversight role in these programs to prevent the breakdown in public confidence that the citizens of Ohio have had to endure.

Ohio's VAP program is completely unbalanced in favor of corporations hoping to avoid their clean up responsibilities as cheaply and as secretly as possible. It is a nightmare program for the neighborhoods around these facilities as its dubious cleanup options, lack clean up standards, negligible state oversight, lack of public notice and participation, and extensive secrecy provisions provide no reasonable confidence that a site addressed by the program will not continue to be a health or environmental danger. This program is dangerous and badly needs to be overhauled from top to bottom.

The Ohio program authorizes private contractors working solely for the polluter to design and implement both the site investigation and the remedy with no involvement by the state. To keep the Secrecy Privilege, the facts discovered must be kept secret from both the government and the neighborhood. At the conclusion of the site work, this contractor simply is to file a brief document with the state certifying that he has followed the state's broad regulations on the site and that no further action is needed. Based only on this letter the Ohio EPA is then required to issue an order granting a covenant not to sue to the contractor's employer within thirty days. The only oversight of this program is a random audit system which the Ohio EPA is to review one site in every four. There is minimal funding for this oversight so at best the review is only a review of the contractor's paperwork.

There is no provisions whatsoever for the community surrounding the site to be made aware of the cleanup or its long term impact on their neighborhood. There is no public notice, no provision for a public hearing, and no provision for comment for local governments, health professionals, or individual citizens, the effected citizens are left out of the process. Over the past seven years I have asked both the Ohio EPA and the US EPA the same question on several occasions. My question is, can you name me one site in Ohio that has been cleaned up that has not been prompted by a local citizen? My question remains unanswered.

The Ohio program gives the party conducting the cleanup a right to keep all information and documents generated completely secret, even in court proceedings. This is true even if the "no further action letter or covenant" are never issued. The surrounding neighborhood will never know what contaminants were at the site, the extent of the contamination or the amount of contamination that remains when the site "remedy" is complete.

In short, the Ohio program purposely keeps the public in the dark about critical issues regarding their own health while their rights as state citizens are voided. I don't remember giving up my right to know what was in my community or what my family is exposed to. When did this happen? You can see why many Ohio citizens consider the program to be sinister and ethically perverse.

In 1989 the Ohio EPA created the Division of Emergency and Remedial Response. One of the goals of this division was to clean up contaminated sites faster. State lawmakers agreed to a $1 per ton tax on all solid waste generated in Ohio. Up to $14 million a year was to be placed in a cleanup fund. While this might sound like a lot of money, in the 10 years that this tax has been in place only 10 sites have been cleaned. In 1992, in order to avoid a budget shortage the General Assembly took $11 million from the fund never replacing it. Little by little the people of Ohio see the fund dwindle. The fund is used for programs that have very little to do with cleaning up Ohio's 1,192 contaminated sites. Last October, the Columbus dispatch conducted an extensive investigation and the headlines of one article read, "Ohio's toxic tally: 10 cleaned up 1,192 to go". (see attached) The Ohio EPA has acknowledged publicly that its clean up program failed to meet expectations.

Citizens of Ohio know all too well what happens when a good idea goes bad. When state agencies put the interest of the polluter above the interest of the public it is the same as a law enforcement officer taking the word of a mugger over the word of the victim. I'm sure these laws can work well, but only if they maintain a balance between corporate and community interests and produce reliable and adequate results. We've missed an excellent opportunity for real environmental progress in Ohio because our program serves only a narrow economic interest while the broad public interest is excluded. Ohio's weak VAP program can promote deceit within the corporate community while giving no peace of mind to Ohio's mothers and fathers that a contaminated site is no longer a source of the worst sort of anxiety they should ever have to bear. A traditional VAP would be welcomed by Ohio's citizens. This would apply to sites with low-level contamination, offer the benefits of a streamlined bureaucracy (but with some oversite), the benefits would be given in exchange for redevelopment (under Ohio's Law there is no quid pro quo required).

Scores of sites in Ohio have now received a release of all liability under state law for contamination that is likely still there. You have it in your power to protect the families who live around these sites by insuring that federal law will stay securely in place, not only for protecting the public health from environmental contamination, but also to insure that the right of Americans to participate in public decisions where they have a vital personal interest will also be honored by state legislature. I believe that Ohio's sorry experience with the VAP proves that minimum federal standards for public participation, openness of information, protective clean up standard, reliability of remedy and adequacy of state and federal oversight must be guaranteed to all Americans.

Citizens who live around these sites oppose any restricting or weakening of existing federal enforcement authority. Later this week a report titled "Hidden from the Public", the distortion of the Ohio EPA's mission will be released. Part of this report is testimony taken from a citizens public hearing on their dealings with different programs in Ohio EPA. I will forward a copy of this report when it is released.

We do not support the restrictions on citizens or the federal governments enforcement authority that are contained in any of the bills that are being considered by the Subcommittee. We pray that the members of Congress will keep our health and welfare in mind when they consider this legislation.

Thank you for your time, I will be happy to answer any question you might have.

Mr. GREENWOOD. Thank you for your testimony, Ms. Mills.

The subcommittee will recess for the vote and return at approximately 10 to 1.

[Brief recess.]

Mr. OXLEY. The subcommittee will reconvene.

Mr. Curtis, I understand that you are the next witness.

Mr. CURTIS. Yes, sir.

Mr. OXLEY. You may proceed.

STATEMENT OF JONATHAN G. CURTIS

Mr. CURTIS. Mr. Chairman, members of the subcommittee, my name is Jonathan Curtis. I am president and CEO of CDM Federal Programs Corporation in Fairfax, Virginia. I am here today in my capacity as president of the Environmental Business Action Coalition, EBAC, formerly known as HWAC.

EBAC is a national business trade organization whose mission is to serve and promote the interests of firms practicing in multimedia environmental management. Our firms employ over 60,000 professionals trained in all aspects of the environmental field, and have extensive experience and knowledge in hazardous waste cleanup.

Let me clarify the position from which we speak. We are the implementers of the hazardous waste laws and regulations. Let there be no misunderstanding on anybody's part: We are not polluters. We typically do not own or operate the sites where Superfund or brownfields cleanups are to be performed. We were not involved in the generation of the waste. We are the firms hired to perform cleanup actions at sites across the country, and our clients are interested in hazardous waste cleanup and environmental protection.

We commend this subcommittee and its chairman and the full Commerce Committee for the tireless efforts undertaken to examine ways to make the Superfund program more readily implementable and to seek enactment of comprehensive and workable Superfund reform legislation.

Turning now to the purpose of this hearing, brownfields redevelopment is one area, I hope all agree on a bipartisan basis, where more needs to be done to spur reuse of abandoned and underutilized properties throughout this country. This testimony focuses on

the brownfields provisions of H.R. 2580, Congressman Greenwood's Land Recycling Act of 1999. EBAC is already on record as strongly supporting H.R. 1300, which also contains strong brownfields provisions as well as overall reforms to Superfund.

The other brownfields bill that is under consideration by this committee is H.R. 1750. While my testimony only addresses 2580, I am prepared to answer questions regarding components of all three bills.

Mr. Chairman, as you referred to in our written testimony, our clients fear that EPA will second-guess State-approved brownfields cleanups. Moreover, there remains the potential downstream liability associated with reuse that further retards the process. Willingness by EPA to negotiate prospective purchaser agreements on a case-by-case basis is not enough.

H.R. 2580's provisions in section 3 provide the finality in brownfields decisions that are truly needed if this market and the actual cleanups are to accelerate. Decisions made by certified States would not be subject to second-guessing by EPA. We believe this provision is very important to spurring increased voluntary cleanup actions at brownfields sites across the country and reducing possible risks to nearby populations that are currently not addressed, expressly because of the fear of Federal liability.

The permit waiver for onsite response actions that is contained in H.R. 2580 would remove the barriers to actual onsite cleanup posed by the often-conflicting provisions of RCRA and Superfund. I must go on record with EBAC's strong disagreement with the requirement of H.R. 2580 for innocent landowners to undertake environmental site assessment in accordance with the standards set forth in the ASTM Standard E1527-94 titled "Standard Practice for Environmental Site Assessments Phase 1 Environmental Site Assessment Process."

We do not believe that this is an appropriate standard for the brownfields situation. We recommend that you drop the requirement for using ASTM Standard E1527-94. We urge that the legislation require EPA to undertake a rulemaking, using an open, transparent process and incorporating substantial input from the professionals who practice in this field to identify the professional judgment required for qualification as an innocent landowner within a limited specific period of time after passage of the bill.

In terms of the liability net of Superfund, EBAC understands the need for any brownfields legislation to define innocent landowners and bona fide prospective purchasers as well as provide liability relief. However, letting everyone off the hook for liability relief can have the unintended consequence of only leaving one entity responsible for site liabilities, and that is the cleanup firm. We know Superfund's harsh liability consequences, and the provisions that have been presented in H.R. 1300 are vital for encouraging and accelerating brownfields cleanups and Superfund cleanups.

We continue to support the provision of financial and technical assistance to States to develop and administer brownfields programs and grants. Although remedy selection is not the subject of this hearing, EBAC is convinced that reform and remedy selection provisions in Superfund is critical to accelerating any program, including brownfields. We hope to be invited back to a subsequent

hearing to discuss why the remedy reform provisions of H.R. 2580 will accelerate cleanups while ensuring protection of human health and the environment and should be adopted by this committee.

In conclusion, EBAC appreciates the opportunity to testify before your subcommittee today. We believe that the time to legislate on brownfields and overall Superfund reform is now, before the program funding that remains in the Superfund trust fund is exhausted and the total burden of the Superfund program falls to the States. The health, safety, and economic well-being of the country are more important than politics.

I remain available to answer any questions you may have. Thank you.

[The prepared statement of Jonathan G. Curtis follows:]

PREPARED STATEMENT OF JONATHAN G. CURTIS, PRESIDENT, ENVIRONMENTAL BUSINESS ACTION COALITION

Mr. Chairman, members of the Subcommittee, my name is Jonathan Curtis. I am President and Chief Executive Officer of CDM Federal Programs Corporation in Fairfax, Virginia. I am here today in my capacity as President of the Environmental Business Action Coalition (EBAC), formerly known as the Hazardous Waste Action Coalition (HWAC). As you know, EBAC is a national, Washington, D.C. based not-for-profit business trade organization whose mission is to serve and promote the interests of engineering, science and construction firms practicing in multimedia environmental management and remediation. EBAC operates as a coalition of the 5,000 firm American Consulting Engineers Council.

The multimedia environmental industry employs more than 1.3 million Americans and generates $181 billion annually in products and services. EBAC members include many of Engineering News-Record Magazine's Top 200 environmental firms, who alone generate $24.1 billion of that revenue. EBAC members employ over 60,000 engineers, hydrologists, geologists, chemists, and other specialists trained in all aspects of the environmental field. Our members have vast experience and extensive knowledge in hazardous waste cleanup. We have pioneered improved methods of waste management and remediation in this country, and today we are developing and implementing tomorrow's solutions for environmental problems worldwide.

Let me clarify the position from which we speak. We are the *implementers* of the hazardous waste laws that you enact and the regulations that EPA develops. Let there be no misunderstanding on anyone's part—we are *not* the polluters. We typically do not own or operate the sites where Superfund or Brownfields cleanups are to be performed. We were not involved in the original generation of the waste that has resulted in the need for a site investigation or cleanup. We are the firms hired to perform cleanup actions at sites across the country—from the highly complex sites on the National Priorities List, to the high level waste and mixed waste sites operated by the Department of Energy, to the former and current military bases and facilities operated by the Department of Defense, to state-listed sites, to manufacturing and commercial facilities, landfills, and other environmental projects. Our clients are the federal government, state governments, private commercial and industrial customers, local governments, citizens groups, and others interested in hazardous waste cleanup and overall environmental protection.

We commend this Subcommittee and its Chairman, as well as Chairman Bliley of the full Commerce Committee, for the tireless efforts undertaken to examine ways to make the Superfund program more readily implementable from an engineering, scientific, and construction viewpoint, and to seek enactment of much-needed, comprehensive, and workable Superfund reform legislation. We appreciate being called back to testify this year after testifying last year in favor of Chairman Oxley's comprehensive Superfund reform legislation, H.R. 3000. In our testimony last year, we stated that H.R. 3000 "will ensure that innovations are applied to cleanups, will provide incentives for new technologies at hazardous waste sites, and will spur essential state and local voluntary cleanup programs that sometimes languish due to the shadow of potential CERCLA liability that runs from the Beltway to every Brownfields site in this country." Mr. Chairman, last year you quoted directly from our testimony in your opening statement. Your opening statement indicated that the cleanup contractors believe that "from a technical, scientific, and engineering perspective, this bill will do more to spur environmental cleanup in a safe and protective manner than could possibly be accomplished under current law."

We are proud to be here and able to provide our technical engineering expertise to the complex, and often emotional, debate regarding hazardous waste cleanup. Our overriding concern is protection of human health and the environment. We believe that the federal Superfund law and related cleanup activities, including Brownfields activities, should focus primarily on cleanups. All too often, the debate becomes lost amid the "who pays" rhetoric. As the CEO of one of our largest members said most eloquently several years ago, "Superfund is not designed to fix problems, it is a program designed to fix blame."

Turning now to the purpose of this hearing, which is Brownfields redevelopment. Brownfields is one area I hope all agree, on a bipartisan basis, where more needs to be done to spur reuse of abandoned or underutilized properties throughout this country. This testimony focuses on the Brownfields provisions of H.R. 2580, Congressman Greenwood's Land Recycling Act of 1999. EBAC is already on the public record as strongly supporting H.R. 1300, the bipartisan Recycle America's Land Act of 1999 introduced by Chairman Sherwood Boehlert containing over 60 cosponsors. It also contains strong Brownfields provisions as well as other, much-needed overall reforms to the Superfund program (including remedy and liability reforms) that would *significantly* improve the program's operations. The other Brownfields bill that is being considered by this Committee is H.R. 1750, the Community Revitalization and Brownfields Cleanup Act of 1999. While this written testimony only addresses H.R. 2580, I am prepared to answer your question regarding the Brownfields components of all three bills.

The U.S. Conference of Mayors, who you will also be hearing from today, has been compiling Brownfields statistics for the past several years. Their most recent Brownfields report[1] indicates that 180 cities alone estimated that they have over 19,000 Brownfields sites. The report points out that the largest obstacles to Brownfields cleanups are (1) funding problems, (2) liability concerns associated with redevelopment, and (3) the need to determine the extent of contamination at the sites identified.

Our members have been analyzing the Brownfields marketplace for the past several years. In 1998, EBAC released the "Environmental Market Report and Market Survey." The survey results indicated that survey respondents anticipate an average 27% growth in Brownfields cleanups in the next five years. State clients identified the highest expectations for Brownfields cleanups in the next five years, indicating that the market is likely to grow by 57% in that time period.

I am here to tell you that, in actuality, the true Brownfields market has *not* kept pace with expectations. Why? We have been asking our clients just that. Our clients' responses are fairly unanimous. They fear that EPA will "second-guess" Brownfields cleanups, and require costly site rework at a later date to reach a different site cleanup standard so they "hold onto" lightly contaminated parcels instead of turning them over to beneficial reuse. Moreover, there remains the potential down-stream liability associated with reuse that further retards the process. These concerns result in owners of such properties not undertaking redevelopment efforts at viable Brownfields sites. While EPA has indicated a willingness to enter into, on a case-by-case basis, prospective purchaser agreements at Brownfields sites, the process to enter into those agreements is quite time consuming and there is no certainty in the end that EPA will agree to a prospective purchaser agreement.

H.R. 2580's provisions in Section 3 provide the finality in Brownfields decisions that are truly needed if this market, and the actual cleanups, are to accelerate. Under the bill, states self-certify that they have enacted a Brownfields program that is adequately funded and appropriately staffed, and will result in cleanups that are protective of human health and the environment. Brownfields decisions made by certified states would not be subject to second-guessing by EPA under the authority of either the federal Superfund law or the federal RCRA law. This provision is very important to spurring increased voluntary cleanup actions at Brownfields sites across the country and reducing possible risks to nearby populations that are currently not addressed, *expressly because of the fear of federal liability.*

Another significant problem associated with cleanup activities is the often conflicting provisions of RCRA and Superfund during site cleanup activities. Of particular note is the need to obtain permits for management of remediation waste during cleanup activities. Remediation waste management is the subject of RCRA reform discussions that your staff and EBAC have been involved in for some time. The permit waiver for on-site response actions that is contained in H.R. 2580 would remove the barriers to actual on-site cleanup and significantly increase the pace of Brownfields cleanups. Cleanup actions would still be protective of human health and

[1] A National Report on Brownfields Redevelopment, Volume II (April 1999), published by the U.S. Conference of Mayors.

the environment and subject to regulatory review and approval, of course, under such a scenario.

I must go on record with EBAC's strong disagreement with the requirement of H.R. 2580 for "innocent landowners" to undertake environmental site assessments "in accordance with the standards set forth in the American Society for Testing and Materials (ASTM) Standard E1527-94, titled 'Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.'" Please note that this standard is also proposed to be codified in Chairman Boehlert's bill, H.R. 1300, and in H.R. 1750. EBAC, ACEC, and other professional organizations strongly disagree with the premise that the so-called ASTM Phase I "standard" is actually a "standard." A practice labeled as a "standard" implies that it is a "tried and true" practice which, if followed, yields reliable and trustworthy results and is endorsed by the professionals who use it. Nothing could be further from the truth. The scientists and engineers who, for the last several decades, have investigated contaminated sites know that it is foolish, even dangerous, to assume that using "cookbook" assessment procedures will uncover all significant contamination. Except for a few simple sites, the technology required to peer underground and locate all significant sources of contamination has not been invented.

Left with these uncertainties, the right thing to do is let the practitioners apply professional judgement to what is truly needed for responsible site cleanup. We recommend that you drop the requirement for using ASTM Standard E1527-94. If some kind of assessment guidelines are deemed necessary, then we ask that they be developed by EPA, using an open, transparent process, and incorporating substantial input from the licensed engineers who practice in this field.

The legislation allows EPA to set up an "alternative standard" through a formal rulemaking process. However, as long as the legislation identifies the specific ASTM standard that qualifies for "innocent landowner" status, we believe that EPA will never get to the rulemaking stage to create an alternative standard. We urge that the legislation delete the ASTM standard, and require EPA to undertake a rulemaking to identify the professional judgment required for qualification as an "innocent owner" within a limited, specific period of time after passage of this bill.

In terms of the liability net of Superfund, EBAC understands the need for any Brownfields legislation to define "innocent landowners," and "bona fide prospective purchasers," as well as to provide liability relief for contiguous property owners and state and local governments. Letting everyone off the hook for liability for site cleanup is good public policy for it will enable reuse of these valuable properties and revitalization of urban areas. However, letting everyone off the hook for liability for site cleanup could have the unintended consequence of leaving only one involved participant with any potential responsible for site liabilities—the cleanup firms. We would be remiss in this testimony by not adding here, briefly, that the federal Superfund law's harsh liability consequences have resulted in imposition of unfair liability on cleanup contractors merely because of their involvement in site cleanups. Last year's H.R. 3000, and this year's Superfund legislation sponsored by Chairman Boehlert of the Water Resources and Environment Subcommittee (H.R. 1300), thankfully included provisions that would address contractor liability issues. These protections are vital for encouraging and accelerating Brownfields cleanups and Superfund cleanups. We look forward to robustly addressing contractor liability and remedy selection issues with you in further detail at a subsequent hearing, and discussing why addressing these issues will help spur Brownfields cleanups and other environmental remediation activities.

H.R. 2580 requires EPA to provide financial and technical assistance to states to develop and Administer Brownfields programs, as well as continues the funding of Brownfields grants. EBAC strongly supports both of these initiatives. State assistance and Brownfields grants will help ensure that strong Brownfields programs continue to operate across this country. While we recognize that tax matters are not the responsibility of this Committee, EBAC urges the Congress to explore maximum use of economic and other incentives to assure that developers will become eagerly engaged in the process of transforming currently wasted and under-utilized urban properties into productive ones. Please note, however, that we expect that the proposed lien on facilities in the amount of the unrecovered response costs could pose a continued obstacle to Brownfields cleanup efforts.

Finally, please note that the fact that we have not addressed Section 9 of H.R. 2580—the Remedy Selection portion of the bill—in this testimony is not an oversight. Remedy selection is not the subject of this hearing. However, as our testimony last year on H.R. 3000 demonstrates, EBAC is convinced that reforming key remedy selection provisions in Superfund is critical to accelerating any cleanup program, whether it be Brownfields cleanups, voluntary cleanups, or Superfund cleanups. We hope to be invited back to a subsequent hearing to be able to inform this Sub-

committee, in detail, why Section 9's remedy reform provisions should be adopted by this Committee and the full Commerce Committee, and why these provisions will accelerate cleanups while ensuring protection of human health and the environment.

In conclusion, EBAC greatly appreciates the ability to testify before your Subcommittee today on H.R. 2580. We believe that the time to legislate on Brownfields and overall Superfund reform is now, before the program funding that remains in the Superfund Trust Fund is exhausted, and the total burden of the Superfund program falls to the states. The health, safety, and economic well-being of the country are more important than politics. I remain available to answer any questions that you may have.

Mr. OXLEY. Thank you.

Ms. Florini.

STATEMENT OF KAREN FLORINI

Ms. FLORINI. On behalf of the Environmental Defense Fund and its 300,000 members, thank you for this opportunity to testify.

Mr. Oxley, I would like to ask if perhaps rather than hearing from me, you might wish to hear from Ms. Mills, as you were not in the room, or at least you were not in the chair when she presented her testimony. I can summarize my remarks in about 30 seconds and I would—I think it is extraordinarily important that you personally hear her remarks.

Mr. OXLEY. I read her testimony, so if you would proceed.

Ms. FLORINI. All right.

Before turning to the specific bills under discussion today, I would like to make four general points:

First, the Environmental Defense Fund and all members of the environmental community think that proper reutilization of brownfields is a very good idea, for the reasons stated a number of times. It not only improves the quality of life and communities otherwise that have these underutilized properties, but also, of course, prevents the redevelopment or the development in greenfield sites.

But the lessons of history make plain that Superfund is not the sole cause or even the primary cause of urban blight. Slums existed long before Superfund did. It is axiomatic in real estate that the three most important factors are location, location, location. Everything else, including preexisting contamination, comes a distant fourth.

Third, the term "brownfields" means different things to different people, and we have already observed that today. To some, it means every formerly used property, regardless of whether the property is grossly contaminated or virtually pristine. To others. Brownfields properties are only those that have low levels of contamination. Whichever way the term is used, it is essential to the protection of public health and the environment that we not wind up with policies that are suitable only for low-contaminationsites also being applied to more highly contaminated sites.

Fourth, State programs vary significantly in quality. In a study released by the Conference of Mayors just 3 months ago, nearly one-third of the responding cities gave a low rating to their State's voluntary cleanup program; 23 percent rated it as not very good, and 6 percent as poor. Another 44 percent rated their State's program as merely satisfactory. In short, the mere existence of a State program is no guarantee of a trouble-free outcome.

This leads to my most important point. Brownfields redevelopment must not be used as an excuse to roll back protections and safeguards provided under Federal law. In particular, the Environmental Protection Agency, local governments, and citizens must retain their ability to respond to an imminent and substantial endangerment as provided by existing law. It is a necessary Federal safety net in those instances where cleanups under State programs don't work. Where they do work, there will not be any imminent substantial endangerment and the question will not arise.

With those general points, I will turn to the three bills under discussion today. First, we strongly oppose H.R. 2580. We regard it as an extreme bill. It would dramatically limit the ability to use Federal statutory authorities at sites subject to cleanup under a State program. This approach eviscerates the Federal safety net. It says that federalism is more important than public health. This is a values question and one where the Environmental Defense fund believes that it is essential to come down squarely on the side of saying public health and environmental protection is more important than federalism, not vice versa.

In addition, H.R. 2580 would effectively repeal portions of other environmental authorities, including key provisions relating to cleanup, or corrective action, as it is known at hazardous waste treatment, storage and disposal facilities. It also eliminates permanent requirements for onsite activities occurring under State cleanup programs, thus eviscerating public participation.

And as we have heard from Ms. Mills in Ohio, there is no other mechanism for public participation under a State cleanup program. Lack of permits also turns compliance with substantive requirements under these programs into a "trust but don't verify" situation in many instances.

The supposed protections built into H.R. 2580 are profoundly inadequate. There is no review of the State programs, just a requirement that States provide a one-time self-certification. EPA cannot reject the certification either initially or at a later time, even if the State program is entirely defunded.

And as indicated in my written testimony, a participant in the Ohio brownfields program at the local government level testified before the Ohio legislature, indicating that already due to inadequate funding, there has been substantial attrition in the State program.

Finally, we oppose the requirement for Governors' concurrence. We believe this is a solution in search of a problem, as EPA already routinely consults with Governors. Making Governors' concurrence mandatory, we regard simply as a further erosion of the Federal safety net.

We have also got serious concerns with a number of H.R. 1300 brownfields-related provisions. Chief among our concerns are the inadequate reopeners, which again cut holes in the Federal safety net. It also has got innocent party provisions which are far more sweeping than those in 2580 or in 1750.

Finally, we think that H.R. 1750 is much more focused and contains sensible criteria for approving State programs and appropriate reopeners and avoids the sins of commission and omission in the other bills. Thank you.

[The prepared statement of Karen Florini follows:]

PREPARED STATEMENT OF KAREN FLORINI, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND

On behalf of Environmental Defense Fund (EDF) and its more than 300,000 members, I appreciate this opportunity to testify regarding the brownfields provisions of H.R. 2580, H.R. 1300, and H.R. 1750. Most of my testimony focuses on the relationship between brownfields legislation and other federal environmental statutes, including Superfund and the Resource Conservation and Recovery Act (RCRA). EDF has been actively involved in the Superfund reauthorization process, serving on EPA's NACEPT Committee on Superfund and on the National Commission on Superfund, and testifying repeatedly on Superfund during the last three Congresses. We have also long participated actively in matters affecting RCRA, the nation's hazardous waste statute.

I. INTRODUCTION: BROWNFIELDS—CAUSES, EFFECTS, AND THE CONTEXT OF STATE CLEANUP PROGRAMS.

In the last several years, the term "brownfields" has become widely used to mean abandoned or under-utilized urban areas with known or suspected contamination from prior industrial or commercial use. (There is considerable confusion about whether this term refers to sites with only minor contamination, or to the full range of contaminated sites.) In some circles, it is fashionable to assert or imply that, but for Superfund and other federal laws, these properties would be restored to productive use forthwith.

Such an assertion is nonsense. Urban properties become abandoned or under-utilized for a variety of complex reasons, of which environmental contamination—real or perceived—is only one, and typically a minor one at that. Anyone familiar with the writings of Charles Dickens, not to mention American history, is well aware that slums existed long before Superfund did. It is axiomatic that there are three things that matter in real estate: location, location, and location. Crime patterns, availability of transportation and other infrastructure, and contamination concerns follow along behind.

That said, however, carefully crafted legislation may provide some incremental benefit in promoting brownfields redevelopment—an objective we support for many important reasons. First and foremost, abandoned and under-utilized urban properties impair quality of life for urban communities. Getting those sites back into beneficial use can provide jobs, services, or recreational opportunities to local residents (though siting polluting facilities near residences can be far worse than leaving the site unoccupied).

In addition, failure to redevelop in existing urban areas also creates greater pressure for development on new "greenfield" sites in rural areas. Doing so disrupts farmland and wildlife habitat (habitat loss is the primary threat to biodiversity, including endangered species). It also contributes to sprawl, which in turn means more traffic, which means more tailpipe emissions of global warming gases, smog precursors, and toxic air pollutants. Indeed, on a national basis, about half of the health risk from air toxics comes from mobile sources.[1]

In short, redeveloping brownfields—if done well and with meaningful community involvement—provides a host of community, public health, and environmental benefits.

At the same time, however, it is important to note that the word "brownfield" is just that: a word. Calling a site a "brownfield" does not lessen its toxicity by one iota. You can't fool Mother Nature; ignoring contamination does not detoxify it. Indeed, if brownfields programs result in more-intensive utilization of still-contaminated properties, they can result in increased exposure to toxics.

With land, as with lead-acid batteries and many other materials, bad recycling is worse than no recycling. What's needed are *good* recycling programs for land—ones that (i) assure adequate cleanups before the site is put into use, (ii)

[1] See the Hazardous Air Pollutants section of EDF's Scorecard web site, www.scorecard.org. Scorecard is a free public information service based on more than 250 electronic data sets, including data from the Environmental Protection Agency's Cumulative Exposure Project (CEP), which provides localized estimates of exposures to 148 air toxics. Scorecard multiples the exposure levels by chemical-specific potency values based on authoritative sources to present county-specific health risks from mobile, area, and point sources of air toxics. (CEP is based on a 1990 emissions inventory, but comparison of the CEP exposure levels with available monitoring data for the late 1990s shows close agreement. See http://www.scorecard.org/env-releases/def/hap—compare.html.)

build in safeguards because cleanups sometimes don't work as expected, and (iii) fully involve the affected community.

The Committee is to be commended for having a hearing on the right topic: brownfields, as opposed to Superfund reauthorization. The Environmental Defense Fund concurs with the Administration and with the U.S. Chamber of Commerce that the time for comprehensive reauthorization has come and gone. Rather than continuing to hold brownfields legislation hostage to the chimera of Superfund reauthorization, it is time to move forward with legislation that serves the legitimate needs of the public, business, and all levels of government.

But while the brownfields problem warrants Congress's attention, it cannot become an excuse for rollbacks of important environmental safeguards and evisceration of the polluter-pays principle. Unfortunately, one of the bills under consideration in this hearing, H.R. 2580, would have just such an effect. H.R. 1300, though less draconian, would also have serious adverse consequences. By contrast, H.R. 1750 is a sensibly tailored approach to the specific issues. All three bills are discussed in more detail below.

Before turning to those bills, it is useful to remind ourselves that state voluntary programs differ substantially in their quality. Indeed, in a study released by the Conference of Mayors just three months ago, nearly one-third of the responding cities gave a low rating to their state's voluntary cleanup program (23% rate it as "not very good" and 6% as "poor").[2] Another 44% rates their states program as merely "satisfactory". In short, cities themselves are less than ecstatic about most state brownfields programs, making clear the continuing need for a federal safety net.

Further illustration of this point comes from a recent study of voluntary programs by the General Accounting Office. [3] Although the majority of 17 states surveyed typically use standards based on industrial-use scenarios in cleaning up sites, only two monitor the land-use restrictions that must be concomitantly imposed on such sites to keep non-industrial uses from occurring.[4] Likewise, in 8 of the 17 states, most cleanups use non-permanent cleanup methods but received only limited monitoring, primarily in the form of periodic reports by the facility owners.

In addition, resource constraints can pose serious problems. Just two months ago, the manager of the Brownfields Redevelopment Project for Ohio's Cuyahoga County Planning Commission testified that the pending budget for Ohio's voluntary cleanup program "reflects no commitment to staff the program". Since the beginning of the year, the [voluntary program] has been in a mode of attrition. As of this week staff has been cut—reducing its size from 25 to 16 FTEs statewide." [5]

In short, the existence of a state cleanup program is no guarantee that cleanups under that program will prove effective. When they aren't, federal authorities must be available to provide a safety net for communities.

II. H.R. 2580: UNDERCUTTING THE FEDERAL SAFETY NET FOR BROWNFIELD CLEANUPS

Unfortunately, H.R. 2580 eviscerates the federal safety net. Sections 3 and 4 are particularly objectionable.[6] Our opposition to these provisions dramatically outweighs our longstanding support for the concept of bona fide prospective purchaser protections such as those in section 6. Likewise, while we support protection of innocent parties, section 5 of H.R. 2580 should be strengthened by adding requirements (such as those in H.R. 1750) that the purchaser take reasonable steps to prevent ongoing or future releases, and cooperate with parties conducting a cleanup at the site.[7]

Our major concerns with sections 3 and 4 are set forth below.

---

[2] U.S. Conference of Mayors (April 1999). *Recycling America's Land: A National Report on Brownfields Redevelopment,* Volume II, p. 12.

[3] U.S. General Accounting Office (April 1997). *Superfund: State Voluntary Programs Provide Incentives to Encourage Cleanups.* GAO/RCED-97-66.

[4] Id. p. 39.

[5] Testimony of Virginia Aveni Before the Senate Finance and Financial Institutions Committee, May 26, 1999, p. 3.

[6] In addition, section 1's "Findings" contain a number of seriously erroneous and misleading statements, and fail entirely to acknowledge the dangers of improperly conducted brownfields cleanups for both current and future generations. Likewise, Section 8's provisions on contiguous properties suffers from several important sins of omission, such as failure to require (i) use of appropriate care in stopping ongoing releases and exposures, (ii) provision of notice, (iii) no exacerbation of release, and (iv) appropriate inquiry at the time of acquisition.

[7] While we do not oppose liability protections for contiguous-property owners, we prefer the provisions in H.R. 1750 to those in H.R. 2580, since the former are less susceptible to abuse.

a. H.R. 2580's Inappropriate Limitations on Federal Authority at State Voluntary Cleanup Sites.

Section 3 bars EPA, citizens, and local governments from bringing an action under Superfund and parts of RCRA with regard to a release at a facility that is or has been the subject of a response action under a state program.

Such restrictions go far beyond the Superfund liability protection for bona fide prospective purchasers, a concept which EDF has long supported as noted above. Those provisions allow parties that have no prior connection to the site, and that meet certain common-sense requirements, to be assured that they will not become liable as an owner/operator under Superfund for pre-existing contamination at the site. This provision should help further spur brownfield redevelopment.

Unfortunately, Section 3 of H.R. 2580 goes much further. It not only limits all Superfund enforcement authorities, but also key RCRA enforcement authorities—ones that enable both EPA and citizens to take action against parties that are mismanaging solid or hazardous wastes to the extent of presenting an "imminent and substantial endangerment."

At the same time, it is far from clear what "release at a facility that is, or has been, the subject of a response action pursuant to a State program" actually means. Does the prohibition apply even if the State response action covered a completely different release at a facility (i.e., does "subject" modify "release," or does it modify "facility")?

Likewise, what does "the subject of" mean? What if the response action was planned years ago, but no steps to implement it were ever taken? Or if action stopped after initial studies were completed? Or if a cleanup was carried out, but failed to achieve required cleanup levels? Or wasn't maintained as required by the state cleanup plan? These questions will also require years of litigation to resolve.

Polluters will seek the broadest possible construction of these phrases to escape liability under Superfund and RCRA. As discussed below, these concerns are particularly acute in light of the breadth of Section 3's scope, as well as the profound weakness of its certification and re-opener provisions.

1. Letting Federalism Trump Public Health

Remarkably, Section 3 limits EPA from taking *any action* at all—even at its own expense—at sites where action under a state program has proven ineffective.

This provision is based on a fundamentally flawed premise: that contaminated sites addressed under state cleanup programs should be above the law, immune from all Superfund and some RCRA enforcement authorities, unless certain limited conditions are met. The result is that private cleanups with no governmental oversight can completely bar use of RCRA and CERCLA safeguards—no matter how serious a threat the site poses.

This approach **undercuts the federal safety net for cleanups and elevates principles of federalism above protection of public health and the environment.** If cleanups under state programs don't work, the federal government should be able to act, under the same standard that applies across the board. There is not a shred of evidence that, following action under a state program, EPA has insisted on post-cleanup cleanups that serve no purpose to protect health and environment. Indeed, EPA has seldom if ever required additional action following completion of a cleanup under a state program, except where the state itself has requested EPA intervention.

Simply put, **it is not acceptable to restrict the ability of federal and local governments and citizens to respond to imminent and substantial endangerments at sites where cleanups under State programs have occurred. By definition, those cleanups didn't work—if they had, the site would not be presenting an imminent and substantial endangerment.**

2. Undercutting Incentives for Effective Voluntary Programs

Under current law, the *authority* of EPA, local governments, and citizens to act following an unsuccessful state cleanup itself creates an important incentive for more-rigorous cleanups, and for minimizing abuses within state cleanup programs. The very fact that this authority now exists decreases the likelihood it will be needed. Conversely, removing or limiting that authority makes it more likely that problems will arise—and be harder to deal with.

Superfund clearly creates powerful incentives for action. The Cleveland Plain Dealer recently ran a story about the Ashtabula River Partnership, a group working to avoid a potential Superfund listing by creating what they regarded as "a better-than-Superfund cleanup plan" for the river's heavy-metal and PCB contamination problems. The paper quoted Rep. Steve LaTourette (R-OH) as remarking that "[t]he prospect of a Superfund designation has proven to be a more effective tool than the

Superfund itself. Without Superfund, however, most parties wouldn't even be at the table."[8] Similarly, GAO noted that State program managers "pointed out that a major incentive for private parties to clean up sites is to avoid having their properties added to the list of the most contaminated sites in the country."[9]

Just as Superfund creates incentives for voluntary action, so continued applicability of Superfund reinforces incentives for high-quality voluntary action. These incentives should not be discarded.

3. Granting Windfall Waivers of Liability.

In addition, Section 3 provides a windfall waiver of Superfund liability for current and past owners and operators of the site, as well as all generators and transporters, who would otherwise be liable for cleanup costs at the site. Even if one accepts the argument that current site owners will be reluctant to re-develop or sell their property unless States can relieve them of liability under federal law—an argument we find singularly unpersuasive—*there is no justification whatsoever for extending the waiver of liability to past owners, or to generators or transporters.*

Relieving current owners of liability is itself highly objectionable, since in many instances it is these very parties who are most responsible for conditions at the site. In EDF's view, the only liability limitations that are warranted are those for bona fide prospective purchasers. Even without prospective-purchaser limitations, the private market is increasingly providing mechanisms for moving forward with brownfield redevelopment today.[10] Until and unless objective evidence demonstrates that liability relief for bona fide prospective purchasers is insufficient to promote adequate brownfields redevelopment, this provision can only be regarded as a giveaway to parties who have known they were potentially liable for two decades.

Finally, it must be noted that the approach taken in Section 3 substantially undercuts the prospective-purchaser provisions in Section 6 of H.R. 2580, since liability is blocked even if Section 6's requirements are not met.

b. H.R. 2580's Implicit Repeals of Other Environmental Authorities.

Unlike other brownfields bills, H.R. 2580's limitations on Superfund and RCRA enforcement authorities apply to a wide range of sites at which there is a clear preexisting federal interest. For example, H.R. 2580 fails to provide that sites cannot be diverted into state programs once they have been proposed for listing on the National Priorities List, providing opportunities for gaming the system.

In addition, the bill fails to preserve the applicability of a host of other federal environmental important laws that may affect contaminated sites:

- RCRA authorities, e.g., relating to corrective action and closure of land-disposal units (such as liners, leachate collector systems, and landfill covers);
- TSCA authorities, e.g., for cleanup of PCB contamination;
- Clean Water Act authorities, e.g., relating to wetlands; and
- Safe Drinking Water Act authorities, e.g., relating to underground injection.

These glaring omissions means that state voluntary programs *which may completely lack public participation and substantive standards* to trump provisions of other major federal environmental laws—each of which has evolved specific implementing regulations, with extensive public participation, over many years.

Most egregiously, H.R. 2580 undercuts the RCRA corrective action program. Since enactment of the 1984 amendments to RCRA, owners and operators of hazardous waste facilities have known that they have a legal obligation to clean up existing messes at their facilities in conjunction with getting their facility permit. Under H.R. 2580, these 15-year-old requirements arguably could be circumvented by a far

---

[8] "Toxic Cleanup: Ohioans Aim to Skirt Superfund Listing," *Greenwire* (electronic newsletter), June 14, 1995 (synopsis of story from June 11 *Cleveland Plain Dealer*).

[9] GAO, p. 3.

[10] See for example, Coffey, "Environmental Firms Assume Cleanup Risks," *Seattle Daily Journal of Commerce,* 02/11/97 [Retrieved from ttp://www.djc.com/data/news/19970211/10020180.htm 2/27/97]. The article describes a "radically different approach to soil and groundwater cleanups that is slowly catching on in the environmental industry. A handful of firms are guaranteeing cleanup costs for their clients and, in some cases, providing definite dates for when the cleanup work will be finished." The article continues, "Not only are these companies promising to bring sites up to [Washington] Department of Ecology standards within a certain amount of time, they also are assuming the financial risks involved if the schedules for site closures can't be met. This new approach is being hailed as the missing link needed to get the state's hundreds of abandoned contaminated properties, or 'brownfields,' cleaned up and redeveloped." Similarly, conferences with titles such as "Realizing Profits in Brownfields," which advertise a "unique opportunity for all parties involved with Brownfields properties to locate and initiate their next profit making real estate deal," are increasingly common. [Flier for conference scheduled for April 10-11, 1997, Philadelphia PA].

weaker voluntary cleanup with no public participation. **Such a rollback of existing federal requirements is completely unacceptable.**

The scope of this issue is significant, as approximately 3,700 RCRA sites may require corrective action.[11] EPA recently designated 1,712 corrective action sites for priority attention through 2005.[12] A state that wants primacy in directing action at these sites (and other RCRA corrective action sites) has a clear means of obtaining it: become authorized to administer the corrective action program, as 30-plus states have done already.

Exacerbating all these problems, H.R. 2580 contains a sweeping exemption to permitting for all on-site activities conducted under a voluntary response plan [§ 3(e), p.7]. This provision offers a massive loophole for evading requirements of RCRA, the Clean Air and Clean Water Acts, and a variety of other federal protections.

In many instances, **eliminating permit requirements eliminates public participation—and H.R. 2580 conspicuously fails to require that state programs provide meaningful participation (or indeed any at all)**.[13]

Although the bill purports to require that the substantive standards be met, this is meaningless since the only way the public (or state or federal regulators) are likely to be able to tell if the standards are met are through inclusion of specific standards in the permit. Under many of the affected statutes, the substantive regulatory standards have been promulgated in relatively general form, so that they may be applied in a site-specific manner *through the permit* (or provides for site-specific exceptions to generally-applicable standards). Obviating the permit will often leave site owners with unfettered discretion to pick a numerical standard that allows them to minimize the cost of cleanup. At the same time, H.R. 2580 fails to require any active state oversight. This is a recipe for disaster.

This provision is by no means analogous to Superfund's exemption for permitting for on-site activities. Under Superfund, there is a high level of active governmental oversight and public participation, making the Superfund remedy-selection process at least the equal of federal permitting processes other environmental programs (indeed, Superfund exceeds all other programs inasmuch as it allows citizens to obtain Technical Assistance Grants.) By contrast, H.R. 2580 conspicuously fails to assure *any* level of public participation in state voluntary programs, just as it fails to require *any* level of active state supervision of the cleanup. Moreover, under Superfund it is EPA that makes cleanup determinations—the same body that develops the substantive standards underlying the waived permits. In the brownfields context, it is States or site owners that make cleanup determinations—groups that may have little interest in assuring that the underlying substantive standards are indeed met.

In short, even if one assumes that federal Superfund authorities should be limited at some sites in order to promote brownfield redevelopment (an assumption we do not share), that constitutes no justification for indirectly repealing significant portions of other major federal laws. Any limitations on Superfund authorities must be accompanied by explicit preservation of authority under these other major federal environmental programs, as well as by adequate certification and re-opener provisions as discussed in the next section, and retention of existing permit requirements.

c. H.R. 2580's Inadequate Certification and Re-opener Provisions

1. Weak Self-Certification Provisions

Although Section 3's reach is purportedly limited by provisions that set both preconditions (State certification) and criteria for re-openers, both sets of provisions are seriously flawed.

The State certification requirements are almost meaningless. The state need only submit a three-part self-certification: that a voluntary response program has been enacted; the State has committed financial and personnel needed to carry it out; and such program will be implemented in a manner protective of human health and the environment (§ 3(b), p.4). For all the bill says to the contrary, the Governor could write these phrases on a post card and mail it to Administrator Browner—and achieve automatic, irrevocable, permanent designation as a State response program for purposes of barring EPA, citizen, and local government action under Superfund and RCRA's imminent-hazard provisions.

EPA has no authority to reject the self-certification, no matter how inaccurate. Moreover, **there is no requirement for public participation of any kind in**

---

[11] See http://www.epa.gov/epaoswer/osw/cleanup.htm#ca program.

[12] See http://www.epa.gov/epaoswer/osw/cleanup.htm#baseline.

[13] Nor does H.R. 2580 have any mechanism for assuring the adequacy of a state's public participation program, even if it the state nominally has one.

the State program (much less provision of technical assistance resources), nor is there any opportunity for the public to provide EPA with comment on the adequacy of the state program. Nor is there any requirement that the state provide any oversight of private parties' cleanup activities. And even if the State has committed adequate resources at the time of the certification, there is no requirement for regular re-certification, or notifying EPA if resources cease to be adequate (e.g., due to dramatic budget cuts).

2. Inadequate Re-openers.

The appropriateness of the re-openers is one of the most vital aspects of any "finality" provision—and an area where H.R. 2580 is particularly flawed (§ 3(d), p.5). The finality provision (which applies even to sites *already* proposed for listing under Superfund) is limited only where:

- The site has been listed under Superfund (but unlike all other brownfields bills, not for sites already proposed to be listed);
- The Governor requests EPA action;
- The site is a federal facility;
- *Prior to commencement of action under a state program,* a federal administrative or judicial order was issued under Superfund, RCRA, the Clean Water Act, TSCA, or the Safe Drinking Water Act; or
- "response actions are immediately required to prevent or mitigate a public health emergency and . . . the State is not responding in a timely manner."

This last proviso is a plum ripe for corporate litigators to pluck, again and again, first as to its general meaning, and then as to its applicability in specific factual settings whenever their clients want to circumvent attention by EPA, citizens, or local governments. What does "immediately" mean? What is a "public health emergency"? Why is there no consideration of the environment? What is a state "response"? What is a "timely manner"?

All this fodder for the litigation mill is unnecessary. EPA should be able to act *without restriction* at voluntary cleanup sites, just as it can anywhere else. Where a voluntary cleanup is efficacious, EPA will have no need (or motive) to act—but where the cleanup doesn't work, a federal safety net should be readily available, under the familiar "imminent and substantial" standard (which is also found in numerous state cleanup laws [14] and in Memoranda of Agreement between EPA and several states regarding state voluntary programs [15]). In addition, prior testimony to this committee by the National Association of Local Government Environmental Professionals has also endorsed the inclusion of a reopener based on the "imminent and substantial" standard.[16]

d. Disempowering the Public: Governor's Concurrence

In another highly objectionable feature of the bill, new sites can be added to the Superfund list only upon the concurrence of the Governor of the State in which the site is located [§ 4, adding CERCLA § 105(h), p.8].

While it may be appropriate to give states "first dibs" on cleanups at sites that will be appropriately addressed through state action, this provision goes much too far. A state could, through simple inaction, bar action under Superfund even though the site will not otherwise be cleaned up. This invites potential abuses (if, for example, a major potentially responsible party at the site also happened to be a campaign contributor to a high-ranking State official).

This provision effectively repeals section 105(d) of CERCLA, under which citizens and local governments can petition EPA to list sites on the NPL. Where prompt state action has been forthcoming, no such petition is needed. But where it is lacking, Governors should not be able to cut a hole in the federal safety net. Notably,

---

[14] See, e.g., Arizona (Arizona Statutes § 49-287(E)); Arkansas (Arkansas Statutes § 8-7-409(a)); California (California Superfund act, § 25358.3(a)); Colorado (Colorado Statutes § 25-15-301(4)(a)); Hawaii (Hawaii Statutes § 128(D)-4(2)); Louisiana (Louisiana Revised Statutes 30:2275(A)); Maryland (MD Environmental Statutes § 7-222 (2)(iii)); Michigan (Michigan Statutes § 324.20119(1)); Minnesota (Minnesota Statutes 115B.18 Subdivision 2); Montana (Montana Statutes 75-10-711(1)(a)); New Hampshire (New Hampshire Statues Annotated § 147-A:13); New Mexico (New Mexico Statutes Annotated § 74-4-13(A)); Oregon (Oregon Statutes § 465.260(5)(b)); Pennsylvania (Pennsylvania Statutes 35, § 6020.501(g)); South Carolina (South Carolina Statutes Annotated § 44-56-50); Texas (Solid Waste Disposal Act § 361-272(a)); West Virginia (West Virginia Statutes § 22-18-18)a)).

[15] E.g., Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. EPA, Region 6; and similar agreements in Colorado, Illinois, Michigan, Minnesota, Missouri, Wisconsin.

[16] Statement of David Levy before the Subcommittee on Commerce and Finance of the House Commerce Committee, Committee Print p. 114.

the majority of NPL sites in Louisiana have resulted from citizen petitions, highlighting the importance of this mechanism.

As above, EPA's *authority* to list absent the Governor's concurrence serves as a useful incentive, and makes it less likely that EPA will actually have to do so. In 1995, EPA established a formal policy for coordinating with states in deciding whether to list. Since that time, no site has been listed over a Governor's objection. However, if EPA were *unable* to list absent concurrence, states would find themselves under much greater political pressure to object to NPL listing—even if the state's program was indeed strapped for resources.

In short, the requirement for the Governor's concurrence is a solution in search of a problem—and one that will itself create a number of problems.

III. H.R. 1300: ANOTHER SET OF HOLES IN THE FEDERAL SAFETY NET.

Though the brownfields-related provisions of H.R. 1300 are less extremist than those of H.R. 2580, they are still far from acceptable. Our most serious concerns involve the limitation on use of Superfund authorities found in section 104 [adding CERCLA § 129, p.17], in tandem with the inadequate re-opener provisions. As discussed above with regard to H.R. 2580, we oppose creating a more-restrictive standard for action under Superfund, which will delay further action at sites with ineffectual voluntary cleanups and also prompt litigation over this new terminology (i.e., action is "immediately required" to address "an emergency" and "there is an immediate risk to public health or welfare or the environment" (p.19)).

These concerns are exacerbated by the fact that H.R. 1300 applies its limitations on Superfund cost-recovery authorities to state programs sight unseen. Those limits apply to any state law "that specifically governs response actions for the protection of public health and the environment" [p.18], regardless of whether those programs actually achieve their objectives, have adequate resources, or provide for any public participation at all. There is no opportunity for EPA to review those programs, or gather communities' views on their adequacy. As noted above, almost one-third of cities responding to a survey for the U.S. Conference of Mayors rated their state voluntary cleanup programs as less than satisfactory, so the blanket approval awarded by H.R. 1300 is plainly unwarranted.

In addition, section 105's requirement for a one-year delay in finalizing an NPL list is not desirable, since more-rapid listing may be appropriate in some cases. (§ 105, adding CERCLA § 105(h), p. 19]. We concur with the National Association of Attorneys General that such provisions allow potentially responsible parties "too many easy routes to avoid enforcement or listing."[17]

In addition, we strongly oppose portions of the innocent-party provisions of H.R. 1300, found in section 303. EDF has long supported tailored provisions, such as those in section 202(a) of H.R. 1750 and section 5(a) of H.R. 2580, that provide liability relief for truly innocent parties, though we strongly prefer H.R. 1750 because it appropriately requires that parties take reasonable steps to stop ongoing and prevent future releases and exposures, and to provide cooperation and access for the cleanup. By contrast, Section 303 of H.R. 1300 changes Superfund's basic defenses to liability to include consideration of "generally accepted good commercial and customary standards and practices at the time"—a sure-fire way to expand litigation while everyone argues about what that means, and to shift cleanup costs to the general taxpayer—and also contains an unworkable site-specific basis for assessing whether the party made all appropriate inquiry [section 303(a), amending CERCLA 107(b)(4), p.64].

In sum, while H.R. 1300 is less draconian than H.R. 2580, it is still far from acceptable.

IV. H.R. 1750: A MODERATE AND TAILORED BILL

By contrast, H.R. 1750 takes a measured approach. Unlike H.R. 2580, it places no restrictions on RCRA authorities; with regard to Superfund, it limits only Superfund's cost-recovery provisions, but not EPA's authority to take direct action. In addition, H.R. 1750 has much more reasonable re-opener provisions. These include (among others) the existing standard for action, namely "imminent and substantial endangerment," as well as new conditions that result in a lack of protection of the environment.

Likewise, H.R. 1750 has far more robust criteria for state programs. Rather than the one-time self-certification provided by H.R. 2580 (which blocks all use of Super-

[17] Comments of the National Association of Attorneys General on H.R. 1300, as transmitted by Lynne M. Ross, Deputy Director, NAAG, by letter of May 24, 1999, to Chairman Sherwood Boehlert of the Water Resources and Environment Subcommittee, p. 2.

fund and some RCRA authorities), H.R. 1750's limitations on cost-recovery authority apply only if a program is approved. Criteria for program approval include public participation and technical assistance, protective site assessment and cleanups, adequate oversight and enforcement, prior approval of cleanup plans, and certification of completion of the cleanup.

In addition, H.R. 1750 provides that a previously-approved program can be disapproved if changed circumstances warrant, a sharp distinction to H.R. 2580's once-and-forevermore approach. In short, H.R. 1750 avoids both the sins of omission, and the sins of commission, found in H.R. 2580 and H.R. 1300.

V. CONCLUSION

We appreciate this opportunity to testify.

Mr. OXLEY. Mr. Garczynski.

STATEMENT OF GARY GARCZYNSKI

Mr. GARCZYNSKI. Mr. Chairman, my name is Gary Garczynski. I am the Vice President and Secretary of the National Association of Home Builders and the senior officer with oversight over the Smart Growth Initiative. I speak to you today on behalf of President Roma, who could not be here due to other business concerns, and he apologizes to you and promises you a round of golf, but watch his handicap.

Redeveloping brownfields revitalizes economically depressed areas, and cleans up the environment as well. That is why we as home builders have made brownfields redevelopment one of the key components of our Smart Growth strategy. In fact earlier this year, the Home Builders joined in an initiative with the U.S. Conference of Mayors and HUD to produce 1 million homes in the inner cities over the next decade. Fixing our brownfields problem will go a long way toward promoting Smart Growth initiatives throughout this country.

Last month, your House Real Estate Caucus hosted the national real estate organization's Annual Conference on Smart Growth. I strongly suggest you review that transcript. The last hour of that meeting did nothing more than talk about the need for legislative reform so that real estate companies and the community can engage in cleaning up and redeveloping brownfields sites. Taking advantage of brownfields would ease pressure to develop on the fringes of the suburbs, thus slowing the rate of suburban expansion.

We appreciate the opportunity to discuss the three bills before you as well as some of our proposals that focus exclusively on brownfields redevelopment.

First, legislation to promote brownfields redevelopment does not necessarily need to be linked to legislation that reauthorizes Superfund. Most Superfund bills, including the ones before your subcommittee, are, by and large, aimed at providing protection for a person who already owns or is otherwise connected to a contaminated site through no fault of his or her own. That is an important reform.

But as builders we don't look at brownfields purely in terms of escaping liability. Indeed, we see brownfields as an opportunity to get involved and turn unproductive land into livable communities, promoting urban renewal, improving the environment and giving communities more options in growth smart.

It makes no sense for us to become involved in a site when we face the added cost of cleanup and the legal uncertainties of Superfund, not to mention a host of other Federal laws and regulations. If Congress is genuinely interested in involving us in the cleanup and reuse of sites, then it should take a look at incentives and guarantees to make up for the risk inherent in developing contaminated sites.

One principle which we can all agree upon is that State-run programs are the most effective means for bringing about brownfields cleanup. To date, over 35 States have adopted legislation or promulgated regulations that use innovative risk-based cleanup standards that drive down the cost of cleanup while protecting public health and the environment. These programs also give the necessary liability protections and assurances to attract us builders. More States are creating voluntary cleanup plans each year.

In encouraging the use of State programs, EPA's role must be clearly defined in terms of its ability to interfere with the cleanup that is underway, or reenter a completed plan. Any developer's top priority before beginning a project is to define. All potential costs or delays in a project. To that end, the more certainty a builder has, the better he or she can plan a project and the more likely he or she will engage in a project.

With this in mind, we find Congressman Greenwood's and Congressman Boehlert's bills the most useful. While all three bills provide some certainty as to EPA's role in State programs, both of these bills provide more certainty as to exactly what circumstances allow EPA to get involved in a particular State program.

Certainly we understand Congressman Towns would like EPA to have oversight over State brownfields programs. However, we worry that this will exact from States concessions that will ultimately rob them of the advantages of their—that their programs would offer.

It has been our experience that the EPA has been very reluctant to give States the kind of guarantees that would empower their voluntary cleanup programs to the extent necessary to make them viable. We believe that EPA's role in brownfields should be dependent upon the level of contamination present on a site. It should retain authority over the most contaminated sites, but less contaminated sites should simply be removed from their authority all together.

In reality, few builders have the money or the technical expertise to take on truly contaminated sites. These sites require the expertise and deep pockets of a government agency for remediation. But less contaminated sites can be effectively remediated by developers or other interested parties by working through a State program.

The National Priorities List, as created by Superfund, is an excellent way of rating these sites and clarifying which belong under the care of Superfund and which should not be part of EPA's authority. Both Congressman Towns' and Congressman Greenwood's bills implicitly acknowledge this principle.

If Congress truly wants to promote brownfields redevelopment to its fullest extent, it should consider a definition of brownfields that covers other contaminants not covered by Superfund.

Foremost among these are contaminants that come from petroleum products. Our estimation suggests that nearly half the redevelopment brownfields sites in this country are contaminated not with Superfund-related toxins but rather petroleum-related toxins.

Unfortunately, none of the legislative proposals you are considering address these sites. Indeed, to be thorough, Congress should address not only petroleum contaminants——

Mr. OXLEY. Could you summarize, please?

Mr. GARCZYNSKI. [continuing] but all federally covered contaminants.

I am suggesting ultimately that Congress should recognize that EPA does have a legitimate role in protecting the public health and the environment, and it should not be hamstrung when generally attacking these hazards for public safety. The most hazardous sites should still be supervised by the agency since it has the resources and expertise to make sure the cleanup is done right, but those that actually cause the contamination contribute their fair share to the cleanup.

But, in conclusion, brownfields redevelopment is a win-win situation for everybody, and it is unfortunate that we have not, as a Congress and administration and a community, been able to channel our resources for solving this problem. I hope that we are going to do that here and now.

Thank you. I am ready to answer any questions, Mr. Chairman.

[The prepared statement of Gary Garczynski follows:]

PREPARED STATEMENT OF GARY GARCZYNSKI, NAHB VICE PRESIDENT/TREASURER ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. Chairman and members of the Subcommittee, I am pleased to represent the 197,000 members of the National Association of Home Builders today and talk about brownfields legislation.

Importance of Brownfields and Smart Growth

As you know, redeveloping brownfields not only revitalizes economically depressed areas but cleans up the environment as well. That is why the homebuilders have made brownfields redevelopment one of the key components of our smart growth strategy. In fact, earlier this year the homebuilders joined in an initiative with the U.S. Conference of Mayors and the Department of Housing and Urban Development that will produce one million new homes in cities and inner suburban rings over the next decade. Solving our nation's brownfields problem would greatly facilitate this effort by opening up to redevelopment areas that desperately need economic revitalization.

In fact, fixing our brownfields problem would go a long way toward promoting smart growth initiatives throughout the country. Last month the House Real Estate Caucus hosted the National Real Estate Organization's annual conference on Smart Growth. We spent most of the last hour of that meeting talking about the need for legislative reform so that the real estate community can engage in cleaning up and redeveloping these sites. Taking advantage of brownfields would ease pressure to develop on the fringes of our suburbs, thus slowing the rate of suburban expansion.

Addressing H.R. 1300, H.R. 1750 and H.R. 2580

You have indicated today that you would like us to testify on three bills your subcommittee will soon take up. H.R. 1300, sponsored by Congressman Boehlert (R-NY); H.R. 1750, sponsored by Congressman Towns (D-NY); and H.R. 2580, sponsored by Congressman Greenwood (R-PA). We appreciate the opportunity to discuss these bills with the Subcommittee as well as present our own proposal that focuses exclusively on brownfields redevelopment.

NAHB has devoted significant time and resources toward finding the best way to bring about brownfields redevelopment. Our first observation is that legislation to promote brownfields redevelopment does not necessarily need to be linked to legislation that reauthorizes Superfund. Most Superfund bills, including the ones before

your subcommittee, are by and large aimed at providing protection for a person who already owns or is otherwise connected to a contaminated site through no fault of his or her own. This is important reform.

But our builders do not look at brownfields purely in terms of escaping liability. Instead, we see brownfields as an opportunity to get involved and turn unproductive land into livable communities. This is something we want to do for all the right reasons: to promote urban renewal, to improve the environment, and to give communities more options in growing smart. But it makes no sense for us to become involved in a site when we face the added costs of cleanup and the legal uncertainties of Superfund, not to mention a host of other federal laws and regulations. If Congress is genuinely interested in involving us in the cleanup and reuse of these sites, then it should look for incentives and guarantees to make up for the risks inherent in developing contaminated sites. Fortunately, all three bills we are discussing today acknowledge that fact to one degree or another.

The Importance of State Voluntary Cleanup Programs

One principle I which we can all agree upon is that state run programs are the most effective means for bringing about brownfields cleanup. To date over 35 states have adopted legislation or promulgated regulations that use innovative risk-based clean-up standards that drive down the costs of cleanup while protecting public health and the environment. These programs also give the necessary liability protections and assurances to attract builders. More states are creating voluntary cleanup plans each year.

In encouraging the use of state programs, EPA's role must be clearly defined in terms of its ability to interfere with a cleanup plan that is underway or re-enter a completed plan. Any developers' top priority before beginning a project is defining as best possible all potential costs or delays in a project. To that end, the more certainty the builder has, the better he or she can plan a project and the more likely he or she will engage in a project.

With this in mind, we find Congressmen Greenwood and Boehlert's bills the most useful. While all three bills provide some certainty as to EPA's role in state programs, both the Greenwood and Boehlert bills provide more certainty as to exactly what circumstances allow EPA to get involved in a particular cleanup project sponsored by a state program.

Certainly, we understand why Congressman Towns would like EPA to have oversight over state brownfields programs—much as it exercises this oversight in state Clean Water programs; however, we worry that this will exact from the states concessions that will ultimately rob them of the advantages their programs offer. It has been our experience that EPA has been very reluctant to give states the kind of guarantees that would empower their voluntary cleanup programs to the extent necessary to make them truly viable.

EPA's Role in Cleanups

This brings us to another important principle that is implicit, to varying degrees, in all three proposals before you today. We believe that EPA's role in brownfields should be dependent upon the level of contamination present on the site; it should retain authority over the most contaminated sites but the less contaminated sites should simply be removed from its authority altogether.

In reality, few builders have the money and technical expertise to take on truly contaminated sites. These sites require the expertise and deep pockets of a government agency for remediation. But the less contaminated sites can effectively be remediated by developers or other interested parties by working through a state program. The National Priorities List, as created under Superfund, is an excellent way of rating these sites and clarifying which belong under the care of Superfund and which should not be a part of EPA's authority. Both Congressmen Towns and Greenwood implicitly acknowledge this principle in their bills.

A Definition of Brownfields that Includes Petroleum Contaminants

And finally, I want to discuss the definition of a brownfield. Here, again, we see a distinction between legislation to reform Superfund and legislation to encourage the development of brownfields. Under both Congressmen Boehlert's and Towns' bills we find a definition of brownfields based largely on the presence of toxins covered under Superfund. However, these are not the only toxins that create the type of uncertainty and liability risks that make a site unattractive for redevelopment.

If Congress truly wants to promote brownfields redevelopment to the fullest extent, it should consider a definition of brownfields that covers other contaminants not covered by Superfund. Foremost among these are contaminants that come from petroleum products. Our estimations suggest that nearly half the redevelopable brownfields sites in this country are contaminated not with Superfund related tox-

ins, but rather petroleum related toxins. Unfortunately, none of the legislative proposals you are considering address these sites. Indeed, to be thorough, Congress should address not only petroleum contaminants, but any federally covered contaminant.

In addressing these other contaminants in a brownfields redevelopment bill, Congress should follow the same principles I have already mentioned. EPA should maintain authority over the more contaminated areas. But in lesser contaminated areas, EPA should have no authority, leaving the states to develop innovative and flexible approaches to remediate these sites and make them productive. EPA's resources would remain focused on finding and cleaning up the most dangerous sites, and the agency would only be limited when it cannot find severe contamination on a site.

In this regard, the approach I am suggesting is very close to Congressman Greenwood's bill. While his bill does not cover all of the contaminants we would like to see covered, it does establish in section three a clear delineation of authority between EPA and the states based primarily upon the level of contamination a site contains. His bill also does not limit itself in defining brownfields under Superfund. This simple approach leaves intact EPA's legitimate need to protect human health and the environment while freeing states and developers to tackle those sites that have much less contamination.

Finding a Political Compromise

Ultimately, if Congress and the Administration are serious about promoting Smart Growth and, as part of that goal, cleaning up brownfields, then we need to get past the rhetoric that has stood in the place of reform. I think we all know the truth about promoting brownfields redevelopment. Eventually, EPA will have to recognize that just because it has not interfered with a state's voluntary cleanup program in the past does not mean it will not get involved in the future. Comfort letters and other promises cannot give us the certainty we need before engaging in brownfields redevelopment, and it makes no sense to get involved when we can build elsewhere without the cost or risk that brownfields present. In fact, EPA's opposition to the legal certainty we need is tantamount to telling the redevelopment community that, indeed, our fears are legitimate.

At the same time, Congress should ultimately recognize that EPA has a legitimate role in protecting the public health and environment, and it should not be hamstrung when genuine hazards threaten public safety. The most hazardous sites should still be supervised by the agency since it has the resources and expertise to make sure the cleanup is done right and those who actually caused the contamination contribute their fair share to the cleanup.

Conclusion

In conclusion, let me reiterate our commitment to solving the problems associated with brownfields and our desire to promote smart growth. Brownfields redevelopment presents a win-win, and it is unfortunate that we have not been able to get from Congress and the administration the reforms homebuilders need so as to devote our resources toward solving this problem.

I am grateful to speak to you today on this important issue, and I await any questions you might have.

Mr. OXLEY. Thank you, Mr. Garczynski.

The Chair would recognize himself for a round of questions.

Ms. Mills, I wasn't here for your testimony, but I did have an opportunity to review it, and the charges that you made against the Ohio cleanup program, from my perspective, simply don't ring true. For those of us who have served at the Federal and State level, my experience has been that our agencies and our legislators have a core mission of public health protection and, in fact, they take that very seriously. Do you actually believe that Ohio's legislators and environmental agencies have, quote, sinister motivations and want to cause intentional harm?

Ms. MILLS. Yes.

Mr. OXLEY. And what do you have to back that up?

Ms. MILLS. Mr. Oxley, my original environmental endeavors when I started in Ohio was with the Columbus Trash Burning Power Plant, the largest known single source of dioxin in the coun-

try. The Ohio EPA did a risk assessment of our trash plant that showed the trash plant only impacted one in a million residents. We had to turn to the U.S. EPA. The U.S. EPA did the same risk assessment and showed that the risk from the trash burning power plant was 450 out of a million would actually be impacted by the trash plant. I have worked with citizens across the State of Ohio. We had generally almost always, on any situation, not just brownfields but in our air division, always had to rely on the U.S. EPA.

Mr. OXLEY. So that there was a difference of opinion. As a matter of fact, that trash burning power plant was closed down, was it not?

Ms. MILLS. Yes, sir, it was closed by a unilateral order by the U.S. EPA.

Mr. OXLEY. Was that the only example that you have? That was a difference of opinion between the Ohio EPA and the Federal EPA you believe that was somehow sinister?

Ms. MILLS. Well, I don't know if I can answer if it was a difference of opinion between Ohio and the U.S. What I am saying——

Mr. OXLEY. Are you saying the Ohio EPA deliberately misled based on their study?

Ms. MILLS. I don't think that the Ohio EPA necessarily lied, but I don't think they necessarily gave us all of the information that——

Mr. OXLEY. How many years does that go back?

Ms. MILLS. The plant itself or my involvement?

Mr. OXLEY. Your involvement.

Ms. MILLS. My involvement, 1993, but there were many other issues. There is the Marion issue where there is a lack of citizen trust in the Ohio EPA. There is Elyria, Ohio, with chemical——

Mr. OXLEY. Let us talk about Marion, Ohio. What is that all about?

Ms. MILLS. That is a former military site.

Mr. OXLEY. I am aware of that.

Ms. MILLS. Right.

Mr. OXLEY. Do you live in Marion?

Ms. MILLS. No, I do not, but I have worked with the citizens in Marion.

Mr. OXLEY. And so have I.

Ms. MILLS. Okay.

Mr. OXLEY. And there is a problem there, but it is being dealt with.

Ms. MILLS. It is being—well, I question how it is being dealt with.

Mr. OXLEY. You obviously have a right to your opinion.

Ms. MILLS. Sure.

Mr. OXLEY. But to come into this committee and say that the Ohio EPA or the Ohio General Assembly has sinister motives or that they want to cause intentional harm is frankly outrageous and not backed up by any facts.

Let me ask you this.

Ms. MILLS. That is my opinion. I am entitled to my opinion.

Mr. OXLEY. You are entitled to that opinion. As wrong as it may be, you are entitled to your opinion.

According to Ohio EPA, no further action letters were submitted for 83 sites, of which 38 have resulted in covenants, 2 were denied, 8 with withdrawn and 35 are pending. This appears to contrast with your testimony that only 10 sites have been addressed by Ohio EPA under the voluntary action program. The reality is that prior to the Ohio program, these sites weren't being cleaned up at all; isn't that correct?

Ms. MILLS. The 10 sites that were cleaned up were not necessarily through the——

Mr. OXLEY. None of these sites have been cleaned up before the voluntary action program have been put into effect; isn't that correct?

Ms. MILLS. The 10?

Mr. OXLEY. Any of them. Isn't it a fact that before the voluntary action program was set up none of these sites had ever been addressed?

Ms. MILLS. Sites that I know—that I am aware of such as Bakerwoods in Marion, such as the Stickles property in Columbus, such as several other sites, the Ohio EPA has asked the U.S. EPA to come in and do the cleanup, do the initial cleanup.

Mr. OXLEY. What happened before the voluntary action program? What happened with these sites? Or were they just in the middle of neighborhoods and were unattended and didn't have any——

Ms. MILLS. Possibly, I know of a couple that the company took it upon themselves to go ahead and clean it up.

Mr. OXLEY. So the question is, is it better to do nothing as what happened for years or is it better to get these sites cleaned up under well-accepted standards and put to productive use as a new industrial site?

I visited one of these sites under a voluntary action program in Columbus a couple of years ago.

Ms. MILLS. Columbus Auto?

Mr. OXLEY. Columbus, Ohio. Contaminated site, just north of downtown.

Ms. MILLS. Is that Columbus Auto? I was just clarifying, is it Columbus Auto?

Mr. OXLEY. It was an old copper smelting operation, and we visited it. It had been cleaned up under the voluntary program in Ohio. The employees I talked to were very pleased to have a job and work in a safe environment, and the mayor was there and other officials who went through the entire process of how this was able to be cleaned up. I was very impressed, as well as the other members of the committee who attended that hearing and the site visitation. So I am a little concerned that——

Ms. MILLS. May I clarify just one thing, Mr. Chairman? Please do not misunderstand me that I do not think that these sites should be cleaned up. Indeed, they must be cleaned up. What I am so concerned of with the Ohio program is the lack of public knowledge and public participation.

Mr. OXLEY. Let me address that, if I can, because in your statement you state that the Ohio program is shrouded in secrecy and

prevents the public from participating effectively. The information about the sites in the program is not available to the public.

However, based on information provided by the Ohio EPA, that appears to be in error. According to information submitted by Ohio EPA—which I offer for the record and without objection is so ordered—information about Ohio's sites under the voluntary action program is not secret.

[The information referred to follows:]

INFORMATION ABOUT OHIO'S VOLUNTARY ACTION PROGRAM

- **Information about sites in the VAP is NOT secret**

When a certified professional submits a No Further Action (NFA) Letter to Ohio EPA, the NFA letter and all supporting documentation becomes public record.

The term "NFA Letter" is somewhat misleading in that it implies minimal documentation. An NFA Letter for a site includes environmental site assessment information and information regarding remediation of contamination at the site. The ownership and use history of the property is also included. The NFA Letter documentation usually consists of several thick volumes, in some cases over 20 separate technical reports. In addition, the volunteer must submit to the certified professional all **previous** relevant investigatory and remedial information pertaining to the property which is also included in the NFA letter.

Any citizen can review these documents or obtain copies of them. If the documents requested are not held by Ohio EPA, we will contact the Certified Professional and obtain them. By rule, the Certified Professional is obligated to provide us with any information we request. All of the documents and information included in the VAP files are available to the public, including any technical assistance files and files related to the certification of professionals and laboratories. Because of these provisions for information sharing, much more information is available about VAP sites than traditional enforcement sites.

In addition to providing more information to individuals in a community affected by a potentially contaminated site, more information is available to government to evaluate the impact on residents in locations with environmental justice concerns. Furthermore, the cleanup standards for the VAP are protective and require consideration of all exposures and therefore do not disproportionately impact minorities and people with low-income.

While information is available to the public, the program does provide protection to volunteers that makes information gathered as part of a voluntary action inadmissible. This encourages parties who are willing to step up to the plate and address their site to enter the program without fear that the information they gather will be used against them. Third parties are not barred from pursuing an action against a volunteer, however, they must collect the own data to support their claim.

- **The VAP is not in conflict with other environmental laws**

Ohio's VAP standards were specifically developed to be consistent with other State promulgated standards. Discharges to surfaces waters must meet the water quality standards established under Ohio's equivalent of the Clean Water Act. Ground water standards are also consistent with other ground water provisions in the state. Rather than ignoring or conflicting with the sole source aquifer and wellhead protection/source water protection laws and programs, the VAP actually provides special protection for sole source aquifers and wellhead protection areas by designating them as critical resource aquifers. Critical resource aquifers, which are contaminated above drinking water standards, must be addressed by cleaning up the ground water underlying and emanating from the VAP property or by providing a reliable source of drinking water to all current and future receptors. Critical resource aquifers that are within USD areas also receive a higher level of protection than other, less productive aquifers. Also, a USD application that involves

- **The Urban Setting Designation (USD) is safe, consistent with the NCP, involves the affected community and does not unfairly discriminate against minorities and people with low-income**

Many brownfield properties are located in highly urbanized areas which rely on community water systems to supply residents with safe drinking water. In those areas, ground water that contains chemicals from prior industrial/commercialactivities poses no appreciable risk to the community because the ground water is not being used and will not be used for drinking water purposes in the foreseeable future. Furthermore, it is cost-prohibitive, and may be technically infeasible, to have one company clean up the soup of combined industrial contamination from many different sources. Other possible exposures to contaminated ground water (such as exposures to wildlife or streams in the area and soil gas migration) still must be addressed even when a USD is granted for an area. The federal criteria in the National Contingency Plan also take these kinds of factors (cost, technical feasibility, protectiveness) into account and may lead to the same result as a USD.

All USD requests must be submitted and approved by the director **prior** to completion of an NFA letter which relies upon a USD for applicable ground water standards for a property. All requests for a USD must demonstrate how specific threshold criteria have been met that indicate the unlikelihood of reliance on ground water in the area for drinking water purposes now and in the future.

Significant information and opportunity to participate is afforded to the community whenever a USD is requested for ground water. Public meetings are held and are an important part of the director's information gathering process. They provide residents with an opportunity to provide information that supports the USD or indicates that the criteria may not have been met.

With respect to the USDs that have been approved to date, no local citizen or local group has opposed a USD within their community. Typically, the residents are pleased to see an eyesore that at best sat idle or at the worst presented a dangerous environment for their children, get turned into productive use.

An example of this is the first USD approved; the Catholic Charities USD in Cleveland. This site, a former dry cleaner, is located in a minority and low-income community that was the site of riots in the 1960's. The Catholic church wanted to build a community center on the dry cleaning site but was concerned about environmental liability. Cleveland gets its drinking water from Lake Erie and therefore does not use the ground water. To require cleanup of the ground water contamination to drinking water standards would have afforded no more protection to the local residents and would have derailed the project. The volunteer still must ensure that contamination won't harm Lake Erie or won't volatilize into basements. The Ohio EPA and the Catholic church met with the community to ensure that they understood what approval of the USD would mean. Armed with that understanding, the local residents were supportive of the USD and the redevelopment of the site.

- **The VAP provides for adequate oversight of cleanups**

There is oversight, albeit different from the traditional model Ohio's program does provide for oversight of work that is conducted by our certified professionals in order to receive a Covenant not to Sue. As mentioned above, the NFA letter contains a significant amount of information that Ohio EPA reviews when considering the issuance of a covenant.

All NFA Letters issued are also subject to at least a one-out-of-four chance of an audit,

which may entail site sampling. Given the likelihood of having an audit, many certified professionals err on the side of caution in their investigation and cleanup.

Certified professionals and laboratories are subject to ethical standards that serve as an effective check and balance. They also must demonstrate that they can perform work in accordance with the program rules. Failure to fulfil these obligations can result in suspension or revocation of their certification.

- **VAP standards are protective and within the range set by U.S. EPA**

The procedures for conducting a risk assessment under the VAP (OAC Rule 3745-300-09) are primarily based upon U.S. EPA's *Risk Assessment Guidance for Superfund, Volume I* (December 1989.) Ohio EPA's VAP references the above-mentioned guidance, along with other U.S. EPA risk assessment guidance documents, as procedures to follow when determining how contaminants reach humans and ecological resources as well as calculating the cancer and non-cancer risk to these receptors.

Ohio EPA follows U.S. EPA's guidance on evaluating pathways for exposure to contaminants. The VAP Phase II Property Assessment rule (OAC Rule 3745-300-07) requires the volunteer to consider **all** potential exposure pathways to humans and important ecological resources. Even in the case where an Urban Setting Designation (USD) has been granted for a property, all complete exposure pathways must be addressed. An approved USD addresses the drinking water pathway but does not absolve the volunteer of the requirement to address any non-drinking (e.g. lawn watering) or ecological pathways to ground water contaminants.

Although Ohio has not adopted a cancer risk goal of one excess cancer in a population of one million (10^{-6} excess cancer risk), the risk goal we did adopt, one excess cancer in one hundred thousand (10^{-5} excess cancer risk), is well within the range of acceptable excess cancer risk under the NCP (acceptable excess cancer risk under the NCP ranges from one excess cancer in ten thousand to one excess cancer in one million.) Furthermore, the acceptable non-cancer risk goal is the same for U.S. EPA as it is for Ohio EPA's VAP (hazard index of one or less.)

The above-mentioned U.S. EPA recommended risk goals, pathway assessments, and risk calculations were also used by Ohio EPA when calculating the VAP generic cleanup standards. The main difference between the methodology used to calculate the VAP standards and U.S. EPA's recommended risk assessment procedures is the use of a probabilistic risk assessment computer model (known as Monte Carlo analysis.) Instead of relying on just **one value** for how many hours a day a person is exposed to a contaminant (or other factors relating to how persons are exposed to contaminants), the Monte Carlo analysis looks at **ranges** of values based on actual research (e.g. a range of values representing the average weight of the adult population). Although not mentioned specifically in their risk assessment guidance, U.S. EPA has utilized Monte Carlo for determining cancer and non-cancer risk for various enforcement sites and considers the methodology to be sound.

Those critical of Ohio's program have criticized the use of institutional controls at VAP properties as inappropriate and unprotective. Institutional controls, which Ohio EPA defines as deed and use restrictions rather than fences or other physical barriers, are found to be acceptable and are utilized by U.S. EPA at enforcement sites. Ohio EPA's VAP requires that an institutional control be recorded on the deed to the property, thereby ensuring its permanence. When a use restriction such as a ground water use restriction cannot be recorded on a deed, as a result of deed recordation regulations, Ohio EPA requires that plans for maintaining that restriction be detailed in an operation and maintenance agreement which is signed by the volunteer and the director of Ohio EPA. Furthermore, the covenant not to sue, or liability release, issued by Ohio EPA, clearly indicates that if the provisions of the deed restriction are violated (e.g. residential dwellings are built on a property with a commercial deed restriction) the covenant becomes void.

Ohio Brownfields Update - Voluntary Action Program
No Further Action Letters Submitted
(as of 08/03/1999)

Site Name	City	County	District Location	Date of Action	NFA Action	Total Acres covered by NFA	# of jobs created
NOVA Chemicals	Copley	SUMMIT	NEDO	04/22/1999	Denied	8 acres	
Universal Cooperatives, Inc, Lube Plant	Kenton	HARDIN	NWDO	08/24/1998	Denied	3.01	
City of Cleveland/ City of Brook Park		CUYAHOGA	NEDO	02/08/1999	Issued	14.61 Acre	
City of Cleveland/ City of Brook Park		CUYAHOGA	NEDO	02/05/1999	Issued	14.31 Acre	
City of Cleveland/ City of Brook Park		CUYAHOGA	NEDO	01/26/1999	Issued	13.79 Acre	
City of Cleveland/ City of Brook Park		CUYAHOGA	NEDO	02/05/1999	Issued	9.92 Acres	
Montrose Plaza	Montrose	SUMMIT	NEDO	05/12/1998	Issued	12	100+
Aerovent Property, Former	Piqua	MIAMI	SWDO	07/13/1999	Issued	.184	88
Lockland Commerce Park	Lockland	HAMILTON	SWDO	05/15/1998	Issued	17.1	90
Stanley Works	Washington CH	FAYETTE	CDO	07/12/1999	Issued	22.277	
Lowe's Northern Parcel	Brooklyn	CUYAHOGA	NEDO	06/02/1999	Issued	2.8079	
Fairview Fuel	Strongsville	CUYAHOGA	NEDO	01/12/1996	Issued	180	0
Northcliff Shopping Center	Brooklyn	CUYAHOGA	NEDO	12/26/1996	Issued	19	550
Goldberg-East	Grandview Heights	FRANKLIN	CDO	12/06/1996	Issued	3.56	35
Kilgore Farms, Former	Westerville	DELAWARE	CDO	05/22/1997	Issued	2.3	0
Northcliff Shopping Center	Brooklyn	CUYAHOGA	NEDO	04/30/1998	Issued	19.1	550
Tower Place Garage	Cincinnati	HAMILTON	SWDO	01/13/1998	Issued	1.28	0

[illegible]	[illegible]	County	District Location	Date of Action	NFA Action	Total Acres covered by NFA	# of jobs created
Chevron - York Street	Oregon	LUCAS	NWDO	12/03/1998	Issued	14	200
Crabar Business Systems Facility	Leipsic	PUTNAM	NWDO	10/01/1998	Issued	4.8	
Adamsmark	Columbus	FRANKLIN	CDO	12/20/1996	Issued	.36	200+
Wellsville Brickyard	Wellsville	COLUMBIANA	NEDO	03/31/1998	Issued	23.4	0
Chemserve, Former	Hilliard	FRANKLIN	CDO	08/14/1997	Issued	5.246	65
White-New Idea Farm Equip. Co.	Coldwater	MERCER	NWDO	03/31/1998	Issued	78	850
Highland Ridge Plaza	Cincinnati	HAMILTON	SWDO	01/06/1998	Issued	16.2	0
Dynacraft Golf Products	Newark	LICKING	CDO	11/19/1998	Issued	8	
Dow Chemical Company	Columbus	FRANKLIN	CDO	01/06/1999	Issued	7.295	
Custom Cartons, Inc.	Hebron	LICKING	CDO	02/08/1999	Issued	6.075	
Stark Co. Garage	Alliance	STARK	NEDO	11/19/1998	Issued	2.066	20-25
Kessler Products	Boardman	MAHONING	NEDO	05/04/1995	Issued	0.868	50
Southern Ohio Port Authority	New Boston	SCIOTO	SEDO	03/05/1996	Issued	36.839	40
Williams Property	Canton	STARK	NEDO	06/19/1996	Issued	0.868	
TURUCO	AVON	LORAIN	NEDO	06/24/1997	Issued	26.7609	9
Swan Dry Cleaners, Former	Worthington	FRANKLIN	CDO	07/12/1998	Issued	.07	
Doherty Rd. Site	Columbus	FRANKLIN	CDO	09/25/1998	Issued	6.014	
Rite Aid Property	Columbus	FRANKLIN	CDO	06/10/1999	Issued	3.105	3,000
McKinley Avenue Property	Columbus	FRANKLIN	CDO	06/30/1999	Issued	1.522	
Mosler Inc., Plant No. 1	Hamilton	BUTLER	SWDO	11/18/1998	Issued	13	
CONRAIL	CLEVELAND	CUYAHOGA	NEDO	01/06/1999	Issued	2.99	0
Collinwood Railroad	Cleveland	CUYAHOGA	NEDO	08/04/1998	Issued	13	185

[illegible]	City	County	District Location	Date of Action	NFA Action	Total Acres covered by NFA	# of jobs created
Works							
Mercury Marine Plant 66	Gallipolis	GALLIA	SEDO	/ /	Pending	31	
Proposed Toledo Prison Site	Toledo	LUCAS	NWDO	/ /	Pending	150	300
Grove port-Pike Yard	Columbus	FRANKLIN	CDO	/ /	Pending	131	25+
Universal Cooperatives, Inc, Lube Plant	Kenton	HARDIN	NWDO	/ /	[illegible]	3.01	11
SBHI, INC.	Columbus	FRANKLIN	CDO	/ /	Pending	3.55	
Tri Dayton Property	Troy	MIAMI	SWDO	/ /	Pending	3.086	
7 Acre Peninsula Off Waterspark Drive	Columbus	FRANKLIN	CDO	/ /	Pending	7	
Findlay Machine & Tool, Inc.	Findlay	HANCOCK	NWDO	/ /	Pending	20.7 acres	
ODRC Substance Abuse Boot Camp	Glouster	ATHENS	SEDO	/ /	Pending	14.046	60
Kichler Lighting	Cleveland	CUYAHOGA	NEDO	/ /	Pending	3.24	0
Halliburton Energy Services	Cortland	TRUMBULL	NEDO	/ /	Pending	7.906	15-25
D O Summers Co.	Woodmere	CUYAHOGA	NEDO	/ /	Pending	0.09	2
Bostik Property, Former	Cleveland	CUYAHOGA	NEDO	/ /	Pending	1	
GR Klein News Company Property	Cleveland	CUYAHOGA	NEDO	/ /	Pending	3.56	
City of Cleveland/ City of Brook Park		CUYAHOGA	NEDO	/ /	Pending	8.4 Acres	
Collinwood Railroad Yard - Jergens	Cleveland	CUYAHOGA	NEDO	/ /	Pending	16.97	
Virginia Dornbusch, Estate	Cincinnati	HAMILTON	SWDO	/ /	Withdrawn	0.91	
OC Fiber-Lite Corp.	Hebron	LICKING	CDO	01/09/1998	Withdrawn	7.382	
Mercury Marine Plant 66	Gallipolis	GALLIA	SEDO	01/01/1997	Withdrawn	31	77

[illegible]	[illegible]	[illegible]	District Location	Date of Action	NFA Action	Total Acres covered by NFA	# of jobs created
Yard - Jergens							
City of Cleveland/ City of Brook Park		CUYAHOGA	NEDO	03/08/1999	Issued	1.434	
Parr West Property	Cleveland	CUYAHOGA	NEDO	/ /	Pending	5.8 acres	0
3M Quarry Area Property	Copley	SUMMIT	NEDO	/ /	Pending	96.7 [illegible]	
Miranova Property Residential Portion	Columbus	FRANKLIN	CDO	/ /	Pending	1.916	[illegible]
NOVA Chemicals	Copley	SUMMIT	NEDO	/ /	Pending	11.7	
Prudence Machinery Corporation Property	Dayton	MONTGOMERY	SWDO	/ /	Pending	2.915	
Simcoe Grinding & Steel Co. Inc.	Tallmadge	SUMMIT	NEDO	/ /	Pending	12.8583	20
Globe Lot Property	Norwood	HAMILTON	SWDO	/ /	Pending	15.4134	
Steelcraft Facility	Blue Ash	HAMILTON	SWDO	/ /	Pending	32	
Chilcote Company	Cleveland	CUYAHOGA	NEDO	/ /	Pending	0.75	
Capital Dry Cleaners - South	Oxford	BUTLER	SWDO	/ /	Pending	1.996 acre	
Capital Dry Cleaners - North	Oxford	BUTLER	SWDO	/ /	Pending	0.25 acres	
Kilgore Farms, Former	Westerville	DELAWARE	CDO	/ /	Pending	11	0
Central High School	Columbus	FRANKLIN	CDO	/ /	Pending	18.053	
Kilgore Farms, Former	Westerville	DELAWARE	CDO	/ /	Pending	97.163	0
Copeland Corporation	West Union	ADAMS	SEDO	/ /	Pending	95	NA
Proposed Toledo Prison Site	Toledo	LUCAS	NWDO	/ /	Pending	1.22 Acres	
Miami-Carey, Former	Monroe	BUTLER	SWDO	/ /	Pending	29.59	80
Exquisite Cleaners	Cincinnati	HAMILTON	SWDO	/ /	Pending	0.564 acre	
Lima Locomotive	Lima	ALLEN	NWDO	/ /	Pending	63.7 acres	3000

[illegible]	[illegible]	[illegible]	District Location	Date of Action	NEA Action	Total Acres covered by NEA	# of Jobs created
Andritz Sprout-Bauer	Springfield	CLARK	SWDO	10/20/1995	Withdrawn	10	
Foitz Machine Inc.	Canton	STARK	NEDO	/ /	Withdrawn	3	
Swan Dry Cleaners, Former	Worthington	FRANKLIN	CDO	01/01/1998	Withdrawn	.07	
Federal-Mogul Corp.	Galipolis	GALLIA	SEDO		Withdrawn		77
Certified Alloys Company	Maple Heights	CUYAHOGA	NEDO	07/01/1998	Withdrawn	5	25

TOTALS = 83 (38 Issued Covenants; 2 Denied Covenant; 8 Withdrawn Covenants; 35 NFAs Pending)

Mr. OXLEY. In fact, when Ohio EPA receives a no further action letter, the letter and all supporting documentations becomes part of the public record. This includes an environmental site assessment and information regarding remediation of site contamination.

As a matter of fact, when we visited that site in Columbus, we saw a lot of that paperwork because they were trying to explain to us how the program worked. And so I would suggest you might want to go back and do your homework and that this information is available to the public, to your group, to you individually, to me as a Member of Congress or anybody else, and I think it is important to point that out for the record.

My time has expired. Let me recognize the gentleman from New York.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Let me just ask Ms. Mills. Ms. Mills, are you saying that U.S. EPA is more responsive to your calls and concerns than the State of Ohio?

Ms. MILLS. That would be correct, yes. The U.S. EPA has been more responsive.

Mr. TOWNS. Why would you say that? I mean, could you expound on it just a little?

Ms. MILLS. I would have to go back again to my first original issue with the Columbus power plant, Columbus Trash Burning Power Plant. The remarks that I received when I first approached the Ohio EPA with my concerns was—one EPA official said, I don't understand, I don't drive by the trash plant and see people falling over dead.

To me that was an insult to my intelligence. Of course, you don't see people driving by dead. But that was the type of response that we or I as a citizen received. Dioxin was no more toxic than peanut butter. Well, I as a citizen know that that was an insult to me.

However, when we approached the U.S. EPA, they were much more receptive of our concerns on the trash plant. The U.S. EPA was much more receptive on our concern on the Stickles property which was an old junk yard that had quite a bit of contamination on it. They were more receptive on Marion. They were more receptive on a site that I had been working on in Elyria, Ohio.

So I guess maybe the Ohio EPA doesn't like me for some reason, but in any issue that I have been involved with, I have always had much better reception from the U.S. EPA than from the Ohio EPA.

Mr. TOWNS. Let me just ask you this, and then I am going to leave that alone because that is Ohio, and the chairman certainly will take care of Ohio. I am not even worried about that. But, Ms. Mills, could you respond to the chairman's statement that Ohio has adequate public participation? Could you respond to that? He said that Ohio has adequate public participation. Very briefly, if you could respond to that.

Ms. MILLS. Do you mean in regards to the brownfields program?

Mr. TOWNS. In the cleanup, in terms—he just used the statement that Ohio has——

Ms. MILLS. The one site that I am most well aware of is the Nationwide Arena site which was the old State pen site. When we contacted the VAP program in Ohio, we said we have known for years that the pen site was highly contaminated. So we imme-

diately began to contact the VAP program coordinator saying, you know, what is going to happen at the pen site? You know, what is going to happen with the contamination? What kind of contamination is there?

The response from the Ohio EPA says, we don't know, we don't know if they are going to enter the voluntary action program or not.

So you have citizens that knew that this site was contaminated but could not get any information on it because the Ohio EPA at that time didn't have any information on it.

My understanding from the voluntary action program in Ohio is, yes, there is certain information that is available after it is given to the Ohio EPA, but a company can go clear through the process prior to giving that information to the EPA.

Mr. TOWNS. Thank you very much.

Let me just—Mr. Garczynski, let me say that my legislation, H.R. 1750, covers more contaminants than the others and also to say to you that I am willing to put petroleum in, you know, now. So I want to let you know I have no problem with that at all.

Mr. GARCZYNSKI. I appreciate that, Mr. Towns—or Congressman Towns, because we find that petroleum-related contaminants are on quite a number of sites that aren't highly contaminated, but we feel that kind of goes back to if we can define brownfields and expand the listing of contaminants, you know, we can go a long way to revitalizing our cities, which is our goal.

Mr. TOWNS. Mr. Curtis, very quickly, the light is on, so ASTM, why do you oppose it?

Mr. CURTIS. The ASTM, quote, standard was developed with a prescriptive approach to site investigations and was originally intended to be for real estate property transactions. We do not believe that you can take one prescriptive approach and say it fits sites of varying complexity, varying contaminants and that professional judgment needs to be applied to the array of sites rather than a prescriptive standard.

And we took great exception with ASTM in the development of that standard. They have agreed with us that they would insert some caveats, making it clear that this was not to be universally applied without professional judgment. Yet those caveats have not yet been inserted in the standard. So we have very real concerns, as the professionals involved with hazardous waste sites, that that standard was not appropriately developed.

Mr. TOWNS. Could I have 30 seconds? I just want to ask Mr. Stypula quickly, within the legislative recommendations contained in your testimony, you recommended several types of Federal funding for local communities seeking to assess and clean up brownfields sites: A clear distinction between Superfund, NPL sites and other sites subject to enforcement under RCRA or CERCLA, and the remaining sites that can be put on a brownfields track; also, the criteria for State cleanup programs that should be demonstrated by the States and reviewed and approved by the EPA and an assurance by the EPA that it will not plan further action at a site unless there is an imminent and substantial threat to public health or the environment, and, No. 2, either the State response is not adequate or the States request EPA's assistance.

Among the three bills that we are looking at today, which bill most closely tracks your recommendations?

Mr. STYPULA. Congressman, NALGEP normally doesn't take a position on a piece of legislation, but we have reviewed all three pieces of legislation and feel that our basic concerns and the needs and desires of that have been identified by our membership are addressed in one form or another in all three bills, and that would include your piece of legislation, H.R. 1750.

Mr. TOWNS. I yield back Mr. Chairman. I definitely yield back.

Mr. OXLEY. The gentleman from Pennsylvania, Mr. Greenwood.

Mr. GREENWOOD. Thank you, Mr. Chairman.

We have heard testimony from—I would like to address this question to Ms. Kerbawy. Mills is easy.

We heard testimony from other witnesses about the current use of memorandums of agreement, MOAs, to establish deferral of cleanup authorities to States, and I would like to submit for the record correspondence between the Association of State and Territorial Solid Waste Management officials and EPA, Mr. Chairman, without objection.

Mr. OXLEY. Without objection.

[The information referred to follows:]

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

444 North Capitol Street, N.W., Suite 315
Washington, D.C. 20001
tel: (202) 624-5828 fax: (202) 624-7875

February 16, 1996

Mr. Tim Fields
Deputy Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Fields:

As we indicated in our January 11, 1996 letter addressed to Mr. Steve Luftig and Mr. Jerry Clifford (see attached), the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) will not support the release of a U.S. EPA guidance document designed to address the development of State Memorandum of Agreements (SMOAs) for endorsement of State Voluntary Cleanup programs which excludes NPL-Caliber sites from eligibility. Nor will we support a guidance document which remains "silent" on the issue of site eligibility, but implicitly references deferral as an option for higher priority sites.

We believe that EPA's desire to dictate which State sites (i.e., those sites which are not listed or proposed for the NPL) are eligible for inclusion in a State Voluntary Cleanup program is in direct conflict with the May 17, 1995 National Performance Partnership System Agreement. This document states that "...The states should serve as the primary front-line delivery agent managing their own programs, adapting to local conditions, and testing new approaches for delivering more environmental protection for less...." A site may only be listed on the NPL if the Governor of the State agrees, otherwise the site should be free to be addressed by the State without federal interference. ASTSWMO can not support any document which does not adhere to this fundamental principle.

Sincerely,

Barbara Coler KH

Barbara Coler, CA
Chair, ASTSWMO Voluntary
Cleanup Task Force

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

444 North Capitol Street, N.W., Suite 315
Washington, D.C. 20001
tel: (202) 624-5828 fax: (202) 624-7875

January 11, 1996

Mr. Steve Luftig
Director, OERR
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460

Mr. Jerry Clifford
Director, OSRE
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460

Dear Steve and Jerry:

As you may be aware, a number of State representatives have participated in the "Voluntary Cleanup Program" workgroup formed by EPA in the summer of 1995. Ann McDonough of OERR has served as the Chair. The group's primary objective was to develop guidance for the regions for development of State Memoranda of Agreements (SMOAs) which serve to endorse State Voluntary Cleanup Programs. For several months, State and EPA representatives worked diligently and cooperatively to develop the guidance which allows for diversity and flexibility while ensuring protectiveness of public health and the environment. The State representatives worked closely with the ASTSWMO Voluntary Cleanup Task Force members to ensure that the document met the needs of all States with established or emerging voluntary programs. The Task Force has representatives from 12 States covering 9 of the 10 EPA regions; 4 of the members participated directly in the workgroup.

As individual States and as members of the ASTSWMO Task Force, we have had significant success with our Voluntary Programs and developed strong ties with our programs' stakeholders. The October 22, 1995 draft SMOA guidance was developed after months of discussion and compromise; State Waste Managers would support its adoption. However, we understand that certain members (or a member) of EPA management want to significantly revise the "Site Eligibility" to exclude NPL-caliber sites. The draft guidance excludes proposed or listed NPL sites which is appropriate. Given our participation in the workgroup and breadth of understanding of the key issues, we feel strongly that we must express our concern over this "late hit" and clarify that State Waste Managers will not support the guidance if NPL-caliber sites are excluded from SMOA eligibility.

The SMOA guidance was developed using previously established Region 5 SMOAs as a basis. We understand that several other regions are nearing completion of similar SMOAs. The draft guidance is therefore consistent with established practice which has been demonstrated to be effective. Additionally, there is a "fail safe" mechanism built into each SMOA and the draft guidance. In the unlikely event that the site poses an imminent or substantial endangerment (including emergency situations), Federal response actions may be taken.

We strongly recommend that EPA management reconsider this position and finalize the October 22, 1995 draft document. Completion of the guidance with the State Waste Managers' support will be a powerful signal to the public and the regulated community that our respective agencies are working in a closely coordinated and efficient manner. The overall benefit is efficient and effective remediation and reuse of Brownfields and other contaminated properties.

We look forward to rapid resolution of this matter.

Sincerely,

Barbara Coler CH

Barbara Coler (CA)
Chair, ASTSWMO Voluntary Cleanup Task Force

cc: Elliott Laws
Steve Herman
Ann McDonough

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

444 North Capitol Street, N.W., Suite 315
Washington, D.C. 20001
tel: (202) 624-5828 fax: (202) 624-7875

October 1, 1997

U.S. EPA
Superfund Docket (MC5202G)
401 M Street, S.W.,
Washington, D.C. 20460

These comments are submitted on behalf of the Association of State and Territorial Solid Waste Management Officials' (ASTSWMO) CERCLA Subcommittee. After review of the "Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs", we respectfully request that EPA withdraw the guidance. The guidance does not fulfill the original intent of the MOA process, namely to provide no action assurances to both the State and regulated communities. Instead this guidance seeks to clarify roles and responsibilities between State and federal agencies. We believe these roles have been clarified. EPA may not spend remedial money on sites not listed on the National Priorities List. Therefore, the vast universe of sites will never be addressed by the federal government. EPA may provide removal assistance, which is appreciated by the States, but this action alone does not generally serve to fully remediate sites and will not go far to address the tens of thousands of brownfield sites across the country. The guidance through the proposed tiering process will also serve to eliminate from eligibility the sites most in need of redevelopment, namely urban sites. State Waste Officials believe the purpose of the MOAs should be to acknowledge administratively, until legislation can be enacted, that EPA generally will not have a role at these sites.

We have provided extensive comments on this guidance (attached), but these comments should not be construed as support for the existing draft guidance. They are provided to illustrate the many deficiencies in the draft. We believe the guidance is fatally flawed and should not proceed forward, especially in the areas of the purpose of the guidance, the scope of sites to be included, the proposed tiering process, the ambiguity regarding CERCLIS listing and archival, EPA's intent to renegotiate existing MOAs, and the current linkage to funding.

It is extremely disappointing that the State Waste Officials must recommend withdrawal of the guidance in its entirety as many State Waste Managers worked for several years with EPA to develop a workable document. It is unfortunate that EPA chose to overturn the good work of the States and the Agency's own staff to produce this guidance. We sincerely hope that the Agency will take the recommendations of the State community seriously over the next few months.

Sincerely,

Mark F. Giesfeldt

Mark F. Giesfeldt, WI
ASTSWMO CERCLA Subcommittee Chair

State Waste Officials have the following specific comments: (NOTE: these comments should not be construed as support for the existing guidance)

1. Page 1, last sentence of "Background" section of transmittal memo from Steven A. Herman and Timothy Fields, Jr.: We do not agree with the statement that MOAs should be developed to "address cleanup of low risk sites, such as brownfields". We believe this statement embodies the fundamental difference of opinion between the U.S. EPA and State officials on the issue of the MOAs. States are responsible for remediating the vast majority of sites in this country, ranging from low to medium to high risk sites. If a State remediates a site which constitutes a "high risk", there is no reason why that site should not be afforded the same benefits of the MOA as a "low risk" site. These sites are "non-NPL" sites rather than "low risk sites".

2. Page 1, first sentence of the "Purpose" section of transmittal memo from Steven A. Herman and Timothy Fields, Jr.: We find it ironic that the purpose of the guidance is to provide a framework for the Regions to use when negotiating with the States, yet there has been no State involvement with the development of this guidance since the release of the draft May 30, 1996 draft MOA guidance. If the guidance is intended to incorporate the interests of both the States and EPA (the two primary parties), we recommend EPA withdraw the guidance and resume discussions with State regulators.

3. Page 1, second sentence of the second paragraph of the "Purpose" section of the transmittal memo from Steven A. Herman and Timothy Fields, Jr.: We believe it is inaccurate to contend that the purpose of the MOA is to "constitute a planning mechanism for division of labor at sites between EPA and the States". This language demonstrates a fundamental misunderstanding between EPA and the States on this issue. Rather, State Waste Managers' understanding of the original purpose of the MOAs was to provide no action assurances. The sites which are to be covered by the MOAs (excluding sites proposed for listed or the NPL) are State sites. We understand that CERCLA liability extends to these sites, but it is our understanding that until a site is listed on the NPL, EPA can not take remedial action at these sites. Removal actions may be taken at these sites, however, removal actions are designed to abate threats posed by sites, not complete the remediation. It is very rare for a site where EPA has taken a removal action not to be passed on to the State to complete the cleanup work necessary at a site. Until EPA is able to take full remedial action at these sites (sites not listed on the NPL), we believe the words "division of labor" are an inaccurate characterization.

4. Page 2, EPA MOA Guidance, first paragraph, first sentence of the "Purpose" section: Currently, there are 11 MOAs which have been signed by States with EPA. The purpose of the MOAs is to provide certainty to the responsible parties/redevelopers that once a site has been cleaned up to State standards that EPA will not plan to take action at a site. By indicating in the July 31, 1997 proposed draft guidance that existing MOAs will be amended or perhaps even voided does not fulfill this purpose. These existing MOAs are working and it should be up to both the State and the Region to determine when or if an MOA should be amended. Mandatory review of MOAs provides no assurance to the regulated community, increases the workload of both State and regional staff, provides no additional value to the environment and has the potential to disrupt MOAs which have already served as a very successful tool in facilitating the redevelopment of Brownfield sites.

5. We do not believe the purpose of the MOA is simply to improve relations between the States and EPA, but rather to facilitate the cleanup of contaminated sites, provide incentives for cleanup (rather than perpetuate existing disincentives), and to clearly outline the roles of the States and EPA. Consequently, the words "or amending" have no valid purpose.

6. Page 2, EPA MOA Guidance, first paragraph, second sentence of the "Purpose" section: The words, "whether to acknowledge the adequacy of a State voluntary cleanup program through an MOA" are condescending. If EPA does not sign an MOA with a State program, are the cleanups which the State performed or oversaw somehow not "adequate". Would EPA anticipate overfiling at the sites already addressed by the State? We do not believe this is EPA's intent and see no purpose in this language.

7. Page 2, EPA MOA Guidance, first paragraph, third sentence of the "Purpose" section: The words "in most circumstances does not anticipate" would more accurately reflect the situation than "does not generally anticipate". We believe EPA should seek to promote the purpose of the MOA in the guidance as much as possible, i.e., provide no action assurances.

   We also believe that the second footnote sends the wrong message. EPA should not be conducting site assessment activities for the purposes of listing a site on the NPL, at least until all planned remedial action for a site has been completed. First, PRPs and/or developers will not have confidence in their work if EPA is on site collecting information for listing; and second, EPA should wait until all work has been completed to collect information in order to obtain a score for a site that reflects the most current site conditions.

8. Page 3, EPA MOA Guidance, first full sentence on the page: We do not believe the statement "non-National Priorities List sites, which, generally speaking, pose a lower risk than those sites listed on the National Priorities List (NPL)" is a true statement. States often address sites which pose a high risk.

9. Page 3, EPA MOA Guidance, second full paragraph, last sentence: EPA should explicitly acknowledge that a review of a State's program based on minimum criteria should be a performance based review and not a process based review. This review should not interrupt the work of existing State voluntary cleanup programs. Again, these programs were developed without federal intervention and have been successful. Ultimately, the full remedial responsibility for the vast majority of these sites will fall on the shoulders of the State regulatory agencies.

10. Page 3, EPA MOA Guidance, last sentence of the page: Many States do not require parties to enter into enforceable agreements. States have made effective use of a variety of mechanisms, i.e., enforceable agreements, consent agreements, licensed site professionals, etc. There does not appear to be a point associated with the sentence as currently written.

11. Page 4, EPA MOA Guidance, III A 1: This is an inappropriate provision. Screening sites prior to their entrance (or during the process) into a voluntary cleanup program is an inappropriate exercise which will merely divert additional money from cleanup to study; waste State resources and provide little environmental benefit or added value. This provision appears to be an attempt by EPA to create yet another assessment program instead of providing a mechanism to enhance the cleanup of sites. The tiering process proposed in this guidance will dramatically reduce the number of contaminated sites which will be remediated in this country if PRPs are led to believe that once their site enters a State voluntary cleanup program, the site will be screened, placed on a list and turned over to EPA. Again, these programs are designed to be NPL prevention programs. The goal is to remediate as many sites as possible, as quickly as possible and as effectively as possible while ensuring protection of human health and the environment.

    Currently, States will screen a site after the site has failed to complete a voluntary cleanup program. The screening process is used as a tool to prioritize the site for State enforcement efforts. The tiering process outlined in this proposal will not serve to satisfy a State prioritization process or a lender's phase I requirements. It is also inconsistent with the pre-remedial work performed today by States and EPA.

12. Page, 4, III A 4: Any provision under RCRA or CERCLA requiring an order should be excluded from the scope of an MOA.

13. Page 5, first paragraph, first sentence: We do not see the relevance of only applying the principles of the MOA guidance to past cleanups if the State program met the requirements of this guidance at the time the voluntary cleanups were commenced. The determining factor should be whether the sites were cleaned up appropriately to protect human health and the environment, not whether the State program met procedural requirements as outlined by EPA. We could support the concept of retroactively applying the principles of the MOA, but the retroactive review must be performance rather than processed based.

14. Page 5, first paragraph, second sentence: The intent of this sentence and how it can be conceived as consistent with the concepts of retroactively applying the guidance needs clarification.

15. Page 5, second and third paragraphs. We do not support the tiering approach proposed by EPA and see no value to these two paragraphs. Please see comment 10 for rationale.

16. Page 6, first paragraph of the page (paragraph began on page 5): We do not support the tiering approach proposed by EPA. It is extremely troubling that a site could be screened as tier 2 and at any time EPA could disagree with the site designation and the MOA for that site becomes null and void. Neither the State nor the responsible party/developer are provided an opportunity to present their views. Again, this guidance seems to be focusing on process rather than on the actual performance of the site cleanup. We strongly believe this is the wrong approach to take.

    We also believe that requiring documentation designating a site as tier 1 or tier 2 creates a stigma (much like that of being listed on CERCLIS or the NPL) which has had negative effects on the market and contributed to the Brownfields stigma. The purpose of the MOA should be to provide certainty, instead the MOA guidance coupled with the tiering construct provides significant uncertainty.

17. Page 6 and 7, Section C: The wording under section C is too prescriptive and does not serve to clarify the intent of the MOA. For example, the second sentence of the last paragraph on page 6 indicates that TSDFs should be reviewed on a case-by-case basis for inclusion into the MOA. One primary purpose of the MOA was to move away from site-by-site decision making and focus more on overall program performance. The bottom line is unless a site is under an enforcement order or permit, it should be eligible for inclusion into the MOA. This is better stated at III A3 on page 4.

18. Section D: In general, State Waste Managers believe the reopeners specified in this guidance are too broad and will not provide the certainty necessary to foster the cleanups of contaminated sites. We consider the attached reopener provisions (please see Attachment A) developed by State members in the course of other work to be superior to those proposed in the guidance.

    Specifically, we have the following comments on the reopeners:

    a: Imminent and substantial endangerment to public health or welfare of the environment is the common standard for a regulator to gain entrance to a site. This is not a high standard. This language also places all the control in the hands of the administrator with no dispute mechanism process or consultative mechanism with the State agency.

    b. No comment.

c and d: the language indicating "...as determined by the Administrator or the State..." should be changed to read "...as determined by the Administrator and the State...". There also is no mention of providing the State an opportunity to cure prior to EPA entering a site.

19. Page 8, section E, first sentence would be more accurately portrayed if it read: "The outcome of these MOAs is EPA acknowledgment of the success ~~adequacy~~ of a State voluntary program..."

20. Page 8, section E, third sentence: Again, we do not believe the purpose of the MOA is to assign roles and responsibilities, but for EPA to acknowledge that the Agency does not 1) have the legal authority to conduct complete remedial actions at non-NPL sites; or 2) have the financial or personnel resources to move into the realm of the non-NPL universe. EPA should be willing to provide the certainty in the form of no-action assurances that these sites are indeed subject to only one master — the State regulatory agency.

21. Page 9, second paragraph, first sentence: We believe States should notify EPA of significant changes in the State law and program, however, we also believe that it is equally important for EPA to notify the State when there are significant changes in the federal "law, regulations, resource levels, guidance, policies and practices governing such programs". We do question the necessity of placing this language in the guidance for either the federal or State program, since periodic reviews should address the issue of new regulations, laws, etc.

22. Page 9, third paragraph, first sentence: The concept of the State reviewing EPA to determine if the State wants to change the MOA should be incorporated. State and federal governments are both sovereigns and the tone in this section (see comment 19) does not appear to recognize this fact and is condescending.

    We also believe the States and Regions are capable of determining when reviews should be conducted of the MOAs and therefore, specific timelines should not be placed in guidance by headquarter staff.

    Lastly, we strongly object to the concept embodied in the last two sentences of this paragraph. Existing MOAs are working, we are aware of no complaints and believe that the inference in this paragraph is for MOAs to be modified to reflect the processes outlined in this guidance. We believe EPA headquarters should support the work of their regions and not encourage backsliding on past agreements. The regulated community will have no faith in existing or future MOAs if EPA sets a precedence of voiding agreements, based on a guidance document change rather than an actual performance problem.

23. Page 9, last paragraph: This paragraph serves no purpose. First, there appears to be a disconnect between an individual's complaint about a specific site and EPA's response to "discuss how the MOA is being implemented". If there is a problem with a specific site, the guidance does contain reopener provisions — which relate to the actual conduct of the site, not the process implementation of the MOA. Second, following the construct of the paragraph, EPA will ask the State for documentation that the site is indeed a tier 2 site. Following proof of designation, EPA will review the implementation of the MOA and the State's voluntary cleanup program. The assumption from this construct is that the site is a tier 2 site and, therefore, according to EPA , a low risk site and not eligible for the NPL. Since, EPA can not spend remedial money at a site not listed on the NPL, we fail to understand how EPA will satisfy the individual's concerns. We believe this sets a false expectation of the Agency's authority and capabilities.

24. Page 10, first full paragraph: We do not understand why a State's views on listing sites on the NPL is relevant to determining whether or not the State has a satisfactory voluntary cleanup program in the eyes of EPA. This provision is not related to the performance of the State program or to whether the State program meets the requirements set forth in the guidance. This appears to be a politically motivated provision which should not be contained in EPA programmatic guidance.

25. Page 10, second full paragraph, first sentence: We object to the words "the adequacy of". Second sentence: The implication of this sentence is that cleanups performed under State programs will follow the National Contingency Plan which is not the case and not relevant. Cleanups will be protective of human health and the environment regardless of the process followed.

26. Page 10, Community Involvement Section: State Agencies are fully supportive of public participation. State Waste Managers believe in public participation, but also realize that each site is different and the needs of each community are different. The guidance should reflect overall programmatic goals for community participation, not specific requirements. We believe the last sentence on page 10 implies that a State should use the methods outlined on page 11. A sentence should be added clearly stating that items a - j on page 11 are suggested examples of effective community public participation tools and not requirements. Again "site by site" should be deleted as the intent of the MOA is to provide programmatic rather than individual site comfort.

27. Page 12, item d: It should be noted that in most States only federal applicable requirements apply at non-NPL sites not the relevant and appropriate requirements. The words "and/or relevant and appropriate" are inappropriate.

28. Page 12, a section "g" should have been added stating: "Other methods determined by the State to be protective".

29. Page 13, 2A, part d: the words "that are enforceable over time" are inappropriate. EPA does not have the statutory authority to enter into deed restrictions for NPL sites and therefore should not be holding States to a higher standard than the federal program.

30. Page 14, first full paragraph: While the first seems relevant, the rest of the paragraph is not. The guidance already indicates that a State program must meet a protectiveness standard — the language in this paragraph is micro management of the State program and restrictive. For example, there are other mechanisms besides conducting a site inspection to ascertain whether a deed restriction is being maintained.

31. Page 14, Section 6: This paragraph will serve to dictate the State's priorities. A site may no longer be eligible for a State voluntary cleanup program for numerous reasons. Once a site prematurely leaves a State voluntary cleanup program, the State may have the capabilities to ensure completion of the response action, but may choose not to do so because the site may not be of high enough priority within the State to warrant immediate response.

32. Page 14 and 15, Section E, Reporting Requirements: The second sentence of the last paragraph on page 14 is inappropriate, particularly if it cannot be justified. What does EPA plan to do with the list of site names?

    Sub-requirement a and b on page 15. Many States will not be able to perform this function. In Washington State, for example, sites can enter the program at any stage in the process and the State keeps numbers only on those sites who successfully complete the program. These requirements will place a burden on the State programs for no justifiable reason.

Sub requirement c on page 15 would only be appropriate if it were restated to read: "Number of sites having received State agency **or alternative mechanism approvals...**"

33. Page 15, first full paragraph, first sentence: State Waste Managers do not support the concept of selective audits. States have agreed through the MOAs to periodic performance reviews of the program (not the site designation process). Audits will only serve to add uncertainty to the process and prolong the concept of finality.

34. Page 15, first full paragraph, second sentence: This sentence is inappropriate. If a site is being addressed under a State voluntary cleanup program it should not be listed on CERCLIS and if a site which is listed on CERCLIS and subsequently remediated through a State program, that site should be archived.

35. Page 15 - 16, Section IV: This entire section is very objectionable to States. The purpose of the MOAs is to provide certainty to the regulated community that EPA will not plan to take action at a site. MOAs are not designed to shape or mold State programs. Funding should be based on the needs of the State not on whether a State has signed an MOA with EPA. By linking the MOA to funding of State voluntary cleanup programs, EPA is attempting to coerce the States into signing MOAs. We oppose any reference to linkage with future funding. Also, the reference to the interim funding approach memorandum from Tim Fields is completely inappropriate for this guidance. The Tim Fields memorandum was developed with the understanding that it was strictly to address the 1997 fiscal year allocation of funding in an attempt to end an impasse between State and federal agencies. EPA tried unsuccessfully last year to link FY 97 funding with the interim MOA guidance. The reference to that memorandum in this guidance represents a breech of agreement between OSWER and ASTSWMO as the memorandum was only to apply to FY 97 funding.

We are providing the following comments on the tier I/II Designation Screening Process. By virtue of the fact that we are providing comments, should no way be construed to imply support for the concept of site tiering.

1. A-Summary-1, first paragraph, fourth sentence: The document advances the concept that any party can use the process outlined for tiering sites, however, the sentence fails to add that State Agencies are ultimately responsible for the designation and documentation of the tiering process.

2. A-Summary-1, second paragraph: Overall, we believe the definition of tier I sites is extremely broad and will encompass virtually all contaminated sites. We make this statement based on the following facts: 1) the second sentence indicates that a tier I site is a site with a release of a hazardous substance that "has caused or is likely to cause, human exposure..." Almost any site has the potential of causing a human exposure; 2) the third sentence indicates that sites which are likely to cause exposure to the environment are tier one sites. This definition does not differentiate between high risk and low risk exposures; 3) this sentence also indicates that sites which are likely to contaminate sensitive environments should be considered tier I sites. States which have many mining sites (many of which are clearly tier II) often impact sensitive environments. This definition does nothing to differentiate between NPL-caliber sites and non-NPL caliber sites; 4) tier II sites may be sites which score below 28.5 based on EPA's HRS. To date, we are aware of over 2600 sites which have pre-scored above 28.5. We have data on 1586 sites which had pre-scored above 28.5. Of these sites, 901 have been or are currently being addressed by State programs. Whether a site scores above 28.5 is not an effective mechanism for determining whether a site is of high priority. Also generating an HRS score prior to allowing a site to enter a voluntary cleanup program will be a major disincentive for the regulated community to remediate sites voluntarily. The workload standard for HRS II is 500 hours; this is clearly not acceptable Lastly, the guidance indicates that sites which are in close proximity to schools, day care centers, or residential properties and have been

contaminated by hazardous substances three times above background levels will be designated tier I sites. Nearly every urban sites is in close proximity to residential properties. Therefore, virtually all urban sites would be eliminated from this guidance.

These are the sites most in need of assurance that EPA will not second guess the cleanup decision of the States. Our cities need to be revitalized and promoting the cleanup of brownfields sites is the first step in the process.

3. A-Summary-1, third paragraph: We think EPA should justify this issue by providing the percentage of sites which have been screened out by EPA as not requiring federal Superfund assistance (approximately 85% according to this summary) that would be classified as Tier I sites. We request that EPA provide this figure to the States.

4. A-1, second paragraph: Again, EPA indicates that at any time the Agency can overrule a State designation of a site without any recourse being provided to the State or private party. We believe this provision will provide absolutely no assurance to the regulated community.

5. A-1, third paragraph: EPA should explicitly state that it does not plan to list sites on CERCLIS that are being remediated under the auspices of a State voluntary cleanup program and language should be added addressing how a site will be archived from CERCLIS should it be addressed under a State program.

6. A-3, first three paragraphs of the page: State Waste Officials do not concur with the statement that assessing sites is an iterative process which involves the five major steps outlined by EPA. Most people conduct either a phase I and/or II and then move straight to remediation. The five steps outlined by EPA are excessive, wasteful and time consuming and will provide no added environmental benefit.

7. A-4 last sentence of the first incomplete paragraph: This sentence provides no additional direction to either the State or federal agencies and creates more areas of confusion. This sentence is inappropriate.

8. A-5, first paragraph, first sentence: the reference to Section III.A. should be replaced with "Section III.A. 3 & 4".

9. A-7, first full paragraph: the examples of data which should be collected may not be available in all States.

10. A-8, first paragraph, second sentence: Reference to 40 CFR section 31.45 is not necessary or relevant since States do not and should not need to comport with EPA federal contractor standards at non-NPL sites.

11. A-8, last paragraph: background samples are generally not taken during a phase II inspection. This type of information is usually acquired during the remedial investigation phase of a remediation process.

12. A-8 through A-9, Question 5: First, many companies will not be able to acquire permission to conduct off-site sampling. Second, we believe the numbers generated via this exercise will be below the EPA Soil Screening levels and third, a multiple of background levels and EPA Standard quantitation limits do not have any relation to the risk posed by a site. The attached chart compares U.S. EPA CLP Quantitation Limits to U.S. EPA Generic Soil Screening Levels as well as three States' risk-based cleanup standards. The quantitation limits, which merely reflect the ability to detect constituents, are significantly lower than any of the four risk-based standards. Using the quantitation limits as a mechanism to direct sites to the "higher risk" tier I category is inappropriate and will place virtually all sites where any contamination is detected into this category, thereby, making them ineligible for the benefits of the MOA.

13. A-9, Question 3: When would EPA be placed in a position to have to ensure that private parties factor sensitive environments into land use changes at non-NPL sites? This question seems irrelevant. EPA should provide justification for this question to support this view.

Attachment A

Proposed reopeners:

1. The State specifically asks for federal assistance; or

2. The State is unwilling or unable to take appropriate action, after EPA has provided notice to the State and opportunity to cure, and;

a) There is a human health emergency either declared by ATSDR, or due to an imminent threat of actual exposure, or

b) The contamination migrates across State lines, resulting in the need for further remediation to protect human health and the environment.

3. If the Administrator makes a showing in the appropriate United States district court that there is a substantial risk presented which requires further remediation to protect human health or the environment due to one of the following:

a) new information is discovered,

b) fraud was committed in demonstrating attainment of standards at the site, or

c) there is a reasonably foreseeable threat of exposure, resulting from remedy failure or change in land use.

QUANTITATION LIMITS (QL) VERSUS RISK-BASED STANDARDS

Constituents	USEPA CLP's Quantitation Limits (QL)	U.S. EPA Generic Soil Screening Standards Ingestion	OHIO VAP Direct Contact Soil Standards Ingestion Inhalation and Dermal	MASSACHUSETTS Ingestion and Dermal Absorption Pathways	MICHIGAN Ingestion and Dermal Absorption Pathways
		Residential	Residential	Residential	Residential
	mg/kg or ppm	mg/kg or ppm	mg/kg or ppm	mg/kg or ppm	mg/kg or ppm
Volatile Organic Compounds					
Benzene	.01	22	8.20	7.00	20.00
Carbon Tetrachloride	.01	5	1.80	7.00	20.00
1,1-Dichloroethene	.01	7,800	1.50	1.00	110.00
Toluene	.01	16,000	520	500	24,000
Trichloroethene (TCE)	.01	58	77	70	160
Vinyl Chloride	.01	0.3	0.58	0.30	1.20
Semi-volatiles					
Benzo(a)pyrene	.330	0.09	0.55	0.70	1.40
Dibenzo(a,h) anthracene	.330	0.09	0.55	0.70	1.40
Indeno(1,2,3-cd)pyrene	.330	0.9	5.58	0.70	14.00
PCBs	.033	1.00	1.00	2.00	2.30
Inorganic Analytes					
Arsenic	.006	0.4	6.90	30.00	5.50
Cadmium	0.003	78.00	32.00	30.00	210.00
Lead	0.003	400.00	400.00	300.00	400.00
Mercury	0.0003	23.00	16.00	10.00	130.00

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

444 North Capitol Street, N.W., Suite 315
Washington, D.C. 20001
tel: (202) 624-5828 fax: (202) 624-7875

March 20, 1997

Ms. Linda Garczynski
Director, Outreach and
Special Projects Staff
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460

Dear Ms. Garczynski:

The purpose of this letter is to provide you with comments on the U.S. EPA's proposed criteria for distributing the FY 97 $10 million dollars appropriated to EPA for support of State Voluntary Cleanup programs (VCPs). This letter is being written on behalf of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) CERCLA Subcommittee and Voluntary Cleanup Task Force.

First, I would like to thank you for giving ASTSWMO the opportunity to comment on these criteria and to participate in the Regional Brownfields and Core Program Coordinators upcoming meeting on this issue. As you are aware, over thirty States have established State VCPs. These programs are quickly becoming the foundation of State cleanup programs and have proven to be very successful. We appreciate EPA's desire to provide additional support to maintain and enhance these existing State VCPs as well as providing funding to create new programs.

We believe a major reason for the success of the State VCPs is the fact that they have been allowed to develop in an atmosphere free of federal interference and consequently have been tailored to the specific needs of the State. We are concerned that EPA may be embarking on a road of national consistency by requiring a federal template, which may inadvertently pave over the many innovations which have taken place at the State level. For example, the proposed criteria and accompanying draft guidance document to the Regions repeatedly states that the goal of the funding is to "...modify existing programs that will, over the long-term meet the criteria ultimately established for review of State voluntary cleanup programs as part of the MOA negotiations." We believe we may be in a circuitous argument, as EPA routinely states that the existence of an MOA is not necessary to receive federal funding, however, in order to receive federal funding a State must meet MOA approval criteria and the long term goal of the VCP funding as stated in the draft guidance is to have States meet the MOA approval criteria. Additionally, the MOA criteria are draft and have not been accepted by the States.

The proposed funding criteria and the tone of the accompanying guidance document appear to suggest that EPA is approving programs for which it is providing funding. We believe that just as CORE money is distributed to support State Superfund programs based on the <u>need</u> of the State, the $10 million VCP dollars should be distributed based on the <u>need</u> of the State. CORE money is not distributed based on EPA's approval of the State Superfund program, nor is it distributed with the explicit intent of having the State "modify" its State Superfund program. While we understand that the CORE grant is merely the vehicle for the distribution of the State VCP funding, we believe the concepts underlying the CORE grant and Voluntary Cleanup grant

are analogous and we recommend EPA revise the proposed VCP funding criteria to reflect a grant program based on "need" not on achieving an EPA version of an acceptable State VCP. We have attached suggested criteria for your review.

Our last overall comment concerns the actual process of distributing the VCP funding. EPA has had many years experience administering grant programs to States often for the express purpose of infrastructure building. We would recommend that your Office follow the process used by many other EPA offices, namely to allocate a block of money to each region and allow the region to negotiate directly with the States and to distribute the funding based on individual State needs. It is unlikely that headquarters' representatives or even other EPA regional representatives will be able to adequately assess the needs of an individual State better than the State representative and his/her regional counterpart. We support a national meeting involving headquarters, regions and State representatives to finalize the criteria utilized for allocating funding, but would strongly recommend that headquarters allow the regions to proceed utilizing their knowledge, expertise and existing relationship with their State counterparts to determine the actual allocation of the funds. We feel that this traditional method of funding the States will ultimately be more efficient and timely.

We have the following specific comments on the draft guidance:

A. Introduction

1. The State members of the EPA/State workgroup for State VCP guidance did approve the criteria as written in the May 30, 1996 draft guidance; however, they never formally approved the abbreviated form of the criteria which was transmitted in the "Interim Approaches for Regional Relations with State Voluntary Cleanup Programs" guidance. We believe this paragraph as written is misleading and should be clarified.

2. More importantly, the above-mentioned criteria were developed and agreed to by the EPA/State workgroup members for the purpose of developing State Memoranda of Agreements (MOAs). The criteria was not developed and agreed to for the purpose of allocating funds. As indicated in our overall comment, criteria developed for approving State VCPs should not be confused with criteria developed to allocate funds for infrastructure building.

B. Relationship Between EPA Funding State VCP Infrastructure and EPA/State Negotiation of Memoranda of Agreement Concerning State VCPs:

1. First paragraph, fourth sentence, seventh line, the following words should be added to the end of the sentence: "....funding a State VCP offers no indication whether EPA will sign an MOA with that State concerning its VCP **or that the State receiving funding intends to apply for an MOA."**

2. We believe the second to last sentence of the paragraph, "EPA's funding of State VCP infrastructure will help State VCP's meet the criteria used in MOA negotiations, which is the long-term goal for the VCP funding effort." should be deleted. It was our understanding that Congress appropriated the ten million dollars to EPA to support either the creation of new State VCP programs or the maintenance of existing State VCPs. It was not our understanding that Congress appropriated the money with the express goal of having States meet an EPA standard of an "acceptable State VCP". Again, we believe EPA may be confusing the establishment of an EPA approval process with a grant distribution process designed to distribute funding based on infrastructure and capacity building needs of the State.

   The last two sentences of section B are clearly contradictory to the sentiments expressed in the first four sentences of this paragraph. We would recommend the last sentence be reworded to read as follows: "Thus, EPA will provide funding to States to develop new voluntary cleanup programs or to enhance and maintain existing programs."

C. Relationship Between EPA Funding State VCP Infrastructure and CORE Program Cooperative Agreement Funding Vehicle:

1. We believe the last two sentences of this paragraph are irrelevant as the CORE grant already requires States to conduct separate tracking of all their expenditures which are tied to specific work plans.

D. National Brownfields and CORE Funding Coordinators Meeting:

1. Again, we support the concept of the National meeting for the purposes of reaching agreement on the criteria and activities eligible for funding State VCPs and for clarifying expectations across headquarters, regions and States. However, we question the use of a National meeting for establishing relative priorities "...among the States within a Region...". Obtaining agreement on the criteria to be utilized for allocating funding will serve to establish relative priorities within the Nation and a National meeting appears to be the appropriate forum for that discussion. Establishing relative priorities within a Region on a National level, however, seems to obfuscate the purpose and need for EPA regions.

E. Information to be presented by Regions:

1. Second bullet, please see our comments on Attachment B.

F. Draft Criteria and Activities Eligible for Funding:

1. Please see our comments on Attachment A and B.

2. Delete first sentence of first paragraph.

3. Second sentence of first paragraph should be modified to read: "EPA's goal is to provide funding to States to develop new programs or to enhance and maintain existing programs.

4. Delete third sentence. Again, we believe EPA should simply be trying to meet State infrastructure needs with the allocation of the VCP funding. EPA should not be trying to direct or dictate State policies and program parameters through a funding grant. It is arguable that this practice should occur in programs subject to EPA approval, but it certainly should not be associated with basic non-site specific technical assistance type grants.

5. Last sentence of the first paragraph on page five (carried over from page four) should be modified to read: "Thus, a State voluntary cleanup program may not meet all these criteria prior to receiving Federal money; rather, the State application for funding will describe how the State intends to develop a new, or enhance and maintain an existing State Voluntary Cleanup program.

G. Reporting:

1. Our overall question regarding this section is why EPA believes it needs for the States to report actual site names? What does EPA plan to do with this list of sites? We are very concerned with the possibility of EPA creating a new list of sites and potentially placing a stigma on the property and hindering overall redevelopment.

   If the intent is truly to measure outcomes, the number of sites which enter a voluntary cleanup program and the number of sites which exit a voluntary cleanup program should be sufficient along with periodic audits of the State programs. Again, this is not an application for approval of the State program with the potential for receiving EPA assurances of no further action, this is merely a funding proposal.

   We also question why EPA needs to know whether institutional controls were placed at the site. Again, does EPA intend to create a list of these sites? How does the State remedy selection process relate to the States' need for funding?

We recommend EPA revise this section to contain the following sole reporting requirement:

- Number of sites which have entered the State VCP and the number of sites which have exited the State VCP.

ATTACHMENT A:

1. 1(a)(ii) - delete the word "modify"

2. Delete number 3. It would seem as if EPA should already know what other support the Agency is providing to the State VCP.

3. Delete number 4. EPA already requires the States to report yearly and quarterly as part of their CORE grants. EPA must approve specific workplans and EPA audits State CORE programs to ensure that funding is used as approved. These provisions are already contained in the CORE grants procedures.

4. We question why number 5 is relevant. The VCP funding the State will receive from EPA is for one year; why does EPA need for the State to forecast its overall budget for its VCP for several years (years which are not covered by the first year EPA grant)? This provision should be deleted.

5. Number six should be modified to read: "If your State has an existing voluntary cleanup program, explain how your current program addresses the criteria for Voluntary Cleanup Programs (see attachment B) If you are starting a new voluntary cleanup program, describe how you plan to develop capacity." NOTE: Attachment B as revised based on ASTSWMO comments.

6. Number 8 appears to be redundant with number four which is already contained in current CORE grant procedures.

ATTACHMENT B:

We strongly recommend that EPA substitute its proposed criteria (which States never agreed to for the allocation of funding) with the following criteria:

GOAL: Maintain and allow for diversity of State programs. However, for a State program to be eligible for federal financial assistance, it should contain the following:

1. Provides for opportunities for meaningful community involvement as a programmatic goal (per the recommendation of the community breakout group during the February 27, 1997 Stakeholders meeting).

2. State cleanup statutes, regulations, rules or guidance

3. Ability, authority and funding to implement or compel cleanups of high priority sites independent of the voluntary programs

4. Management programs in place to administer requested funding.

We also recommend that a list of activities/needs be used as a basis for awarding grants, not a list of program components. A sample list of activities could include:

- Technical assistance (site-specific, generic, including development of information materials)
- Compliance activities (including audits and other inspections) and resulting enforcement actions
- Review and approval of submittals required by the State program (e.g., permits, cleanup plans, etc.)
- Records/data management

- Program development (including legislation, regulation, guidance and policy development)
- Program marketing (including development of fact sheets, conferences, workshops, etc.)
- Providing support to EPA pilots

Attachment C:
We believe that attachment C should be clarified to indicate that it is merely being attached as an information tool for States. States should not have to respond to these questions as this would be duplicative of the current CORE grant process.

Again, we appreciate the opportunity to comment. Unfortunately, we believe we may have a significant difference in our interpretation of how the funding should be utilized, i.e., we believe the funding should be utilized to create or enhance and maintain existing programs and that funding should be allocated based on need. We read from this guidance that EPA believes the funding should be used to create new programs and to "mold" existing programs into line with EPA approval criteria. We hope that we simply have a misunderstanding of intent and that these potentially significant differences can be resolved. We look forward to working with you in the future on this subject.

Sincerely,

Mark F. Giesfeldt

Mark F. Giesfeldt, WI
ASTSWMO CERCLA Subcommittee Chair

cc: ASTSWMO CERCLA Subcommittee
ASTSWMO Voluntary Cleanup Task Force
Tim Fields
Steve Luftig
Charlene Dunn
Jim Konz

Mr. GREENWOOD. I would like to ask if you could elaborate on the problems that you see with that system as the primary mechanism for redevelopment of the hundreds of thousands of non-NPL brownfields.

Ms. KERBAWY. The memorandum of agreement process is being utilized to try to fix a problem that is created by the current law. The States have not been extremely satisfied with what they can accomplish in the memorandum of agreement. We do have one with Region 5 EPA. It is better than most States can get now, but it still doesn't do what we would have liked to have been able to, and I think that there still is a need to really fix the law in dealing with who has authority at what sites.

The non-NPL universe isn't going to be addressed by EPA in most situations. The removal program can do some work but generally doesn't take a site for cleanup, and we are dealing with a situation where we tried to reach closure with people but if there is still a specter of EPA being able to come in at some point in time, can we really cut the full deal? I think that is a really big issue.

The MOA helps. We have been able to do more with it in place than we were able to without it, but it doesn't do what is really necessary.

Mr. GREENWOOD. And I take it you assume that the legislation that I have introduced, Mr. Boehlert introduced, enables you to get that finality——

Ms. KERBAWY. Yes, it does.

Mr. GREENWOOD [continuing] and to move forward.

If I could turn to Ms. Florini. You set up a duality which was we have to somehow choose between federalism or public health, that that is a choice, that somehow they are mutually exclusive. Well, you did say that, as a matter of fact, that we have to——

Ms. FLORINI. No. Actually, what I intended to say was if there is a conflict, then public health should win.

Mr. GREENWOOD. Well, it presumes that there is a conflict, and it seems to me to be an extraordinary choice. Because when I think of my State and I think of the thousands of ways, as we speak, that the State of Pennsylvania is protecting, is responsible exclusively in a whole variety of arenas for the protection of public health, hygienic standards at restaurants, the health care of seniors in nursing homes, the quality of care delivered in hospitals, variety of State regimes with regard to solid waste and air and water, we are not making a choice in Pennsylvania.

The State—we have federalism in place in more ways than not and a very good record on protection in public health, and it seems to me that the alternative here is we either allow these 500,000 sites to sit with whatever contamination is there, continuing to permeate into the water table, being released into the atmosphere, because EPA will never get to them, never get to them.

Ms. FLORINI. On the other hand, it is very clear from a number of other witnesses' testimony today that, in point of fact, in many other locations around the country under current law brownfields redevelopment is indeed happening to a significant degree.

The only point that I am making is we should not change the law to take away the Federal safety net that now exists. I do not believe it is necessary or appropriate to go that far. We have supported and we continue to support provisions on bona fide prospective purchasers, including the provisions that are in your bill, provisions on innocent landowners, although we think that there need to be some modest modifications to what is in your bill, and the provisions on innocent landowners. We are objecting strongly to two particular provisions of your bill: section 3, which we think goes way too far in undercutting the Federal safety net that now exists; and section 4, which makes Governor's concurrence mandatory.

We think that there are things that can and should be done with respect to other changes under existing law that would, in fact, further facilitate brownfields, but we do not think it is necessary or appropriate to take away the Federal safety net as part of that.

Mr. GREENWOOD. The Federal safety net implies Federal reopener, and it implies that that can happen at virtually any time. If you believe any of the other witnesses who have testified today, they said that is a chilling factor in their ability to develop these brownfields site and clean them and reclaim them. And that is the bottom line, and that is what the disagreement is all about, and I don't know if we can bridge it, but we will try.

My time has expired.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

We want to thank all of you for your excellent testimony and for sitting through some floor votes and some other inconveniences, but we appreciate it very much.

And the Chair notes that some members may have additional questions of this panel which they may wish to submit in writing. Without objection, the hearing record will remain open for 60-days for members to submit written questions to these witnesses and to place their responses in the record and to provide extraneous material for the record. So ordered.

Again, thank you; and this subcommittee is adjourned.

[Whereupon, at 1:40 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Environmental Business Action Coalition
an association of engineering and science firms practicing in multimedia environmental management and remediation

1999-2000 BOARD OF DIRECTORS

OFFICERS

Jonathan G. Curtis
CDM Federal Programs Corporation
President

Jeremiah D. Jackson, Ph.D.
The Kleinfelder Group
President Elect

Daniel E. Kennedy
Bechtel Environmental, Inc.
Immediate Past President

Mary F. Saras
Leverage Enterprises, LLC
Interim Treasurer

DIRECTORS-AT-LARGE

Gary C. Beswick
Radian International

William J. Birkhofer
Jacobs Engineering Group, Inc.

Richard L. Corrigan
CH2M HILL

Craig A. Crotteau
The IT Group

Mark Fenner
Harding Lawson Associates

Enemute Odusan
ECG Industries, Inc.

Ralph Shapot
Roy F. Weston, Inc.

Edward A. Straker
SAIC

Richard C. Tucker
ERM

LIAISON DIRECTORS

Lamar Dunn
Lamar Dunn & Associates

Robert S. Johnston
Dames & Moore Group

September 7, 1999

The Hon. Mike Oxley
Chairman, Subcommittee of Finance and Hazardous Materials
2125 Rayburn House Office Building
Washington, DC 20515

The Hon. Edolphus Towns
Ranking Member, Subcommittee on Finance and Hazardous Mateials
2232 Rayburn House Office Building
Washington, DC 20515

Re: Response to Testimony Regarding the Ohio's Voluntary Action Program

Dear Chairman Oxley & Ranking Member Towns:

Thank you for this opportunity to share with you information written by Mr. Marty Seltzer, Partner, in the Columbus law firm of Porter Wright Morris & Arthur. As you may know, the Porter Wright firm is one of Ohio's leading environmental law firms.

You'll find the information Mr. Seltzer compiled addresses many of the points brought up by Ms. Mills in her August 4, 1999 testimony before your Subcommittee. If the Environmental Business Action Coalition can be of further assistance, we would be happy to do so.

Thank you again for this opportunity.

Sincerely,

Jonathan G. Curtis, P.E.
President

Enc.

Cc: Marty Seltzer, Esq.

1015 Fifteenth Street, N.W. • Washington, D.C. 20005 • Phone 202-347-7474 • Fax 202-898-0076 • Website http://www.hwac.org

RESPONSE TO TESTIMONY OF TERESA B. MILLS CONCERNING AVAILABILITY OF INFORMATION UNDER OHIO'S VOLUNTARY ACTION PROGRAM

On August 4, 1999, Teresa B. Mills, representing the Buckeye Environmental Network, provided the following testimony before the House Finance and Hazardous Materials Subcommittee:

> "The Ohio [Voluntary Action] Program gives the party conducting the cleanup a right to keep all information and documents generated completely secret, even in court proceedings."

There is no truth to this statement which was made without reference to any provision of the Ohio Voluntary Action Program (Chapter 3746 of the Ohio Revised Code) or of the very extensive VAP rules found at Chapter 3745-300 of the Ohio Administrative Code (OAC).

Before reviewing the VAP provisions which require full disclosure of all information generated by a volunteer in the Ohio VAP program, it should be remembered that until the VAP program was enacted, a person voluntarily remediating his or her property was under no obligation to provide anyone with information regarding the cleanup. That is still the case if one chooses not to use the Ohio VAP program. In other words, contrary to Ms. Mills' testimony, the Ohio VAP program, for the first time, required volunteers to provide the Ohio EPA and the public with full disclosure of the details of the voluntary remediation.

In order to receive a covenant not to sue from the Ohio EPA under the VAP program, a certified professional must submit a no further action letter (NFA) to the Director. See ORC 3746.11. See Attachment A. The minimum information required to

be included in the NFA is listed in OAC 3745-300-13(E). See Attachment B. A casual review of this information list should reveal that it is as extensive as any public information list provided under any Federal statute, including RCRA and CERCLA.

To assure that the public has access to all this information, ORC 3746.31 requires the Director of Ohio EPA to provide any person who makes a written request with any or all of the information, documents, reports or data included in the No Further Action letter.

Similar statutory and regulatory analyses could be provided to demonstrate the inaccuracies of other substantive statements made by Ms. Mills regarding the Ohio VAP program, including lack of cleanup standards, negligible state oversight, extensive secrecy provisions, Ohio EPA requirement to automatically issue covenants, and the claim that cleanups have been prompted only by local citizens.

the property to achieve applicable standards, a demonstration that the use restrictions have been recorded in the office of the county recorder of the county in which the property is located, or have been entered in the appropriate register for registered land as defined in section 5309.01 of the Revised Code, in compliance with section 3746.14 of the Revised Code;

(4) If the remedy relies on engineering controls that contain or control the release of hazardous substances or petroleum at or from the property, a plan for the proper operation and maintenance of the engineering controls.

(D) Except as otherwise specifically provided in this chapter and rules adopted under it, voluntary actions under this chapter and rules adopted under it shall be undertaken in compliance with all applicable laws of this state and rules adopted under them and with applicable ordinances, resolutions, and rules of political subdivisions of this state.

HISTORY: 145 v S 221. Eff 9-22-94.

Cross-References to Related Sections

Adoption of rules; fees; public meetings on proposed rules, RC § 3746.04.

Director may request supporting documents and data, RC § 3746.18.

Duties of certified professional in connection with no further action letter; submission to director, RC § 3746.11.

Filing and recording of letters, covenants and restrictions; transferability, RC § 3746.14.

Information and documents to be submitted by affidavit; falsification or deception, RC § 3746.20.

Issuance or denial of covenant not to sue; revocation, RC § 3746.12.

Ohio Administrative Code

Voluntary action program. OEPA: OAC ch. 3745-300.

Certified laboratories. OEPA: OAC 3745-300-04.

Certified professionals. OEPA: OAC 3745-300-05.

Content and scope of no further action letters. OEPA: OAC 3745-300-13.

"Phase I Property Assessment" for the voluntary action program. OEPA: OAC 3745-300-06.

"Phase II Property Assessments." OEPA: OAC 3745-300-07; remediation. OEPA: OAC 3745-300-15.

Law Review

The CERCLA paradox and Ohio's response to the brownfield problem: senate bill 221. Comment. 26 ToledoLRev 435 (1995).

Overview of Brownfield redevelopment initiatives: a renaissance in the traditional command and control approach to environmental protection. Bradford C. Mank. 25 NoKyLRev 51 (1997).

§ 3746.11 Duties of certified professional in connection with no further action letter; submission to director.

(A) After receiving the demonstrations and operation and maintenance plan, if any, required to be submitted to him under division (C) of section 3746.10 of the Revised Code, a certified professional shall review them to verify whether the property where the voluntary action was undertaken complies with applicable standards or shall ensure that they have been reviewed by another person or persons who performed work to support the request for the no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code. If, on the basis of the best knowledge, information, and belief of the certified professional, the certified professional concludes that the property meets applicable standards, he shall prepare a no further action letter for the property. The no further action letter shall contain all the information specified in rules adopted under division (B)(7) of section 3746.04 of the Revised Code or in division (E) of section 3746.07 of the Revised Code, as applicable.

Upon completion of a no further action letter, the certified professional shall send a copy of the letter to the person who undertook the voluntary action. The letter shall be accompanied by a written request that the person notify the certified professional as to whether the person wishes to submit the no further action letter to the director of environmental protection and by a written notice informing the person that the original letter may be submitted to the director only by a certified professional and that the person may receive a covenant not to sue from the director in connection with the voluntary action only if the no further action letter for the voluntary action is submitted to the director on his behalf by the certified professional.

Promptly after receipt of the letter and request, the person who undertook the voluntary action shall send written notice to the certified professional informing him as to whether the person wishes to submit the letter to the director and shall send a copy of the notice to the director. If the person's notice indicates that he wishes to have the no further action letter submitted to the director, promptly after receipt of the notice, the certified professional shall submit the original no further action letter to the director by certified mail on behalf of the person who undertook the voluntary action. If the person who undertook the voluntary action notifies the certified professional that he does not wish to submit the no further action letter to the director, the certified professional shall send the original letter to the person promptly after receiving the notice.

(B) If after reviewing the demonstrations required to be submitted to him under division (C) of section 3746.10 of the Revised Code, the certified professional finds that the property where the voluntary action was undertaken does not comply with applicable standards, the certified professional shall send to the person who undertook the voluntary action written notice of that fact and of the certified professional's inability to issue a no further action letter for the property.

(C) A certified professional shall prepare a summary report detailing his findings and conclusions about the environmental conditions at the property concerning which the professional was requested to prepare a no further action letter and the remedial activities undertaken to mitigate or abate any threat to public health

and safety and the environment, including, without limitation, all of the following:

(1) A description of the nature and extent of contamination emanating from sources on the property;

(2) A risk assessment performed in accordance with rules adopted under division (B)(2) of section 3746.04 of the Revised Code if such an assessment was used in lieu of generic numerical clean-up standards established in rules adopted under division (B)(1) of that section;

(3) A description of any remedy conducted at the property and how the remedy complies with applicable standards;

(4) A description of any plan for the proper operation and maintenance of engineering controls identified under division (C)(4) of section 3746.10 of the Revised Code;

(5) Any documents prepared by any other person who performed work to support the request for the no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code.

(D) A certified professional shall maintain all documents and data prepared or acquired by him in connection with a no further action letter for not less than ten years after the date of issuance of the letter or after the notice required under division (B) of this section has been sent, as applicable, or for a longer period as determined in rules adopted under section 3746.04 of the Revised Code. The director shall have access to those documents and data in accordance with section 3746.18 or 3746.31 of the Revised Code.

HISTORY: 145 v S 221. Eff 9-28-94.

Cross-References to Related Sections

Actions for recovery of costs of conducting voluntary action; allocation of costs by contract, RC § 3746.23.

Adoption of rules; fees; public meetings on proposed rules, RC § 3746.04.

Audits in connection with issuance of letters, RC § 3746.17.

Certified professional defined, RC § 3746.01.

Director may request supporting documents and data, RC § 3746.18.

Filing and recording of letters, covenants and restrictions; transferability, RC § 3746.14.

Issuance or denial of covenant not to sue; revocation, RC § 3746.12.

Methods of issuance of covenant not to sue; fee, RC § 3746.13.

Notice of noncompliance by professional or laboratory; audits of property where certification suspended or revoked, RC § 3746.19.

Records to be kept by county recorder, RC § 317.08.

Standards and requirements governing until rules take effect, RC § 3746.07.

Ohio Administrative Code

Certified professionals. OEPA: OAC 3745-300-05.

Content and scope of no further action letters. OEPA: OAC 3745-300-13.

Law Review

The CERCLA paradox and Ohio's response to the brownfield problem: senate bill 221. Comment. 26 ToledoLRev 435 (1995).

§ 3746.12 Issuance or denial of covenant not to sue; revocation.

(A) Except as provided in division (C) of this section, the director of environmental protection shall issue to a person on behalf of whom a certified professional has submitted to the director an original no further action letter and accompanying verification under division (A) of section 3746.11 of the Revised Code a covenant not to sue for the property that is named in the letter. The director shall not issue a covenant not to sue if an original no further action letter is submitted to him by any person other than the certified professional who prepared the letter or if a copy of the letter is submitted to him.

A covenant not to sue shall contain both of the following, as applicable:

(1) A provision releasing the person who undertook the voluntary action from all civil liability to this state to perform additional investigational and remedial activities to address a release of hazardous substances or petroleum when the property has undergone a phase I or a phase II property assessment in compliance with this chapter and rules adopted under it or has been the subject of remedial activities conducted under this chapter and rules adopted under it to address a release of hazardous substances or petroleum and such an assessment or those activities demonstrate or result in compliance with applicable standards, except:

(a) As otherwise specifically provided in this chapter or as may be conditioned by the director under this chapter;

(b) For claims for natural resource damages the state may have pursuant to section 107 or 113 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2781 and 2792, 42 U.S.C.A. 9607 and 9613, as amended;

(c) For claims the state may have pursuant to section 107 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2781, 42 U.S.C.A. 9607, as amended, for costs other than those for damages to natural resources, provided that the state incurs those other costs as a result of an action by the president of the United States under section 104, 106, 107, or 122 of that act or pursuant to section 3746.29 of the Revised Code.

(2) If the voluntary action involves the use of engineering controls that contain and control the release of hazardous substances or petroleum at or from the property in order to comply with applicable standards, all of the following:

(a) A provision requiring that the person enter into an operation and maintenance agreement with the director that ensures that all engineering controls are maintained so that the remedy is protective of public health and safety and the environment; that includes provisions requiring the person to conduct monitoring for compliance with the engineering controls and the applicable standards upon which issuance of the covenant was based, and periodically to report the findings of the

(D) After receiving the information which is required to be submitted by a volunteer under paragraphs (B) and (C) of this rule, a certified professional must perform work or review work of other persons that was conducted to support the request for the no further action letter, or must ensure that the work has been performed and reviewed by other persons with experience and competence in areas other than the certified professional's expertise and competence, as necessary for the issuance of the no further action letter.

(E) If, on the basis of the best available knowledge, information and belief, the certified professional concludes that a property meets or will meet applicable standards, a certified professional may prepare a no further action letter for the property. The no further action letter must contain, at a minimum, the following information:

(1) A legal description of the property;

(2) Site maps, including, but not limited to the following:

(a) The boundaries of the property to which the no further action letter pertains, as determined by a property survey conducted by a professional skilled in the appropriate discipline(s);

(b) The latitude and longitude of the property to the nearest second;

(c) The existing topography delineating streams, swamps, lakes, springs, and other surface waters, with a contour interval of no greater than five feet;

(d) Any improvements, including all roads, railroads and above and below ground structures and appurtenances;

(e) Locations of all borings, monitoring wells, or other sampling locations;

(f) The location and identification of any engineering controls and the portion of the property to which they apply; and

(g) The identification of any use restrictions on the property;

(3) The "Phase I Property Assessment" report completed in accordance with rule 3745-300-06 of the Administrative Code.

(4) The "Phase II Property Assessment" report completed in accordance with rule 3745-300-07 of the Administrative Code.

(5) Identification of the groundwater classification for the property and the basis for that classification in accordance with rule 3745-300-10 of the Administrative Code.

(6) Identification of all applicable standards which apply to the property.

(7) A summary of the information required to be submitted by the volunteer to the certified professional preparing the no further action letter as described in paragraphs (B) and (C) of this rule.

(8) Notification that a risk assessment was performed in accordance with rule 3745-300-09 of the Administrative Code, if such an assessment was used in lieu of or in addition to using generic numerical standards established in rule 3745-300-08 of the Administrative Code, and the risk assessment report completed in accordance with rule 3745-300-09 of the Administrative Code;

(9) Information demonstrating that the property conforms with the exposure assumptions used to calculate the generic numerical standard(s) for the land use identified, if the applicable standard(s) for the property is based upon the generic numerical standard(s) established in rule 3745-300-08 of the Administrative Code. Or the exposure assumption(s) used to determine an applicable standard under rule 3745-300-09 of the Administrative Code;

(10) Identification of all contaminants addressed or identified at the property, their source, if known, and their locations and concentration levels prior to and after any remediation;

(11) The name and qualifications of any other person, identified under paragraph (D) of this rule, who performed work in support of the no further action letter and the nature and scope of the work performed by that person;

(12) A list of all documents, and the date such documents were prepared, which were reviewed by the certified professional in preparing the no further action letter;

(13) A copy of any deed restriction on the use of the property, if applicable, bearing the mark of recordation of the office of the county recorder for the county in which the property is located. A copy of any deed restriction for the property is not required pursuant to this paragraph if the volunteer is not the owner of the property in which the voluntary action is being conducted, and as a condition of the covenant not to sue the recordation of any use restriction is required before the covenant [sic] not to sue becomes effective;

(14) A copy of any consolidated standards permit and supporting documents issued pursuant to section 3746.15 of the Revised Code, and any rules adopted thereunder;

(15) A copy of any operation and maintenance plan or agreement, if required pursuant to paragraph (F)(3)(b) of rule 3745-300-15 of the Administrative Code;

(16) Identification of the tax parcel number(s) and the taxing district(s) for the property;

(17) All affidavits prepared in connection with the voluntary action; and

(18) Any other information the certified professional considers relevant.

(F) Upon completion of a no further action letter, the certified professional must send a copy of the no further action letter to the volunteer. The no further action letter must be accompanied by:

(1) A written request that the volunteer notify the certified professional as to whether the volunteer wishes to submit the no further action letter to the director; and

(2) A written notice informing the volunteer that the original letter may be submitted to the director only by a certified professional and that the volunteer may receive a covenant not to sue from the director in connection with the voluntary action only if the original no further action letter for the voluntary action is submitted to the director on behalf of the volunteer by the certified professional.

(G) Promptly after receipt of the no further action letter and the request described in paragraph (F)(1) of this rule, the volunteer must:

(1) Send written notice to the certified professional which indicates whether or not the volunteer wishes to submit the letter to the director; and

(2) Send a copy of the notice, described in this paragraph, to the director.

If the volunteer's notice indicates that he wishes to have the no further action letter submitted to the director, the certified professional must, promptly after receipt of the notice described in this paragraph, submit the original no further action letter to the director by certified mail on behalf of the volunteer. If the volunteer notifies the certified professional that he does not wish to submit the no further action letter to the director, the certified professional must send the original

ntified under circum-
on.

tions
ducing voluntary action;
RC § 3746.23.

pense to the brownfield
ent. 26 Toledo L.Rev 435

al liabilities for lenders
ed property—a reply to
chraff. 25 CapitalU.L.Rev

y of entry into or
of information or

ting in the voluntary
er and rules adopted
dmission of criminal
ate or rules adopted
esolutions, and rules
tate or an admission
d Code or common

s entered into or is
n program under this
t is not admissible in
ive proceeding initi-
3704., 3714., 3734.,
e Revised Code.
rts, reports, or data
l as a result of inter-
oluntary action pro-
s adopted under it
ion undertaking the
nerable, in any civil
it the person under-
judicial or adminis-
section 3746.22 of the
r section 3746.04 of
ith an alleged viola-
sed Code.
any person whose
evoked under this

ng in the voluntary
and rules adopted
be an acknowledg-
erty identified and
nstitute a threat or
the environment.

ity of director;
reatened release.

s the authority of

the director of environmental protection to act under sections 3734.13 and 3734.20 to 3734.23 of the Revised Code.

(B) Nothing in this chapter limits the authority of the director to request that a civil action be brought pursuant to the Revised Code or common law of this state to recover the costs to the environmental protection agency for investigating or remediating a release or threatened release of hazardous substances or petroleum at or from a property where a voluntary action is being or has been conducted under this chapter and rules adopted under it when the director determines that the release or threatened release poses an imminent and substantial threat to public health or safety or the environment.

HISTORY: 145 v S 221. Eff 9-28-94.

Cross-References to Related Sections

Exemption of persons holding indicia of ownership in a property primarily to protect a security interest, RC § 3746.25.

Issuance or denial of covenant not to sue; revocation, RC § 3746.12.

§ 3746.30 Obligations, rights and liabilities arising under other state and federal laws not affected.

(A) Nothing in this chapter shall be construed as abrogating any obligation or right established in federal law.

(B) Nothing in this chapter shall be construed as releasing a person to whom the director of environmental protection has issued any final findings and orders under Chapter 3704., 3734., or 6111. of the Revised Code on or before September 28, 1994, from the obligation to comply with any requirements established in the findings and orders.

(C) Nothing in this chapter shall be construed as relieving a person from any requirement established under the "Atomic Energy Act of 1954," 68 Stat. 919, 42 U.S.C.A. 2011, as amended, and regulations adopted under it or under Chapter 3747. or 3748. of the Revised Code and rules adopted under them, including, without limitation, any applicable requirement existing when a voluntary action is undertaken to notify or coordinate remedial activities with the United States nuclear regulatory commission or the department of health in connection with radioactive materials regulated under that act or those chapters.

(D) Nothing in this chapter alters, abridges, abrogates, diminishes, or otherwise limits the rights or protections afforded any shareholder, director, officer, or employee, or, in the case of a partnership, any general or limited partner, under the Revised Code and common law of this state.

HISTORY: 145 v S 221. (EH 9-28-94); 146 v S 18. Eff 9-8-95.

§ 3746.31 Director to provide copies of materials upon request.

Upon the written request of any person for information, documents, reports, or data described on a list submitted to the director of environmental protection pursuant to division (F) of section 3746.07 of the Revised Code or rules adopted under division (B)(7)(e) of section 3746.04 of the Revised Code, as applicable, the director, within a reasonable period of time after receipt of the request, shall provide copies of the requested materials to the person. If the requested materials are not on file in the offices of the environmental protection agency, the director, promptly after receipt of the request, shall send a written request to the certified professional who submitted the list pursuant to that division or those rules to submit the requested materials to the director within a specified reasonable period of time. The certified professional shall submit the requested materials to the director within the time specified in the director's request. Within a reasonable period of time after the director receives the requested materials from the certified professional, the director shall provide copies of them, at cost, to the person who requested them and shall retain the originals in the agency's files.

HISTORY: 145 v S 221. Eff 9-28-94.

Cross-References to Related Sections

Adoption of rules; fees; public meetings on proposed rules, RC § 3746.04.

Duties of certified professional in connection with no further action letter; submission to director, RC § 3746.11.

§ 3746.35 Annual reports by directors of environmental protection and development.

(A) Not later than September 1, 1996, and not later than the first day of September of each subsequent year, the director of environmental protection shall prepare and submit to the chairmen of the respective standing committees of the senate and house of representatives primarily responsible for considering environmental and taxation matters a report regarding the voluntary action program established under this chapter and rules adopted under it and the tax abatements granted pursuant to sections 5709.87 and 5709.88 of the Revised Code for properties where voluntary actions were conducted. Each annual report shall include, without limitation, all of the following:

(1) Both of the following for each property for which a covenant not to sue was issued under section 3746.12 of the Revised Code during the preceding calendar year:

(a) The address of the property and name of the person who undertook the voluntary action at the property;

(b) Whether the applicable standards governing the voluntary action were the interim standards established in section 3746.07 of the Revised Code or the generic numerical clean-up standards established in rules adopted under division (B)(1) of section 3746.04 of the Revised Code, were established through the performance of a risk assessment pursuant to rules adopted

LEGISLATION TO IMPROVE THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

WEDNESDAY, SEPTEMBER 22, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Gillmor, Greenwood, Largent, Bilbray, Ganske, Shimkus, Wilson, Fossella, Blunt, Ehrlich, Towns, Stupak, Engel, DeGette, Barrett, Luther, Markey, and Pallone.

Staff present: Nandan Kenkeremath, majority counsel; Amit Sachdev, majority counsel; Kristi Gillis, legislative clerk; and Richard Frandsen, minority counsel.

Mr. OXLEY. The subcommittee will come to order.

The Chair will begin with an opening statement.

Welcome to yet another legislative hearing on Superfund. The difference is that I hope that this will be the last legislative hearing we will need to hold in the Commerce Committee after four Congresses.

We have seen many good proposals to reform this badly broken program, and the House and Senate have held hearings on these proposals. We know what needs to be done. We know that there are members on both sides of the aisle who want to get something done. So it is time for Congress to fulfill its responsibility through bipartisan legislation.

The bills we continue to review today are strongly bipartisan. The Greenwood-Hall bill has nine Democrat and seven Republican cosponsors. The Boehlert-Dooley bill has 60 Democrat and 60 Republican cosponsors. It was reported out of the Transportation Committee with a 69-2 vote. Last Congress Mr. Condit and I introduced strong bipartisan Superfund reform legislation with 19 Democrats and 19 Republicans.

It is unfortunate that after 5 years of extensive process and numerous opportunities of negotiation, the administration has not been able to find agreement with any bipartisan Superfund bill in any committee in either body of Congress. Even today we find some of the unfortunate rhetoric about bills that have attracted strong bipartisan support and only provide incremental reforms.

Whether it is the Conference of Mayors, the Governors, the State cleanup agencies, cleanup contractors, small businesses, and many, many others, all support provisions in bipartisan legislation to significantly reform Superfund. These groups can tell us from firsthand experience that the current Superfund program is wasteful and unfair. But what distinguishes these groups is that they are willing to work to find constructive solutions. The time has long since past when you can claim to be for Superfund reform but against all bipartisan efforts.

Superfund continues to haunt individuals, small businesses, and communities across the country. We must provide liability relief and not unfairly shift costs to other parties at the site. H.R. 3000 did this primarily by limiting liability to those generators or transporters who provide significant contributions of waste. Their overall amount would be picked up by the Federal orphan share. Under this model, EPA would issue orders to the significant parties, but neither those parties nor EPA would have incentive to pursue further endless waves of litigation. It was a practical and fair approach.

H.R. 1300 looks more at specific circumstances and contexts. Nonetheless, it meets important criteria by getting numerous parties out of the system and not unfairly shifting responsibility to other parties at the site.

H.R. 1300, H.R. 2580, and H.R. 3000 from last Congress focus on sound science, reasonably anticipated land use, and site-specific risk management. H.R. 2580 and H.R. 3000 ensure that the preference for treatment is guided by practicality, and that it never overrides concerns to the health and safety of the local community and workers. All of these bills eliminate the needlessly bureaucratic and so-called relevant and appropriate requirements and provide for reasonable points of compliance.

These are important and reasonable changes that have been supported by States, cleanup contractors, and many others. These changes will streamline and improve remedy selection for new sites added to the NPL for site cleanup secured under section 104 or 106 and for sites that use contribution authority under the liability provision of section 107. Unless you are prepared to terminate funding under section 104, administrative orders under section 106, or the liability provisions of section 107, you cannot legitimately argue that remedy selection does not need repair.

I note that we have a relatively short final hearing today. Over the course of 7 years, however, we have had over 27 hearings and 275 witnesses appearing in the subcommittee, some of them multiple times, like our friend from EPA today, Mr. Fields. Moreover, numerous parties have submitted statements for the record.

The basic point is that this has been an extraordinarily open process that I am basing my position and efforts on, the record taken as a whole. While my door has been open for negotiations for nearly three consecutive Congresses, some 5 years, and I am getting old in the process, I believe we are at this point where the major proposals out there to reform the program are eminently modest and reasonable.

It is time that we moved past the rhetoric and right at least a few of the Superfund wrongs. I look forward to hearing from to-

day's witnesses, particularly those who have or support specific changes for significant reform.

The Chair's opening statements are completed. I now turn to our distinguished ranking member, the gentleman from New York, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. And I want to take that thank you back, really. What I would like to do is applaud you for your determination and commitment. You know, I am not sure after 27 hearings, you know, I am not certain that I want to thank you for more hearings.

First of all, I would like to welcome our witnesses today to our hearings on reauthorization of the Superfund program.

Mr. Chairman, as I have indicated previously, I believe it would be unwise and counterproductive to make comprehensive changes to the Superfund program at this point. Such changes would also slow Superfund cleanups. This is a concern that we will probably hear from some of our witnesses. This is a result I hope none of us want.

Even though delay may suit the interests of some of those responsible for contamination of certain sites, we should not subscribe to it or support it. I hope the subcommittee members can agree that where possible we should be treating or eliminating the most toxic or mobile hazardous wastes at these sites, and doing our utmost to provide permanent cleanups so that our citizens and particularly our children do not have to fear for their health.

According to the former head of the Agency for Toxic Substances and Disease Registry, Dr. Barry Johnson, approximately 1.3 million children under the age of 6 live within 1 mile of a Superfund site. Cleanups will also assist redeveloping these properties for the full economic benefit of our communities, which I think is extremely important.

Just last week the General Accounting Office released a report on their survey of all the non-Federal Superfund sites. According to the GAO, half of all the sites have completed all cleanup construction activities. The GAO results are consistent with the U.S. Chamber of Commerce position that I now quote:

"The Federal hazardous site program established by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 is expected to achieve its goal of restoring the highest-priority cleanup sites to environmental health within the next 3 to 5 years." With the significant progress occurring in the Superfund program, I hope we can put our forces on the Brownfields issue that were the subject of our August hearing. Mr. Greenwood and I have agreed to try to work out our differences in our two bills, H.R. 1750 and H.R. 2580. I hope that after this hearing we can again refocus on our efforts to do that.

Mr. Chairman, I look forward to hearing from the witnesses, and I am extremely pleased today that we have a witness from Brooklyn, New York, who happens to be employed by the attorney general's office and will be representing the attorney generals across this country, Mr. George Johnson. I am anxious and eager to hear from him, because he happens to reside in my district.

Thank you, Mr. Chairman. I yield back.

Mr. OXLEY. The gentleman yields back.

The gentleman from Pennsylvania, and one of the authors of the legislation we are dealing with.

Mr. GREENWOOD. Thank you, Mr. Chairman. I would first like to thank you for holding today's hearing on the remedy selection and the liability provisions in my bipartisan land recycling act, H.R. 2580, as well as Mr. Boehlert's legislation, H.R. 1300.

While I believe the legislation that I have introduced represents a well-balanced approach to the issues at hand, I still look forward to continuing to work in a bipartisan manner toward an overall improvement in the Comprehensive Environmental Response, Compensation and Liability Act, better known as Superfund.

The Land Recycling Act represents an important first step toward that goal. Mr. Chairman, as you know, last Congress the remedy selection provisions in H.R. 3000, which was your bipartisan Superfund reform bill, were based on extensive work and the support of the National Governors Association, the State cleanup agencies, and the trade association for cleanup contractors. In fact, the Governors stated that the remedy title would "enhance the efficiency and quickness of cleanups." The State cleanup agencies stated that the remedy title "seeks to promote a commonsense, streamlined approach to remediating sites," and that "we believe this title most adequately reflects the lessons learned over the last 18 years."

In addition, the Commission on Risk Assessment and Risk Management stated that the risk principles would move us toward a "remedy selection process that is based on objective science-based risk characterization."

Finally, the cleanup contractors stated that H.R. 3000 would "do more to spur environmental cleanup in a safe and protective manner than could possibly be accomplished under current law."

As you may recall, the cleanup contractors specifically supported provisions on scientifically objective risk-assessment consideration of future land use, and modification of the preference for permanence and treatment.

Mr. Chairman, based on aforementioned recommendations and your work with all stakeholders, I have produced an important subset of bipartisan remedy selection changes in H.R. 2580. These changes are aimed at improving the cleanup process for all manner of sites.

However, it is worth mentioning that any remedial action under CERCLA must comply with section 121, regardless of whether or not a site is on the National Priorities List. Furthermore, under section 107, any non-Federal party cleaning up a site and seeking to use CERCLA to obtain contributions from potentially responsible parties must show that the remedial action costs are "consistent with the national contingency plan."

Therefore, even in the universe of voluntary cleanups, CERCLA's remedy selection requirements can have legal relevance in court.

Overall I firmly believe that H.R. 2580 will streamline the Federal cleanup process by ensuring that regulators require treatment to the extent practicable, consider future land use, consider risks to the community and workers' health, require compliance with drinking water standards at reasonable points of compliance, are

not hampered by needless bureaucratic relevant and appropriate standards, and employ sound and objective assessment practices.

While I am confident that the Land Recycling Act will go a very long way, we in Congress have a larger task in hand, improving the Superfund program in a way that is protective of human health and the environment, reduces litigation, unfairness, and waste, and removes the Federal barriers to toxic waste cleanup. The Land Recycling Act of 1999 is only a piece of the puzzle.

Once again, Mr. Chairman, I thank you for holding this hearing, and I look forward to continuing to working in a bipartisan committee on the issue, and, Mr. Towns, you and I keep saying that we want to work this out together. When we get our staff to come to the same level of agreement that you and I have agreed to, I think we will get this done.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from New Jersey, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman.

We are here again of course with many of the same witnesses and members as at prior Superfund, and I just want to say that my attitude about Superfund remains the same. I think the Superfund program is now one of our most successful environmental programs, particularly as a result of the efforts of the Clinton administration, and therefore I believe we should not be making substantial changes at this time that could interfere with the progress that is well under way. That is why 175 members have signed on to Mr. Towns' bill, H.R. 1705, the Brownfields bill, and I want to mention also Diana DeGette's involvement in efforts on that, and that bill addresses a combined set of issues that would facilitate environmental cleanup and industrial development and that enjoys widespread support here in the House.

However, if we are to make any changes to the Superfund law, we must strengthen the program, not roll back years of progress, and that is why just a few moments ago some of my colleagues and myself held a press conference outside the room to announce the impending introduction of the Children's Protection and Community Cleanup Act of 1999, a pro-community Superfund reform measure. Our bill would truly strengthen current law by requiring real cleanups, making polluters pay, ensuring environmental justice, and protecting children's health. If this subcommittee insists on taking up broader Superfund issues, we will insist on measures that uphold the fundamental principles on which the Superfund was based, and that is protection of human health and the environment.

Nearly a fourfold increase has occurred in the number of Superfund sites that have been cleaned up—in other words, where construction has been complete—since 1992, 592 sites, including Federal facilities. A large number of the sites in my home State of New Jersey at which work has been completed may not have been deleted from the NPL only because long-term monitoring is still ongoing or because long-term treatment of groundwater is still under way. But such efforts are critical to protect human health and resources for current and future generations.

Remedial measures undertaken now will help minimize the extent and cost of future remedial actions. Moreover, many State offi-

cials have informed me and other Congress members that the Federal framework with its liability and enforcement mechanisms now provide important incentives for private entities to voluntarily clean up these sites.

Particularly, Mr. Chairman, we have noticed in the aftermath on the east coast of Hurricane Floyd, we are reminded that we must be vigilant in ensuring that Superfund cleanup efforts remain strong. Following the hurricane, officials are confronting floating chemical containers, and we are still waiting for officials to determine whether flood waters that washed over hazardous waste sites carried contamination to nearby land and subsequently into water pathways.

My point is that we can't allow Superfund site cleanup to be held hostage to special interest groups, nor can we permit sham Superfund reform legislation. Families need real cleanups so that sites in their communities can be reused and redeveloped, not simply capped and fenced off.

I wanted to say briefly that the legislation being considered today by this subcommittee is opposed by nearly 60 groups—the Sierra Club, the Environmental Defense Fund, U.S. PIRG—the list goes on. H.R. 1300 claims to be a Brownfields bill, but only 18 pages of the bill's 166 pages fall within the Brownfields title. Moreover, H.R. 1300 would seriously undercut the "polluter pays" principle, increase litigation, slow the pace of current cleanups, and weaken Brownfields provisions.

More specifically, H.R. 1300 would eliminate State maximum contaminant levels, MCL's, for groundwater, that are more stringent than Federal MCL's, and would eliminate State MCL's where no Federal MCL exists when determining the standard for ground water cleanup. The bill would eliminate the ability of the Federal and local governments and citizens to bring enforcement actions after any action has occurred under a State voluntary cleanup program, even in situations that continue to present an imminent and substantial endangerment.

Another important issue which was incorporated in a letter initiated by Congressman Markey, DeGette, and myself to the EPA sought clarification on the preference of treatment of the most toxic or mobile hazardous substances as part of a remedy at Superfund sites. Selection of treatment as part of a remedy has dropped from 70 percent in the early nineties to 32 percent of the sites in 1997.

The Greenwood bill would reduce the options available to local communities for reuse and redevelopment. The preference for treatment found in current law is supported by the EPA, the Association of Metropolitan Water Agencies, and other organizations and community representatives.

And finally, Mr. Chairman, my point is simply that we cannot tolerate these rollbacks. We must support H.R. 1750, the Towns bill, that provides real Brownfields cleanup and community redevelopment provisions. If we are going to continue to discuss the so-called Superfund reforms, we must ensure true protection of children's health, inform communities about exposure to toxic chemicals, encourage their participation in the cleanup process, and make sure polluters pay for cleanups and not the taxpayers.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. So many issues, so little time on this Superfund debate, and most people know I focused on the small business liability. So today I am pleased to see that the committee has extended an invitation to Mr. Mike Nobis of JK Creative Printers in Quincy, Illinois.

For those who have been following this issue in this Congress, Quincy now is a community that is being well known based upon the EPA's involvement with a site there, and I have come to know Mike since the EPA went into Quincy earlier this year and announced that 149 companies in this small town were big polluters.

Mike, thanks for coming to Washington for this hearing. Your testimony is important today, and it is good to see you again. I hope that the EPA will stay around to hear your testimony. I know that your written testimony is inserted in the record, but also hearing the testimony is very important, because by hearing, you really understand the emotive background that the small businesses have had to fight in the Quincy situation.

We will hear from Mike that most if not all the trash that was contributed to the municipal landfill was legally deposited and that the EPA cannot even tell my constituents exactly how much of the trash they deposited was harmful.

But they have done zero to promote that issue. Thank you.

Mr. OXLEY. Thank you.

Mr. SHIMKUS. Mr. Chairman, I think it should be an interesting hearing. I yield back my time.

Mr. OXLEY. The gentleman yields back. The gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much, and I as well am glad—you know, with the end of the baseball season what they are able to do is begin to compare statistics for how this season and the things that happened this season compared with past seasons and with the lifetime statistics as well. I always kind of enjoy that right at the end of the baseball season, so I was trying to figure out if we have had more lifetime hearings on electricity restructuring, Glass-Steagall restructuring, or Superfund restructuring in the committee, and it is tough because we are basically hitting that "sixty barrier" on each one of the areas, but I don't think the Superfund quite matches up to electricity restructuring, unfortunately. It is kind of like the Sammy Sosa of this year, you know?—just a little bit behind.

I want to thank you for taking up the Recycle America's Land Act and without question I am all in favor of recycling including recycling America's land by cleaning up and redeveloping Brownfields sites, but H.R. 1300 merely recycles provisions from old, failed Republican Superfund proposals.

It will leave toxic waste sites contaminated but clean up polluters' regulatory rap sheets with a wide array of expensive liability exemptions and limitations. These measures should be dumped, not recycled. They have no further use.

Let us look at just what would happen if H.R. 1300 became law. Suppose you discover dioxin-laden black sludge in your basement, as at Love Canal. Or you realize your children and your neighbors'

children are dying of cancer, as happened in Woburn—in my district in Massachusetts. You look across to the malodorous cesspool next door and want to get the mess cleaned up and make your children safe, so you go to the EPA, and after the site is surveyed they declare it a Superfund site.

Now you think it is ready for cleanup, but you are wrong. H.R. 1300 reduces incentives for polluters to settle, and for many sites it requires a new and untested allocation process, so while more ooze seeps into your basement, you may have to wait for EPA to issue a cleanup order, or wait for polluters to play "hot potato" over liabilities in the new process.

When financial arrangements are settled, it is finally time to select a remedy, but does this mean that the waste actually will be cleaned up? Despite the preference for treatment in the Superfund law, the percentage of sites using treatment has declined from 70 percent at the beginning of the decade down to 32 percent in 1997. H.R. 1300 would make it easier to avoid treatment even if that would make the groundwater in the neighborhood undrinkable, for relevant and appropriate standards and would no longer apply.

So under H.R. 1300 they may decide just to cap that cesspool and to leave it in place. Well, let us say that against the odds the cesspool next door is cleaned up. Who will pay? Of course, the polluter should, but under H.R. 1300 the polluter is exempt if it is one of the vast majority of businesses that are under the cutoff of 75 employees or $3 million in revenue, even if this small business left a large mess.

The polluter is exempt if it is a used oil generator or transporter even if it is as large as Exxon.

In addition, an owner that bought land it knew was contaminated and would have to be cleaned up, that got a bargain deal because the land was contaminated, is exempted from any responsibility for the cleanup—a nice windfall for owners that may have sat on toxic waste sites for a couple of decades.

Under Superfund when the actual polluter cannot be held liable, other polluters are supposed to pay through a pollution tax, but this tax expired in 1995 and H.R. 1300 does not renew it, so while the polluters are given a tax holiday other taxpayers will be stuck with the bill. In other words, the victims will have to pay for part of the cleanup of that toxic black sludge in their basements.

We need a targeted bill to foster Brownfield cleanups and help truly innocent parties reuse these sites, but H.R. 1300 will delay or prevent cleanups of Brownfields and Superfund sites, let polluters off the hook and stick that hook in the side of taxpayers.

I hope that after hearing about Superfund today that we will return to the subject of a previous hearing and focus our efforts on legislation to clean up Brownfields without making taxpayers pay for the mess Superfund polluters have made.

I thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired. The gentlelady from New Mexico.

Mrs. WILSON. I have no opening statement, Mr. Chairman.

Mr. OXLEY. The gentleman from Ohio, Mr. Gillmor.

Mr. GILLMOR. Thank you very much, Mr. Chairman, and I appreciate you calling this hearing on a subject that has plagued us now

for nearly 20 years, and that is the operation and the ramifications of Superfund, and this is not the first time our panel has sought to take some action to reform the program, and I am hopeful at some point the other end of Pennsylvania Avenue will wake up to the need for real reform in a failed program.

Superfund is the archetypical government program in that it spends too much and it achieves too little. The program was created in 1980 to clean up the worst hazardous waste sites in the country. That is 19 years ago and the record is a program that has (1) failed to achieve its purpose, (2) consumed billions of dollars in the process of that failure, and (3) spent less than half of those billions of dollars to cleaning up the environment, with the rest going for regulatory costs and attorney fees.

Today the plan is to focus on the core Superfund issues of liability, remedy selection, and I believe these are two areas that call out for legislative reform.

For example, I have long been a supporter of repealing retroactive liability and as someone who cares about the environment I think that is a very responsible position. After listening to 8 years of testimony before this panel I have no feeling other than to see this punitive system eliminated.

Our current system is designed to punish the innocent party who followed the law at the time the material was disposed of.

I have introduced a bill in the past to create a standard in which only those entities which caused the release would be held liable. I first introduced that bill, as well as a bill to require that more money be spent on actual cleanup, 2 years ago, and I asked both the U.S. EPA and the Justice Department for their input. I am still waiting.

The administration's approach has basically been to defend the status quo and not to reform a failed program.

In regard to remedy selection, this again is an area where Superfund has failed. Most of us had breakfast this morning. I am a big fan of "Shredded Wheat" and I thought I would bring in a box. From all that I have read and seen, this stuff is supposed to be good for you. Well, you know, a simple reading of the ingredients list on this box shows that if we dumped it on the ground and we dropped a lot of boxes on the ground we could participate in the designation of a Superfund site.

I have long supported science-backed, risk-based criteria for determining what constitutes a danger and which methods ought to be used to clean it. We do not need gold-plated solutions to problems that can be safely solved for much less.

So Mr. Chairman, I again thank you for calling this hearing. I think making Superfund work requires a person to ask two simple questions, do I want to see hazardous waste remediated, and the answer is yes, and the second question is is the current system working, and the answer is clearly no.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired. The gentlelady from Colorado, Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased that we are having this hearing today to talk about the liability and remedy selections of H.R. 1300.

I am concerned that, as we heard from Mr. Markey and others, the provisions fail to adequately address some of the needs in current law. We should find ways to make the Superfund run more efficiently and effectively rather than undercut the things that have made it successful.

For example, by the end of the year 2000 four times as many sites will have finished construction in the 8 years of the Clinton administration as compared to the first 12 years of the program. I am particularly concerned that the bill seeks to capitalize on the success of the Brownfields program by gutting the Superfund in the name of Brownfields legislation.

Brownfields programs are successful in part because they pick up where the Superfund leaves off, and they complement the program. I do not think that it makes sense to gut one program in favor of another one. As I have said in many of these hearings, I don't think we need Superfund legislation, which will be very difficult to pass on a bipartisan basis, to pass successful Brownfields legislation.

We should not gut Superfund to pass Brownfields. I have talked some to Mr. Greenwood and others. I think we can come up with a bipartisan Brownfields bill. Our business communities want it, our citizens want it, and we should do it.

I have got to say I think that we want to encourage the successful aspects of Brownfields that promote cleanup of previously ignored sites like inner city industrial sites, but I do not think that by initiating cleanups we should absolve polluters of all liability. Current liability provisions that target polluters work and fewer Superfund sites have been created since these provisions were enacted.

We should protect the people who want to do the right thing and clean up polluted sites for reuse, like prospective purchasers or innocent land owners, but we also need to ensure, as Mr. Markey said, that polluters will clean up their mess without leaving the taxpayers with the bill.

I don't think H.R. 1300 does enough to strike this balance.

I am also deeply concerned by H.R. 1300's alterations to remedy selection provisions, particularly its attempt to eliminate the relevant and appropriate provisions of CERCLA. The relevant and appropriate definitions have proved useful in avoiding disputes about applicability of solutions and provided standards that ensure that remedies are protective. Relevant and appropriate is by its nature site-specific, a critical component to a successful remedy.

I point to the Shattuck Superfund site in my district as an egregious example of a site where the ARARs were not met. As a result, the remedy has completely failed the community. At Shattuck the constituents contained within the contaminated soils and waste materials were never adequately characterized nor were groundwater ARARs ever attained as required. The entire onsite disposal could be seen as a violation of cleanup laws because of its failure to comply.

Now new reports indicate that even the EPA is beginning to believe that the remedy at Shattuck is inadequate. I am sure there are few people in this room who agree that leaving radioactive waste capped with clay and stone in the middle of a residential

neighborhood in a large metropolitan area was either a relevant or appropriate remedy for the people of the Overland Park community.

The problem is because of that initial failure to follow standards, the cleanup is going to be extra expensive mainly for the taxpayers because now that this stuff has been scraped onto a football field and covered up with some concrete it is now going to have to be moved at a cost maybe twice what the original cost was. That is why we need to get these statutes right the first time, and that is why we need to enforce them adequately.

I hope today's hearing is going to lead to a better understanding of what works for Superfund today and that this committee can work together to ensure that all of these pieces of legislation, not just H.R. 1300, can adequately address the real needs of environmental cleanup standards.

Thank you, Mr. Chairman. Oh, Mr. Chairman, by the way, there is another hearing going on and I know many of our colleagues would like to stay for this important hearing. I, myself, am going to have to leave for this hearing after the questioning and I just want to apologize in advance to the witnesses, because I know this is very important.

Mr. OXLEY. The gentlelady's time has expired.

The Chair would ask unanimous consent that all of the members' opening statements be made part of the record. Without objection, so ordered.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. BILLY TAUZIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. Chairman, I am very pleased that you are holding this hearing today on an issue that many of us have been grappling with for almost a decade. Clearly, Superfund needs to be reformed, and it needs to be reformed now. I am pleased to see that several Superfund initiatives this Congress include legislative language that I have introduced in the past to ensure that certain small businesses are no longer burdened by litigation under Superfund's draconian liability scheme.

Unfortunately, however, both H.R. 1300 and H.R. 2580 fail to address the current inadequacies of the Natural Resource Damage (NRD) program under CERCLA. Failing to address the current inadequacies of the NRD program will, in my opinion, amount to replacing one litigation nightmare with another. Let me explain.

No one, including the business community, opposes expeditious restoration of natural resources. Unfortunately, trustees have been more interested in maximizing damage claims than restoring resources. Trustees have asserted claims for hundreds of millions of dollars and, in a few cases, over a billion dollars based on theories that there was necessarily compensable damage to the "public psyche." These so-called "Non-use" damages are simply unfair to named "Potentially Responsible Parties (PRPs)" in that they impose a degree of liability which, in most cases, exceeds the actual harm done. Mr. Chairman, the result is a program mired in excessive litigation with few if any success stories.

This problem has recently manifested itself in my home state of Louisiana, where concerns over very low levels of pollutants in the Sediments of the Calcasieu River have led to a near paralysis of critical navigation projects, as well as essential environmental restoration efforts to protect the marshes of South Louisiana. Efforts by industry to step up to the plate and do the right thing have been rebuffed in favor of a bureaucratic, litigious approach that will at best leave the Calcasieu River-bed unrestored for a decade or more. This is not the proper approach to the restoration of our critical resources or a way to promote the nation's economic vitality.

We all know that the federal government, particularly the Departments' of Defense and Energy, is liable for more contaminated sites than any private party. An unreformed NRD program therefore also poses a significant threat to the federal treasury and to national security. This threat is already becoming a reality. One state, Mr. Chairman, recently notified the Departments of Defense and Energy that

it intends to file a $260 million NRD claim against them at one site for contaminated groundwater that these Departments are already paying to clean up under Superfund. The total NRD liability could be very large—as much as $20.5 billion for DOE alone according to GAO—and GAO's estimate does not include DOE's largest and most expensive sites.

Given this threat to our nation's environmental and fiscal health I believe that reform of the NRD program, in addition to more general Section 107 reforms, is essential to any meaningful Superfund legislation.

Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you, Mr. Chairman. Let me first commend you for your continued diligence and persistence in continuing our long-standing effort to reform Superfund.

I've said this many times—perhaps one of the hardest tasks in politics is fixing a broken environmental program. The Superfund law is a prime example of such a program. It is unjust, costly, slow, unrealistic, and poses barriers to cleanups all across the Nation. Its liability scheme has created a litigation nightmare which has hurt individuals, small businesses, and communities, and has delayed the cleanup of toxic waste sites. Superfund has created barriers to voluntary cleanups and redevelopment of brownfields across the country. Mr. Chairman, you only have to review the extensive record that your Subcommittee has compiled over the past five years to know that Superfund has been a public policy embarrassment.

I've said this too many times before, but I'll say it once again—it is time to get on with the business of cleaning up America's toxic waste sites. We have bipartisan legislation before the Subcommittee that will go a long way towards making the federal program more fair, effective and efficient, and that eliminates many of the barriers to redevelopment and cleanup.

But unfortunately we are still at odds with the Administration. Where I see a program that takes too long to identify and cleanup hazardous waste sites, the Administration, and some of my colleagues, see a program moving at a satisfactory pace. Where I see waves and waves of unjust litigation, the Administration sees its "polluter pays" principle in action. Where I see needless uncertainty and counterproductive Federal rules, the Administration and the national environmental groups see unprotective State cleanup programs.

The fact is that today there is simply no reason for politics to continue to stand in the way of meaningful Superfund reform. Thanks to the efforts on both sides of the aisle, there is already significant bipartisan support in Congress for Superfund legislation. H.R. 1300, the Recycle America's Land Act of 1999, introduced by our colleague Sherry Boehlert, currently has 60 Democrat and 60 Republican cosponsors. It was reported last month from the Transportation and Infrastructure Committee by a vote of 69-2. H.R. 2580, The Land Recycling Act of 1999, introduced by Mr. Greenwood, also enjoys strong bipartisan support with 9 Democrat and 7 Republican cosponsors. States, local governments, cleanup engineers, dozens of experts, and Republicans and Democrats alike agree on the need for substantial reform.

Today, we will be completing our legislative hearings on these two bills. They contain provisions addressing the major components of the Superfund program, including brownfields, the liability scheme, remedy selection, public participation, and grant programs. These bills represent the product of years of negotiating to achieve a workable compromise. I look forward to hearing from today's witnesses, and to moving forward with legislation to fix this broken program and save countless others from the litigation nightmare that has befallen so many of our constituents.

PREPARED STATEMENT OF ELIOT L. ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

The Superfund has experienced many changes since it was created in 1980. The Congress has modified this important program a number of times and is continuing in that tradition. Superfund is not a perfect program; determining the party responsible for contamination is a slow process, and the actual cleanup of a contaminated site takes even longer. I, too, believe we must continue to streamline the Superfund and make it as efficient as possible, but the proper structure is already in place.

Targeted reforms, as proposed in Congressman Towns' bill, are the appropriate means of refining the Superfund. The unnecessary reforms, before the committee today, change Superfund's basic structure and will diminish its ability to conduct cleanups.

Although off to a slow start through the 1980's, the Superfund has experienced a tremendous increase in the number of construction completions in the last six years. We must continue to move forward with this program, not backwards. Unfortunately, the comprehensive reforms proposed in H.R. 1300 will reverse the progress made over the past 19 years. Many of the sites that would be cleaned under the existing provisions, may be left untouched for many years. H.R. 1300 is a regressive piece of legislation that overreaches and undercuts Superfund's ability to effectively clean up contaminated sites. This committee should be focusing on H.R. 1750, Congressman Towns' legislation, which concentrates on brownfields cleanups.

H.R. 1750, institutes the brownfield assessment grants and revolving loan fund grants programs, which help local governments conduct inventory and make site assessments of brownfields. This legislation also adds liability protection to innocent parties, such as landowners who did not contribute to contamination of the site, as well as prospective purchasers. Targeted reforms will make the Superfund more efficient by providing better assessment and reduce litigation by providing liability protection to innocent parties. These are the types of reforms needed to make the Superfund a more effective program in the future. Therefore, I urge this Committee to focus on the targeted reforms in the Towns bill.

PREPARED STATEMENT OF HON. LOIS CAPPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you Mr. Chairman for holding this important hearing to improve the Superfund program.

During hearings held by the Committee both in March and August, a common theme emerged on brownfields. There appeared to be bipartisan consensus for the Committee to act on targeted legislation on the issue of brownfields. However, unfortunately, the legislation that we are debating today goes further than merely addressing the issue of brownfields, and in some instances threatens important provisions in our nation's Superfund law to protect public health and the environment. As you will hear today, the Administration and environmental groups also share these concerns.

There is no question that the current Superfund program is in need of reform and historically there has been frustration at the pace of Superfund cleanup. Reform is needed to save in the cost and time of cleanup of Superfund sites. There also exists a need in our country to provide important incentives to redevelop brownfield sites, bringing economic revitalization of neighborhoods across the nation. However, this reform should be a targeted one. We have an opportunity to pass consensus legislation in this Committee as long as we keep it focused on brownfields.

I am proud to be a cosponsor of H.R. 1750, the Community Revitalization and Brownfield Cleanup Act of 1999, along with a number of my colleagues here on the Committee and urge other members on the Committee to work together in a bipartisan fashion and move forward with brownfields legislation.

I think it is safe to say that we all share the same goal of cleaning up our nation's waste sites as quickly and cost effectively as possibly. We should pass legislation to provide incentives for prospective redevelopment of Superfund sites, particularly as it relates to brownfields. But let's not weaken our nation's laws to protect public health and the environment in the process.

I look forward to working with my colleagues in the Committee to pass important brownfields legislation.

Mr. OXLEY. The gentleman from Oklahoma, Mr. Largent.

Mr. LARGENT. No.

Mr. OXLEY. The gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. No opening statement.

Mr. OXLEY. We will then turn to our witness, Mr. Tim Fields, Assistant Administrator for the Office of Solid Waste and Emergency Response, from U.S. EPA. Mr. Fields, welcome back and you may begin.

STATEMENTS OF HON. TIMOTHY FIELDS, JR., ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY; ACCOMPANIED BY STEVE HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

Mr. FIELDS. Thank you, Mr. Chairman. I have with me Assistant Administrator Steve Herman from the Office of Enforcement and Compliance Assurance at EPA. We will both make brief opening statements, if you don't mind.

Mr. OXLEY. Without objection.

Mr. FIELDS. Thank you.

We would like also to enter into the record our written statement but we also have letters commenting on the subject before us today from the Department of Justice, the Department of Agriculture, and the Department of Interior. We would like to have these letters into the record as well.

Mr. OXLEY. Without objection, so ordered.

[The letters follow:]

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
August 4, 1999

The Honorable JAMES L. OBERSTAR
Ranking Democratic Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515-6256

DEAR CONGRESSMAN OBERSTAR: In light of the Committee on Transportation and Infrastructure markup scheduled for tomorrow on H.R. 1300, the Recycle America's Land Act of 1999, we would like to provide you with an overview of the concerns of the U.S. Department of Agriculture (USDA) and the U.S. Department of the Interior (DOI) with this bill, as well as with the proposed Amendment in the Nature of a Substitute to be offered by Subcommittee Chairman Sherwood L. Boehlert and Subcommittee Ranking Member Robert A. Borski. We appreciate your efforts to move the Superfund reauthorization process forward. However, the USDA and DOI strongly oppose the bill for the reasons discussed below.

USDA and DOI are seriously concerened by the loss of enforcement authority on Federal lands that would result from H.R. 1300 and the Substitute. In particular, Section 104 limits Federal authority when there is State action; this provision would effectively undermine the Federal Government's ability to manage and set priorities for Federally-managed lands, and restrict the ability of the Federal land-management agencies to respond effectively and efficiently to environmental hazards.

As you may know, decisions about appropriate environmental response activities must be coordinated with the full range of land-management decisions that the Federal land-management agencies are charged with making. It is critical that we have the ability to integrate environmental response with the Agencies' overall mission. Although it certainly makes sense to coordinate our response activities with those of State authorities, the Federal land-management agencies must retain their lead-agency enforcement authority under CERCLA with respect to hazardous releases affecting Federal lands to ensure that appropriate response activities are carried out effectively along with other land-management responsibilities. Given the limited amount of appropriated agency funds that are available to perform environmental response activities on Federal lands, it is essential that the Federal land-management agencies retain enforcement authority under CERCLA in order to induce the responsible parties to either undertake or pay for the site cleanups for which they are responsible. Without adequate enforcement authority we will be unable to maintain the current pace of cleanup on Federal lands, and the "polluter pays" principle will be undermined.

In addition, we strongly oppose Section 301 of the bill and the Substitute, which would prevent an agency from using its delegated authority under Section 106 of CERCLA to address a release or threatened release of hazardous substances at a

site where the agency may be a potentially responsible party (PRP) under CERCLA. The Federal land-management agencies' ability to address serious threats to human health and the environment is enhanced by this authority.

At the same time, there are a number of significant existing safeguards which ensure that the Federal land managers' enforcement authority under CERCLA Section 106 is exercised in a prudent and reasonable manner. In 1998, the Federal land managers entered into a Memorandum of Understanding (MOU) with the Environmental Protection Agency (EPA), the Coast Guard and the Department of Justice. The MOU ensures that the Federal land managers' authority under CERCLA Section 106 may only be used with EPA or Coast Guard concurrence. Federal land managers may not issue unilateral orders to avoid responsibility for their own share of response costs. Where there may be the potential for any claim of this nature, Justice Department concurrence also is required. Section 301 of H.R. 1300 and the Substitute are thus both counterproductive and unnecessary.

Finally, we have significant concerns about several other provisions of this bill and the Substitute, including but not limited to those relating to certain key cleanup requirements and the States' role at Federal facilities. For example, we believe that the provisions significantly expanding the role of States at Federal facilities lack essential safeguards to ensure there would be no disruption of ongoing cleanup activities. This could undermine the ability of agencies to continue to use risk-based prioritization systems for allocating increasingly scarce cleanup funds. In addition, the liability exemptions, as drafted, would undermine the "polluter pays" principle.

For all of the above reasons, we strongly oppose not only H.R. 1300 as currently written but also the Boehlert-Borski Amendment in the Nature of a Substitute.

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

DAN GLICKMAN, *Secretary*
U.S. Department of Agriculture

BRUCE BABBITT, *Secretary,*
U.S. Department of the Interior

cc: The Honorable Sherwood L. Boehlert, *Chairman*
Subcommittee on Water Resources and Environment,
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Robert A. Borski
Ranking Democratic Member
Subcommittee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
August 4, 1999

The Honorable BUD SHUSTER
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515-6256

DEAR MR. CHAIRMAN: In light of the Committee on Transportation and Infrastructure markup scheduled for tomorrow on H.R. 1300, the Recycle America's Land Act of 1999, we would like to provide you with an overview of the concerns of the U.S. Department of Agriculture (USDA) and the U.S. Department of the Interior (DOI) with this bill, as well as with the proposed Amendment in the Nature of a Substitute to be offered by Subcommittee Chairman Sherwood L. Boehlert and Subcommittee Ranking Member Robert A. Borski. We appreciate your efforts to move the Superfund reauthorization process forward. However, the USDA and DOI strongly oppose the bill for the reasons discussed below.

USDA and DOI are seriously concerened by the loss of enforcement authority on Federal lands that would result from H.R. 1300 and the Substitute. In particular, Section 104 limits Federal authority when there is State action; this provision would effectively undermine the Federal Government's ability to manage and set priorities

for Federally-managed lands, and restrict the ability of the Federal land-management agencies to respond effectively and efficiently to environmental hazards.

As you may know, decisions about appropriate environmental response activities must be coordinated with the full range of land-management decisions that the Federal land-management agencies are charged with making. It is critical that we have the ability to integrate environmental response with the Agencies' overall mission. Although it certainly makes sense to coordinate our response activities with those of State authorities, the Federal land-management agencies must retain their lead-agency enforcement authority under CERCLA with respect to hazardous releases affecting Federal lands to ensure that appropriate response activities are carried out effectively along with other land-management responsibilities. Given the limited amount of appropriated agency funds that are available to perform environmental response activities on Federal lands, it is essential that the Federal land-management agencies retain enforcement authority under CERCLA in order to induce the responsible parties to either undertake or pay for the site cleanups for which they are responsible. Without adequate enforcement authority we will be unable to maintain the current pace of cleanup on Federal lands, and the "polluter pays" principle will be undermined.

In addition, we strongly oppose Section 301 of the bill and the Substitute, which would prevent an agency from using its delegated authority under Section 106 of CERCLA to address a release or threatened release of hazardous substances at a site where the agency may be a potentially responsible party (PRP) under CERCLA. The Federal land-management agencies' ability to address serious threats to human health and the environment is enhanced by this authority.

At the same time, there are a number of significant existing safeguards which ensure that the Federal land managers' enforcement authority under CERCLA Section 106 is exercised in a prudent and reasonable manner. In 1998, the Federal land managers entered into a Memorandum of Understanding (MOU) with the Environmental Protection Agency (EPA), the Coast Guard and the Department of Justice. The MOU ensures that the Federal land managers' authority under CERCLA Section 106 may only be used with EPA or Coast Guard concurrence. Federal land managers may not issue unilateral orders to avoid responsibility for their own share of response costs. Where there may be the potential for any claim of this nature, Justice Department concurrence also is required. Section 301 of H.R. 1300 and the Substitute are thus both counterproductive and unnecessary.

Finally, we have significant concerns about several other provisions of this bill and the Substitute, including but not limited to those relating to certain key cleanup requirements and the States' role at Federal facilities. For example, we believe that the provisions significantly expanding the role of States at Federal facilities lack essential safeguards to ensure there would be no disruption of ongoing cleanup activities. This could undermine the ability of agencies to continue to use risk-based prioritization systems for allocating increasingly scarce cleanup funds. In addition, the liability exemptions, as drafted, would undermine the "polluter pays" principle.

For all of the above reasons, we strongly oppose not only H.R. 1300 as currently written but also the Boehlert-Borski Amendment in the Nature of a Substitute.

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

DAN GLICKMAN, *Secretary*
U.S. Department of Agriculture

BRUCE BABBITT, *Secretary,*
U.S. Department of the Interior

cc: The Honorable Sherwood L. Boehlert, *Chairman*
Subcommittee on Water Resources and Environment,
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Robert A. Borski
Ranking Democratic Member
Subcommittee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
September 23, 1999

Honorable EDOLPHOUS TOWNS
Ranking Minority Member
Subcommittee on Finance and Hazardous Materials
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

DEAR CONGRESSMAN TOWNS: This letter is to provide the views of the Department of Justice on H.R. 1300, the "Recycle America's Land Act of 1999," as ordered reported by the Committee on Transportation and Infrastructure on August 5, 1999. The Department of Justice previously expressed strong opposition to H.R. 1300, as introduced, in a letter of May 11, 1999 to the Honorable Sherwood L. Boehlert. Although minor changes were made to the bill subsequent to its introduction, these changes did not address the Department's fundamental concerns with the bill and thus, the Department of Justice remains strongly opposed to H.R. 1300.

We believe the approach in this bill would not improve the federal Superfund program and will only serve to undercut the significant improvements achieved by EPA through its administrative reforms over the past few years. Furthermore, we believe comprehensive reauthorization legislation is not needed and would be counterproductive. Instead, we support a narrow approach that would address brownfields issues and provide targeted liability relief for certain innocent parties. However, even on these more limited issues, H.R. 1300 goes too far.

Below is a brief summary of the major reasons the Department of Justice strongly opposes H.R. 1300. Our comments here address five primary areas: the allocation process, bars on federal enforcement authorities, new liability exemptions and expanded defenses, the impact on litigation, and the shift of major new costs to the Fund. While this letter provides only the main concerns we have identified, we would be happy to share a more detailed analysis with you and your staff.

The New Allocation Process Will Discourage Settlements and Slow Cleanups

Section 310 of H.R. 1300 would add a new section to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") establishing a prescriptive, mandatory allocation process. We believe this new section is not needed, in light of the significant improvements we have made in adopting a more equitable enforcement approach over the past four years. Just one example of this is the expanded use of "orphan share" settlements. Since issuance of EPA's "orphan share" policy in 1996, more than 85 settlement offers have been made that would include a government contribution to the "orphan share," amounting to more than $160 million.

If enacted, H.R. 1300's allocation system will generate litigation, not settlements, pulling lawyers back into the process and miring cleanup in litigation and transaction costs. It will also drag exempt and already-settled parties (including the smallest parties) through the allocation process and greatly increase their transaction costs. Finally, it would slow down or stop ongoing response actions, and could force the federal government to rely primarily on Fund-lead cleanups to avoid disruptions in the remediation process.

Under current law, the United States resolves most of its CERCLA claims through settlement, not litigation. Approximately 70% of all cleanups are performed by potentially responsible parties (PRPs) through such settlements. Under these settlements, PRPs generally agree to perform the cleanup and determine an allocation of cleanup costs among themselves. H.R. 1300's allocation provisions, however, would change the landscape by requiring that an allocator first quantify the PRPs' liability. This will slow the pace of cleanup.

H.R. 1300 also will slow cleanups because it will remove incentives for PRPs to promptly enter into settlements to perform work. We believe a PRP will rarely, if ever, agree to perform the entire cleanup under a settlement when it could wait for an allocation and only be required to perform or pay for its assigned share of cleanup. Even then, a settlement to clean up a site will be difficult, if not impossible, to obtain if even one party refuses to settle, since there is no incentive for any party to pick up another's allocated share. Instead parties will, seek "cash out" settlements for their assigned share of cleanup costs rather than agree to perform the entire cleanup. H. R. 1300 would further discourage settlements by rewarding parties that refuse to settle. The bill would entitle parties that have declined to settle and are performing under a Unilateral Administrative Order (UAO) to full reim-

bursement for costs in excess of their allocated share.[1] Our previous experience in the Superfund program indicates that response actions proceeding under an adversarial UAO approach will not produce quick, high-quality cleanups. Moreover, under H.R. 1300 parties that choose to perform under a UAO preserve the right to challenge EPA's remedy, undercutting the current bar on preenforcement review. As a result, to get complete cleanups done" in a timely manner, the Fund may well have to pay for the entire cleanup in the first instance.

Another way H.R. 1300 would discourage cleanup settlements is by undermining joint and several liability. Despite language apparently intended to avoid this result, PRPs would certainly attempt to convince courts that in light of the new statutory allocation provision, the allocator's report provides a basis for finding that environmental contamination at a site is "divisible" and thus that defendants cannot be held jointly and severally liable. Without the threat of facing joint and several liability if they end up in court, parties would have little incentive to settle prior to an allocation (or perhaps even after the allocator's report is issued).[2]

In addition to undermining settlements, H.R. 1300 penalizes small parties and settlers by dragging them through the allocation process. The bill vests the allocator with authority to determine who qualifies for an exemption as a small business, a recycler, a service station dealer, or a generator or transporter of municipal solid waste (MSW) or municipal sewage sludge (MSS), and leaves these parties "in" the process until the allocator acts. Because these parties' shares must be assumed by the Fund,[3] remaining PRPs have a strong incentive to identify as many additional parties as possible. Even if the small parties are ultimately exempt from liability, these parties will nevertheless be forced to spend substantial time and money hiring lawyers to respond to information requests and subpoenas.

H.R. 1300 Would Restrict the U.S.'s Ability to Respond to Imminent and Substantial Endangerments

We clearly want to encourage well-qualified states to take the lead in getting sites cleaned up and to establish good cleanup programs. At the same time, however, we believe that there is a need to preserve federal authority at sites where states are administering the cleanup program so that we can ensure adequate protection of human health and the environment for everyone in this country. In that respect, Superfund should remain consistent with every other major federal environmental law and preserve federal authority to keep the safety net intact for everyone. This is especially important because every state is different and their cleanup program abilities vary considerably.

We believe the federal enforcement bar in section 104 of this bill fails to protect human health and the environment for a number of reasons. First, the reopeners in section 104 are simply inadequate to protect human health and the environment. Under the bill, the U.S. could only respond where it determines that action is "immediately required to prevent, limit, or mitigate an emergency." Rather than preventing harm to the public or the environment in the first place, as current law would provide, the U.S. would be forced to wait for harm to occur before it could take action. Even then, the U.S. must first determine whether the state intends to respond. Thus, as a practical matter, the U.S. would not be able to take an enforcement action unless there is a state request—even if the State is a PRP or if it ignores a community expressing serious concern. Second, this new "emergency" standard differs from imminent and substantial endangerment, ignoring nearly twenty years of established case law. The bill will bring on a new round of litigation to interpret the new standard and in the process will delay federal intervention, putting public health at risk. Third, section 104 would delay cleanups and waste resources by cutting off federal enforcement authority as soon as "response action" commences. Finally, the enforcement bar is exacerbated by the total absence of criteria

[1] Further, parties who maintain their right to challenge a remedy get only a little less reimbursement than parties who have settled all outstanding claims. § 131(o)(4), p. 129, 9. Again, this places nonsettlers in the drivers' seat and encourages them to continue to litigate.

[2] As both Republican and Democratic Administrations have repeatedly testified, as well as individual states and the National Association of Attorneys General, joint and several liability is critical to getting settlements, to getting cleanups done and to ensuring that the public is made whole. Given a choice for settling for an approximation of a share now and for paying a share after years of allocation and litigation, parties will elect to wait. If joint and several liability is undermined, we will obtain many fewer settlements and many fewer cleanup settlements in the first instance—let alone after allocation. Instead, we will be forced to litigate in many more cases.

[3] Under the bill, however, an allocator would not attribute any response costs to include homeowners, certain small businesses, and small non-profits who disposed only MSW/MSS; *see* § 131(j).

for EPA to evaluate and approve state response programs, including any requirement for meaningful public involvement in the process. Overall, the bill radically departs from the usual mechanisms for establishing federal/state partnerships under all other federal environmental laws.

New Liability Exemptions and Expanded Defenses Are Over Broad

H.R. 1300 contains a number of new exemptions and defenses from CERCLA liability. While we support some narrow, targeted liability relief, the bill would provide exemptions that are far too broad. Several of the more troubling provisions are discussed below.

For example, section 303 of the bill would create a new defense to liability for certain current owners or operators, even those that bought with knowledge of the contamination at a substantially reduced purchase price to account for this. Such relief would undermine longstanding principles of common law which recognize that owners often are in the best position to address hazards on their property, even if not created by them. Minor changes made in H.R. 1300's owner/operator provision that address development, redevelopment, or expansion at property that an owner bought after 1980 with knowledge that it was contaminated do little to relieve this problem.

In addition, the bill would grant an exemption to a larger group of small businesses, which could include businesses that contributed large amounts of highly toxic wastes. The only ability to restrict this exemption is for the U.S. to prove that the small business contributes or contributed significantly to the cost of the cleanup. Given the complexities found at many sites, it will be difficult for the U.S. to satisfy this standard with certainly. Even where possible, this provision will, at a minimum, lead to extensive litigation and transactions costs.

Furthermore, the municipal solid waste (MSW) exemption is not consistent with EPA's recently issued MSW settlement policy and would provide inappropriate relief to large waste generators and commercial haulers. Among other things, it would exempt from liability all past contributors of MSW or MSS to a landfill. The only exception would be for large commercial waste haulers transporting material containing hazardous substances that contributes significantly to overall response costs, whose costs would be arbitrarily capped at 10% of response costs. Post enactment, the liability of all persons who arranged for the disposal or transportation of MSW or MSS, even large commercial haulers, is capped at an aggregate 10% of response costs.

Finally, we have concerns with the reach of the bill's recycling provision. Among other things, it extends coverage to generators and transporters of used oil and byproducts of copper productions, and would shift the share of cleanup up costs attributable to exempt recycling parties to the Fund.

H.R. 1300 Would Result in a Significant Increase in Litigation

We have worked hard over the past few years to reduce the amount of litigation associated with the Superfund program. We have implemented a more equitable enforcement program and emphasized settlements instead of lawsuits. It is disappointing, therefore, to see a Superfund reauthorization bill that would put the lawyers back into the forefront by creating numerous new standards and terms that will guarantee extensive new litigation.

The bill introduces many new terms and concepts—from affirmative defenses to exemptions, from changes to remedy selection provisions to risk assessments provisions—and will invite a new round of expensive litigation over what is meant by all of them. In addition, the bill's changes to existing remedy selection provisions in CERCLA will require revisions to the National Contingency Plan (NCP). The last round of NCP revisions resulted in extensive litigation. During the revision process and litigation, uncertainty over the ultimate outcome of cleanup requirements will further chill settlements with private parties, as it did during the last round of revisions after the 1986 Superfund amendments. Furthermore, nothing in the bill would make the changes prospective only in application. Private parties (especially those covered by the new allocation process) will be free to seek to re-open already-signed RODs or modify not-yet-signed RODs, and will be free to challenge the remedies selected in those RODs. The bill would create new terms and criteria for making remedy selection decisions, all of which would require judicial interpretation.

Each of these changes (and many more I have not described in this letter) would invite litigation over how the new law should be interpreted. This process would substantially increase transaction costs as courts would be asked to revise eighteen years of established case law in response to significant changes to the current law. I fail to see the value in this approach, especially where we have strived to reduce

litigation and where we have seen such dramatic improvements in the cleanup program over the past few years.

The Bill Would Shift Major New Costs to the Fund

Congress has failed to reinstate the Superfund tax authority which expired on December 31, 1995. Since that date, industry has benefitted from a windfall of approximately $4 million a day in unpaid taxes.

At the same time, H.R. 1300 shifts major new costs to the Fund. Under the new allocation scheme, the Fund must assume the costs of all of the following: insolvent and defunct parties, newly exempt parties (including small businesses, most MSW/MSS generators and transporters, service station dealers, and recyclers), the differential between what ability-to-pay parties are assigned and actually pay, as well as the differential between what MSW/MSS parties pay and their actual share of liability. In addition, the Trust Fund would assume a pro rata share of responsibility, with site PRPs, for materials for which no responsibility can be attributed.

In summary, we believe H.R. 1300 would not result in improvements to the federal Superfund program. To the contrary, the bill would increase litigation, slow down cleanups, and disrupt the progress we have made through administrative reforms. I hope our analysis of this bill is helpful, and would be pleased to discuss our concerns with you further.

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

JON P. JENNINGS
Acting Assistant Attorney General

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
September 23, 1999

Honorable MICHAEL G. OXLEY
Chairman
Subcommittee on Finance and Hazardous Materials
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

DEAR MR. CHAIRMAN: This letter is to provide the views of the Department of Justice on H.R. 1300, the "Recycle America's Land Act of 1999," as ordered reported by the Committee on Transportation and Infrastructure on August 5, 1999. The Department of Justice previously expressed strong opposition to H.R. 1300, as introduced, in a letter of May 11, 1999 to the Honorable Sherwood L. Boehlert. Although minor changes were made to the bill subsequent to its introduction, these changes did not address the Department's fundamental concerns with the bill and thus, the Department of Justice remains strongly opposed to H.R. 1300.

We believe the approach in this bill would not improve the federal Superfund program and will only serve to undercut the significant improvements achieved by EPA through its administrative reforms over the past few years. Furthermore, we believe comprehensive reauthorization legislation is not needed and would be counterproductive. Instead, we support a narrow approach that would address brownfields issues and provide targeted liability relief for certain innocent parties. However, even on these more limited issues, H.R. 1300 goes too far.

Below is a brief summary of the major reasons the Department of Justice strongly opposes H.R. 1300. Our comments here address five primary areas: the allocation process, bars on federal enforcement authorities, new liability exemptions and expanded defenses, the impact on litigation, and the shift of major new costs to the Fund. While this letter provides only the main concerns we have identified, we would be happy to share a more detailed analysis with you and your staff.

The New Allocation Process Will Discourage Settlements and Slow Cleanups

Section 310 of H.R. 1300 would add a new section to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") establishing a prescriptive, mandatory allocation process. We believe this new section is not needed, in light of the significant improvements we have made in adopting a more equitable enforcement approach over the past four years. Just one example of this is the expanded use of "orphan share" settlements. Since issuance of EPA's "orphan share" policy in 1996, more than 85 settlement offers have been made that

would include a government contribution to the "orphan share," amounting to more than $160 million.

If enacted, H.R. 1300's allocation system will generate litigation, not settlements, pulling lawyers back into the process and miring cleanup in litigation and transaction costs. It will also drag exempt and already-settled parties (including the smallest parties) through the allocation process and greatly increase their transaction costs. Finally, it would slow down or stop ongoing response actions, and could force the federal government to rely primarily on Fund-lead cleanups to avoid disruptions in the remediation process.

Under current law, the United States resolves most of its CERCLA claims through settlement, not litigation. Approximately 70% of all cleanups are performed by potentially responsible parties (PRPs) through such settlements. Under these settlements, PRPs generally agree to perform the cleanup and determine an allocation of cleanup costs among themselves. H.R. 1300's allocation provisions, however, would change the landscape by requiring that an allocator first quantify the PRPs' liability. This will slow the pace of cleanup.

H.R. 1300 also will slow cleanups because it will remove incentives for PRPs to promptly enter into settlements to perform work. We believe a PRP will rarely, if ever, agree to perform the entire cleanup under a settlement when it could wait for an allocation and only be required to perform or pay for its assigned share of cleanup. Even then, a settlement to clean up a site will be difficult, if not impossible, to obtain if even one party refuses to settle, since there is no incentive for any party to pick up another's allocated share. Instead parties will, seek "cash out" settlements for their assigned share of cleanup costs rather than agree to perform the entire cleanup. H. R. 1300 would further discourage settlements by rewarding parties that refuse to settle. The bill would entitle parties that have declined to settle and are performing under a Unilateral Administrative Order (UAO) to full reimbursement for costs in excess of their allocated share.[1] Our previous experience in the Superfund program indicates that response actions proceeding under an adversarial UAO approach will not produce quick, high-quality cleanups. Moreover, under H.R. 1300 parties that choose to perform under a UAO preserve the right to challenge EPA's remedy, undercutting the current bar on preenforcement review. As a result, to get complete cleanups done" in a timely manner, the Fund may well have to pay for the entire cleanup in the first instance.

Another way H.R. 1300 would discourage cleanup settlements is by undermining joint and several liability. Despite language apparently intended to avoid this result, PRPs would certainly attempt to convince courts that in light of the new statutory allocation provision, the allocator's report provides a basis for finding that environmental contamination at a site is "divisible" and thus that defendants cannot be held jointly and severally liable. Without the threat of facing joint and several liability if they end up in court, parties would have little incentive to settle prior to an allocation (or perhaps even after the allocator's report is issued).[2]

In addition to undermining settlements, H.R. 1300 penalizes small parties and settlers by dragging them through the allocation process. The bill vests the allocator with authority to determine who qualifies for an exemption as a small business, a recycler, a service station dealer, or a generator or transporter of municipal solid waste (MSW) or municipal sewage sludge (MSS), and leaves these parties "in" the process until the allocator acts. Because these parties' shares must be assumed by the Fund,[3] remaining PRPs have a strong incentive to identify as many additional parties as possible. Even if the small parties are ultimately exempt from liability, these parties will nevertheless be forced to spend substantial time and money hiring lawyers to respond to information requests and subpoenas.

---

[1] Further, parties who maintain their right to challenge a remedy get only a little less reimbursement than parties who have settled all outstanding claims. § 131(o)(4), p. 129, 9. Again, this places nonsettlers in the drivers' seat and encourages them to continue to litigate.

[2] As both Republican and Democratic Administrations have repeatedly testified, as well as individual states and the National Association of Attorneys General, joint and several liability is critical to getting settlements, to getting cleanups done and to ensuring that the public is made whole. Given a choice for settling for an approximation of a share now and for paying a share after years of allocation and litigation, parties will elect to wait. If joint and several liability is undermined, we will obtain many fewer settlements and many fewer cleanup settlements in the first instance—let alone after allocation. Instead, we will be forced to litigate in many more cases.

[3] Under the bill, however, an allocator would not attribute any response costs to include homeowners, certain small businesses, and small non-profits who disposed only MSW/MSS; *see* § 131(j).

H.R. 1300 Would Restrict the U.S.'s Ability to Respond to Imminent and Substantial Endangerments

We clearly want to encourage well-qualified states to take the lead in getting sites cleaned up and to establish good cleanup programs. At the same time, however, we believe that there is a need to preserve federal authority at sites where states are administering the cleanup program so that we can ensure adequate protection of human health and the environment for everyone in this country. In that respect, Superfund should remain consistent with every other major federal environmental law and preserve federal authority to keep the safety net intact for everyone. This is especially important because every state is different and their cleanup program abilities vary considerably.

We believe the federal enforcement bar in section 104 of this bill fails to protect human health and the environment for a number of reasons. First, the reopeners in section 104 are simply inadequate to protect human health and the environment. Under the bill, the U.S. could only respond where it determines that action is "immediately required to prevent, limit, or mitigate an emergency." Rather than preventing harm to the public or the environment in the first place, as current law would provide, the U.S. would be forced to wait for harm to occur before it could take action. Even then, the U.S. must first determine whether the state intends to respond. Thus, as a practical matter, the U.S. would not be able to take an enforcement action unless there is a state request—even if the State is a PRP or if it ignores a community expressing serious concern. Second, this new "emergency" standard differs from imminent and substantial endangerment, ignoring nearly twenty years of established case law. The bill will bring on a new round of litigation to interpret the new standard and in the process will delay federal intervention, putting public health at risk. Third, section 104 would delay cleanups and waste resources by cutting off federal enforcement authority as soon as "response action" commences. Finally, the enforcement bar is exacerbated by the total absence of criteria for EPA to evaluate and approve state response programs, including any requirement for meaningful public involvement in the process. Overall, the bill radically departs from the usual mechanisms for establishing federal/state partnerships under all other federal environmental laws.

New Liability Exemptions and Expanded Defenses Are Over Broad

H.R. 1300 contains a number of new exemptions and defenses from CERCLA liability. While we support some narrow, targeted liability relief, the bill would provide exemptions that are far too broad. Several of the more troubling provisions are discussed below.

For example, section 303 of the bill would create a new defense to liability for certain current owners or operators, even those that bought with knowledge of the contamination at a substantially reduced purchase price to account for this. Such relief would undermine longstanding principles of common law which recognize that owners often are in the best position to address hazards on their property, even if not created by them. Minor changes made in H.R. 1300's owner/operator provision that address development, redevelopment, or expansion at property that an owner bought after 1980 with knowledge that it was contaminated do little to relieve this problem.

In addition, the bill would grant an exemption to a larger group of small businesses, which could include businesses that contributed large amounts of highly toxic wastes. The only ability to restrict this exemption is for the U.S. to prove that the small business contributes or contributed significantly to the cost of the cleanup. Given the complexities found at many sites, it will be difficult for the U.S. to satisfy this standard with certainly. Even where possible, this provision will, at a minimum, lead to extensive litigation and transactions costs.

Furthermore, the municipal solid waste (MSW) exemption is not consistent with EPA's recently issued MSW settlement policy and would provide inappropriate relief to large waste generators and commercial haulers. Among other things, it would exempt from liability all past contributors of MSW or MSS to a landfill. The only exception would be for large commercial waste haulers transporting material containing hazardous substances that contributes significantly to overall response costs, whose costs would be arbitrarily capped at 10% of response costs. Post enactment, the liability of all persons who arranged for the disposal or transportation of MSW or MSS, even large commercial haulers, is capped at an aggregate 10% of response costs.

Finally, we have concerns with the reach of the bill's recycling provision. Among other things, it extends coverage to generators and transporters of used oil and byproducts of copper productions, and would shift the share of cleanup up costs attributable to exempt recycling parties to the Fund.

H.R. 1300 Would Result in a Significant Increase in Litigation

We have worked hard over the past few years to reduce the amount of litigation associated with the Superfund program. We have implemented a more equitable enforcement program and emphasized settlements instead of lawsuits. It is disappointing, therefore, to see a Superfund reauthorization bill that would put the lawyers back into the forefront by creating numerous new standards and terms that will guarantee extensive new litigation.

The bill introduces many new terms and concepts—from affirmative defenses to exemptions, from changes to remedy selection provisions to risk assessments provisions—and will invite a new round of expensive litigation over what is meant by all of them. In addition, the bill's changes to existing remedy selection provisions in CERCLA will require revisions to the National Contingency Plan (NCP). The last round of NCP revisions resulted in extensive litigation. During the revision process and litigation, uncertainty over the ultimate outcome of cleanup requirements will further chill settlements with private parties, as it did during the last round of revisions after the 1986 Superfund amendments. Furthermore, nothing in the bill would make the changes prospective only in application. Private parties (especially those covered by the new allocation process) will be free to seek to re-open already-signed RODs or modify not-yet-signed RODs, and will be free to challenge the remedies selected in those RODs. The bill would create new terms and criteria for making remedy selection decisions, all of which would require judicial interpretation.

Each of these changes (and many more I have not described in this letter) would invite litigation over how the new law should be interpreted. This process would substantially increase transaction costs as courts would be asked to revise eighteen years of established case law in response to significant changes to the current law. I fail to see the value in this approach, especially where we have strived to reduce litigation and where we have seen such dramatic improvements in the cleanup program over the past few years.

The Bill Would Shift Major New Costs to the Fund

Congress has failed to reinstate the Superfund tax authority which expired on December 31, 1995. Since that date, industry has benefitted from a windfall of approximately $4 million a day in unpaid taxes.

At the same time, H.R. 1300 shifts major new costs to the Fund. Under the new allocation scheme, the Fund must assume the costs of all of the following: insolvent and defunct parties, newly exempt parties (including small businesses, most MSW/MSS generators and transporters, service station dealers, and recyclers), the differential between what ability-to-pay parties are assigned and actually pay, as well as the differential between what MSW/MSS parties pay and their actual share of liability. In addition, the Trust Fund would assume a pro rata share of responsibility, with site PRPs, for materials for which no responsibility can be attributed.

In summary, we believe H.R. 1300 would not result in improvements to the federal Superfund program. To the contrary, the bill would increase litigation, slow down cleanups, and disrupt the progress we have made through administrative reforms. I hope our analysis of this bill is helpful, and would be pleased to discuss our concerns with you further.

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

JON P. JENNINGS
Acting Assistant Attorney General

Mr. FIELDS. Thank you very much.

Mr. Chairman and members of the subcommittee, we thank you so much for being here. It is a pleasure again to be here at another Superfund hearing. We are pleased to have the opportunity to be here with you to discuss the current progress of the Superfund program and to give the administration's views on H.R. 1300, H.R. 2580 as well as Congressman Shimkus's bill. We would be happy to discuss these small business elements at well of his bill, a plan to discuss remedy and several other provisions, and Assistant Administrator Herman will discuss liability and allocation issues.

We believe, Mr. Chairman and members of the subcommittee, that Superfund is a fundamentally different program after three rounds of administrative reforms to that program. Since 1996 we

have increased the pace of cleanup to 85 construction completions per year, as compared to 65 sites a year more than 3 years ago. Today Superfund has 629 sites where construction is complete, another 459 sites where construction is underway, 214 sites where removal construction has occurred, so therefore more than 90 percent of the current Superfund sites have cleanup construction completed or underway. Both the time and cost has been reduced by 20 percent.

So given the significant progress that is going on in cleaning up toxic waste sites, the last thing we need is legislation that would undermine our current cleanup progress. I am convinced that comprehensive Superfund legislative reform like the bills before us today, even if well-intentioned, would halt or delay the cleanup progress we see in the program today.

That result is simply unacceptable to the Clinton administration and would be a disservice to the American people who live around these toxic waste sites.

The remedy provisions in H.R. 1300 and H.R. 2580 would undermine the current level of human health and environmental protection in the Superfund program. I am sure that is not the intent of the subcommittee members, however I am afraid that that would be the result. Both bills would replace the current cleanup goal to restore contaminated groundwater to beneficial uses with a lower standard. Both bills would eliminate the current statutory need for Superfund cleanups to meet Federal and State relevant and appropriate regulatory requirements. These requirements often result in a cleanup remedy that is tailored to the particular conditions at a site, thereby adding an additional level of protection.

The Clinton administration also opposes provisions that limit the authority of EPA to list toxic waste sites on the Superfund National Priorities List. H.R. 2580 prevents the EPA from listing toxic waste sites on the NPL without a Governor's concurrence even when the State is a liable party, even when toxic waste has crossed State lines or even when toxic waste has contaminated tribal lands.

EPA currently works well with States when proposing sites for the listing on the NPL. Statutory NPL limitations are unnecessary and could weaken protection of human health and the environment.

I would refer the members to EPA's written statement for a more detailed discussion of the impacts of the remedy selection, the listing, and other elements of our program.

I would now refer the remainder of our testimony to Assistant Administrator Herman.

Mr. HERMAN. Thank you. Good morning, Mr. Chairman and members of the committee. I am pleased to appear here today to identify some of the concerns that the administration has with the liability and allocation provisions of H.R. 1300 and the liability provisions of H.R. 2247.

The Superfund liability system is the engine that drives 70 percent of Superfund long-term cleanups. EPA has continued its use of an enforcement first strategy in securing commitments from responsible parties for the cleanup of Superfund toxic waste sites. Through fiscal year 1998 responsible parties have committed more than $15.5 billion to clean up response and cost recovery. That is

$15.5 billion that did not have to be collected from the taxpayers or appropriated by Congress.

While EPA and the Justice Department continue to secure cleanup funding from responsible parties, we do not ignore the effect Superfund liability may have on small parties. The agency has aggressively sought to promote fairness in the liability system by reaching settlements with more than 18,000 small volume waste contributors, more than 65 percent of these settlements occurring in the last 4 years.

To date we have also offered more than $170 million in Orphan Share Compensation by forgiving past costs and oversight costs at more than 90 Superfund sites. The President's fiscal year 2000 budget request asks for $200 million for Orphan Share funding at Superfund sites and the administration supports the enactment of legislation that would authorize EPA to use those dedicated funds without reducing the pace of cleanups.

Turning to liability and allocation issues, the administration continues to have very serious concerns with provisions in H.R. 1300 and the small business exemption in H.R. 2247. Some of the liability exemptions would do more harm than good. The so-called Innocent Landowner Exemption in H.R. 1300 is both misnamed and bad policy in that it effectively repeals Superfund liability by exempting owners of contaminated property who purchased the property knowing it was contaminated. EPA's written statement goes into much greater detail about our specific concerns with liability exemptions in the bills.

The administration also has serious concerns with the allocation provisions in H.R. 1300. These provisions would undermine the Superfund settlement process, a process that as I said has generated billions of dollars in cleanup funding. EPA's experience with allocation pilots has given us on-the-ground experience and has taught us that a prescriptive, mandatory allocation process does not promote timely settlements and may encourage recalcitrant parties to delay performing cleanup work while waiting for an allocation.

Parties will inevitably dispute their fair share of cleanup costs, requiring EPA to issue many more cleanup orders to maintain the current pace of cleanup. Issuing cleanup orders is a far more adversarial process than reaching settlements and will undoubtedly lead to an increase in litigation and transaction costs, the very result the administration and the Congress has sought to avoid. It will particularly be harmful to the small parties whom we are trying to exclude from this process.

Finally, I want to stress that the administration does support responsible legislative provisions on Superfund liability. We support vigorous Brownfields development through provisions directed toward prospective purchasers, legitimately innocent landowners and contiguous property owners. We also support a liability exemptions for small businesses that generated and transported trash and small amounts of hazardous waste. The targeted provisions that the administration supports have generated consistent bipartisan support and have appeared in one form or another in Superfund legislation for the past three Congresses.

The provisions the administration supports build upon the success of EPA's administrative reforms without delaying cleanups and without unfairly shifting cleanup costs to Federal, State or local governments or the taxpayers. The targeted, focused provisions we support could garner bipartisan support quickly.

In closing, Mr. Chairman, the administration stands ready to work with Congress to enact responsible Brownfield and Superfund legislation that builds upon the administrative reforms, recognizes the current status of the program and does not undermine the current cleanup progress. Unfortunately, as currently written, the administration must strongly oppose H.R. 1300, 2580, and 2247.

Thank you, Mr. Chairman. Assistant Administrator Fields and I will be happy to answer any of your questions.

[The prepared statement of Timothy Fields, Jr. and Steven A. Herman follows:]

PREPARED STATEMENT OF HON. TIMOTHY FIELDS, JR., ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, AND STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good morning, Mr. Chairman, and Members of the Committee. We are pleased to have this opportunity to appear before you today to discuss H.R. 1300, the "Recycle America's Land Act of 1999," as well as the Agency's record of accomplishments over the past several years in fundamentally improving the Superfund program. The Superfund program plays a key role in the Administration's goal of building strong and healthy communities for the 21st Century.

SUPERFUND PROGRESS

The Superfund program continues to make significant progress in cleaning up hazardous waste sites and protecting public health and the environment. EPA has significantly changed how the Superfund program operates through three rounds of administrative reforms which have made Superfund a fairer, more effective, and more efficient program. As of September, 1999, 90% of the sites on the final NPL are either undergoing cleanup construction (remedial or removal) or are completed:

- **623** Superfund sites have reached construction completion.
- **459** Superfund sites have cleanup construction underway;
- An additional **214** sites have had or are undergoing a removal cleanup action.

Nearly 31,000 sites have been removed from the Superfund inventory of potentially hazardous waste sites to help promote the economic redevelopment of these properties.

EPA's "Enforcement First" strategy has resulted in responsible parties performing or paying for approximately 70% of long-term cleanups, thereby conserving the Superfund Trust Fund for sites for which there are no viable or liable responsible parties. This approach has saved taxpayers more than $15.5 billion to date—more than $13 billion in response settlements, and nearly $2.5 billion in cost recovery settlements.

Through the commitment of EPA, State, and Tribal site managers, other Federal agencies, private sector representatives, and involved communities, EPA has made Superfund faster, fairer, and more efficient through three rounds of administrative reforms. Several years of stakeholder response indicates that EPA's Superfund Reforms have already addressed the primary areas of the program that they believe needed improvement. EPA remains committed to fully implementing the administrative reforms and refining or improving them where necessary.

REAUTHORIZATION

As stated on March 23, 1999 in testimony before this committee, the success of EPA's administrative reforms and the resulting improvements in the Superfund program have fundamentally altered the need for Superfund reauthorization legislation. Many of the provisions in the bills under discussion today are designed to fix problems that have been addressed through the Superfund Administrative Reforms.

As the result of the progress made in cleaning up Superfund sites in recent years, and the program improvements resulting from administrative reforms, there is no longer a need for comprehensive legislation. Comprehensive legislation could actually delay clean ups, create uncertainty and litigation, and undermine the current progress of the program. As a result, the Clinton Administration believes only provisions that provide narrow, targeted liability relief for qualified parties that builds upon the current success of the Superfund program are appropriate. Let me reiterate the provisions the Clinton Administration would support. In addition to legislation to reinstate the Superfund taxes, and provide EPA with access to mandatory spending for orphan shares, Superfund reauthorizing legislation should be limited to provisions dealing with:

- prospective purchasers of contaminated property
- innocent landowners
- contiguous property owners, and
- the liability of small parties

HR 1300, HR 2580, AND HR 2247 WEAKEN THE CURRENT PROGRAM

The Administration has reviewed H.R. 1300—the "Recycle America's Land Act" as reported out of the House Transportation and Infrastructure Committee, H.R.2580—the "Land Recycling Act of 1999," and H.R. 2247—the "Small Business Superfund Fairness Act." Each of these bills would undermine the current progress being achieved in the Superfund program. As a result, the Clinton Administration is opposed to these bills. After several years of administrative reforms, Superfund has been fundamentally improved. Overhauling Superfund at this stage of the program with a significantly changed statute will erode many of the improvements we have achieved. Superfund legislation should be narrowly targeted and build upon the success of Superfund Administrative Reforms. Legislation should focus on provisions that have generated broad Congressional and Superfund stakeholder consensus. Unfortunately, significant provisions in each of these bills lack this consensus. By contrast, the Administration strongly supports H.R. 1750, the Community Revitalization and Brownfields Cleanup Act of 1999.

CLEANUPS LESS PROTECTIVE

Superfund cleanups must be protective of human health and the environment over the long term. Unfortunately, a number of provisions in H.R. 1300 and H.R. 2580 weaken current law and could result in a Superfund program that would not adequately protect human health and the environment.

H.R. 2580's remedy title weakens current law and could result in a Superfund program that would not adequately protect human health and the environment. Under the current statute remedies are required to "utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." Under H.R. 2580, the word "maximum" is stricken. This change effectively eliminates the importance of selecting permanent remedies and permanent protection for communities. Also, under H.R. 2580, the preference for treatment does not apply to treatment remedial alternatives "that would increase risk to community or to worker's health". Under the current law, protection of community and workers is already addressed under : (1) the National Contingency Plan (NCP) remedy selection criteria of protection of human health and the environment, and short-term effectiveness, (2) the ARAR waiver of greater risk to human health and the environment, and (3) worker protection standards. This imposition of a separate test for treatment remedies may weaken long term protection of remedies by reducing treatment, inviting additional litigation, and delaying cleanups.

RELEVANT AND APPROPRIATE REQUIREMENTS

The provisions in H.R. 1300 and H.R. 2580 that eliminate the current statutory requirement to attain or waive Relevant and Appropriate requirements (RARs) represents an attempt to address a problem that does not exist. Dated Superfund reform legislation eliminated RARs in conjunction with States having the option of repromulgating State RARs as Applicable standards. Superfund Administrative reforms and further Agency and State experience selecting cleanup remedies have eliminated the need for legislative changes to remedy provisions in current law. Further, the use of RARs often result in remedies tailored to site specific conditions, providing an additional tool to ensure protection of human health and the environment.

GROUNDWATER NOT PROTECTED

Contaminated ground water is a problem at more than 85 percent of Superfund sites. With roughly fifty percent of the U.S. population relying on ground water for their drinking water, the Administration strongly believes that this critical resource must be protected. The citizens of this nation want and deserve a safe and reliable supply of water for drinking and household use, industry and agriculture, recreation, and many other beneficial uses, and to know that they will continue to have such a supply available for future generations.

For example, H.R. 1300 and H.R. 2580 replace the current Superfund program goal to restore contaminated ground water to beneficial uses, wherever practicable, with a much lower standard. Both HR. 1300 and HR 2580 protect groundwater only for its "reasonably anticipated use", rather than its "current or potential beneficial use." Reliance on this land use concept may create a perception of a bias against protecting uncontaminated ground water. Furthermore, under H.R. 2580 there is no requirement to clean up ground water to beneficial use. Remedies selected under H.R. 2580 would not keep contaminated ground water from spreading to uncontaminated ground water. By including the term "reasonable point of compliance," the bill invites disputes over whether drinking water standards should be met in the groundwater or at the tap—potentially delaying cleanup and leaving valuable groundwater resources unprotected. Superfund legislation should not weaken the goal of restoring ground water to beneficial uses, wherever practicable.

Under the current program, EPA is using "smart" ground water remediation to provide appropriate levels of protection at lower cost. In the early days of the program, we relied almost solely on extraction and treatment of ground water to achieve cleanup objectives. In 1995, 60% of our ground water cleanup decisions reflect extraction and treatment being used in conjunction with other techniques, such as bioremediation, underground treatment walls, or monitored natural attenuation, which is often used to reduce low levels of contaminants. In 1995, about 25% of Superfund ground water remedies included monitored natural attenuation of contamination.

CLEANUPS MAY BE DELAYED

Under both H.R. 1300 and H.R. 2580 new and confusing provisions and terminology regarding ground water, and risk assessment will delay cleanups and generate costly new litigation. For example, new risk assessment terms and requirements may require EPA, States, and contractors to change the way a Superfund cleanup remedy is chosen. New risk provisions requiring consideration of information, regardless of reliability, quality, or whether the information is representative of site conditions, is unnecessary and will delay remedy selection decisions.

New terminology could also cause time consuming and costly litigation as the meaning and relevance of new terms are fought over in the courts. For example, defining when data is "reasonably obtainable" or if the scientific and technical information is the "best available" would be debated and litigated, leading to delayed cleanups.

THE LIABILITY PROVISIONS OF H.R. 1300 AND H.R. 2247 WILL INCREASE LITIGATION AND EXEMPT MANY PARTIES WHO SHOULD PAY FOR CLEANUP

Though changes were made to H.R. 1300 subsequent to its introduction, the bill passed by the Committee on Transportation and Infrastructure remains unacceptable and is strongly opposed by the Administration. The bill would roll back current cleanup progress and undermine the critical "polluter pays principle. EPA, along with the Department of Justice, has already expressed strong concerns regarding the prohibitions on EPA's ability to provide protections to all communities, regardless of the State in which they are located, at the August 4, 1999 hearing before this Committee. Our concerns remain the same on those issues. In addition, the Administration remains concerned about the other liability provisions in the bill.

Specifically, H.R. 1300 still requires mandatory allocations at many sites where they are unwarranted, thus significantly increasing transaction costs. In addition, while H.R. 1300 attempts to address the need for limitations on liability for prospective purchasers, innocent landowners and contiguous property owners, H.R. 1300 goes beyond these reforms needed to foster redevelopment, and includes a number of overly broad liability exemptions which may result in the transfer of responsibility for large cleanups to the Trust Fund. H.R. 2247 also suffers from this problem by promoting an overly broad exemption for moderately sized businesses, even if they sent hazardous waste to a site. As a result, the liability provisions of H.R. 1300

will increase transaction costs and litigation, and H.R. 1300 and H.R. 2247 will exempt many parties who should help pay for the costs of cleanup.

H.R. 1300 WOULD REQUIRE COSTLY TIME CONSUMING ALLOCATIONS, AND REMOVE INCENTIVES FOR SETTLEMENT

Over the past 18 years, we have learned that settlements with responsible parties are the most effective way to achieve timely cleanups. A large measure of the program's progress derives from the fact that over two-thirds of the work is done by responsible parties, most of it through settlements. We want to continue that achievement. The current law provides significant incentives for parties to reach agreement at the negotiating table, and to move quickly to cleanup without resorting to adversarial, unilateral orders. As described below, we believe H.R. 1300 severely reduces or eliminates these incentives to step forward and agree to perform cleanups voluntarily.

Lessons learned from EPA allocation pilots have shown that prescriptive, mandatory allocations can prevent reaching timely settlements. The Administration believes that the allocation process in H.R. 1300 remains overly burdensome and could discourage settlements, rather than promoting them. In addition, because of the broad nature of eligible response actions, EPA will be forced to expend considerable resources providing allocated "fair share" settlements and reimbursing parties that expended costs above their "fair share," even for actions concluded in prior administrative settlements.

Of greatest concern is the structure of the allocation and settlement processes. Within these processes, the concept of joint and several liability—which has been instrumental in bringing parties together at the negotiating table to conduct cleanups—could be severely weakened. As a result, if just one party decides not to settle, it is unlikely that any settlement will occur, as there is no incentive for any other party to pick up this share. Because parties will be unwilling to settle until they are allocated a "share" pursuant to a time-intensive allocation, EPA's only means of securing a timely cleanup, short of funding the cleanup itself, is to issue parties a cleanup order. This immediately places the Agency in an adversarial relationship with these parties, and has the added detriment of allowing parties to challenge the cleanups—effectively circumventing the current bar on pre-enforcement review. In addition, because parties are allowed under the bill to seek reimbursement for costs expended above their "fair share," even when performing under a CERCLA section 106 cleanup order, parties would be discouraged from cleaning up sites through a settlement. Instead of resolving its outstanding costs up-front, as well as how future problems will be dealt with, EPA will be forced to resolve such disputes as they occur before a judge, and will also be required to file separate legal actions to collect its costs, resulting in both a loss of efficiency, as well as a significant increase in transaction costs and multiple delays in the cleanup process.

H.R. 1300 attempts to address the Administration's concerns over reopening existing Superfund settlements and orders. However, we don't believe the language as written meets this intended purpose. In cases where an allocation may be required and a party has entered into a prior settlement for other response actions at the site, such as prior operable units, those parties may have an opportunity to argue before the allocator that their previous settlements were in excess of their share and request an adjustment in the settlement subject to the allocation based on the prior settlement amount. This revisiting of issues at sites with previous settlements will result in disputes among the same parties arguing over the same previously resolved issues. For example, after years of negotiations over Operable Unit 1 between EPA and 18 PRPs at the York Oil Superfund Site in Franklin County, NY that settled over $20 million in cleanup and past costs, a mandatory allocation for the second Operable Unit, valued at about $4 million, could undermine all of EPA and the parties' efforts to settle this site.

PULLING PARTIES BACK INTO ALLOCATION DISPUTES

In addition to revisiting issues from prior settlements, the requirement to allocate shares for the response action will result in dragging exempt or settled parties back through the allocation process, even if they had previously settled. The intent of the Administration has always been to prevent these parties, such as the over 18,000 de minimis parties that have settled their liability, from being faced with Superfund again. H.R. 1300 reverses that objective. Because the Fund is responsible for the share of exempt parties, as well as insolvent, and defunct parties, H.R. 1300 places a premium on these parties, encouraging other responsible parties subject to the allocation to perform a "witch hunt" to identify such parties in order to reduce their share. Even though such parties may not be liable for the site costs, they will be

forced to expend substantial time and money to hire lawyers to respond to information requests and subpoenas.

OVER BROAD ALLOCATION PROVISIONS UNDERMINE "POLLUTER PAYS" PRINCIPLE

Though H.R. 1300 was revised to limit in some cases the types of sites to which the allocation provisions would apply, it will still require allocations at numerous other sites where an allocation is unwarranted or simply not necessary. For example, while the bill attempts to limit the number of "chain of title" sites where an allocation would be required, it creates a large loophole by bringing back into the process, sites where the current owner is insolvent or defunct, or where the current owner has a defense and the previous owner is insolvent and defunct. At a site such as the Copperhill mining site in Tennessee, an allocation could result in the transfer of a $100+ million cleanup to the Trust Fund if the current owner, Occidental Chemical, successfully claims an innocent owner defense, because the previous owner, Tennessee Chemical Company, is insolvent. Because many current owners would likely be exempt under H.R. 1300, and because many prior owners would likely be insolvent, these provisions would potentially bar very few owner/operator-only sites.

Aside from the fact that issues at most chain-of-title sites are burdened not by questions of hazardous waste contributions, but instead by legal questions of corporate successorship, and thus not particularly suited for a traditional allocation, the requirement for an allocation at owner/operator sites could amount to a windfall for these parties at an enormous cost to the Superfund Trust Fund. At many of these sites, the owner acquired the property at a reduced purchase price to reflect the presence of contamination at the site and with the intent to continue the same or similar operations that gave rise to the contamination. It is consistent with longstanding principles of law and not unfair to hold landowners responsible for the hazardous conditions on their property.

LIABILITY EXEMPTIONS ARE OVER BROAD AND WILL INCREASE COSTS AND LITIGATION

The Administration supports liability reform for small volume contributors and generators and transporters of household municipal solid waste. Such reform should take the form of clearly defined exemptions or limitations on liability to ensure that the transaction costs imposed on these parties is minimized. As amended, however, H.R. 1300 will still be extremely difficult to implement, will generate substantial new litigation and will result in significant transaction costs. Further, many of the liability provisions are over broad, exempting parties that should remain responsible for the cost of cleanup.

OVER BROAD INNOCENT LANDOWNER EXEMPTION

H.R. 1300 continues to provide a liability defense to current owners of contaminated sites if the current owner did not "cause or contribute" to the release, exercised "appropriate care," and depending on when the property was purchased, performed some limited redevelopment. This provision effectively repeals strict, joint and several liability for these parties, and replaces it with a new causation and appropriate care standard. This new standard would be difficult, if not impossible, to determine because of the "toxic soup" of waste that exists at most Superfund sites, thus leading to expensive litigation. In many cases, this provision would exempt experienced and knowledgeable large parties, that acquired hazardous wastes sites with full knowledge of site conditions, as well as full knowledge of their responsibility to clean the sites up. In some cases, these may be the only parties available to conduct cleanups, which will place an enormous drain on the Trust Fund. At sites such as the San Fernando Valley Superfund sites in California, which are contaminated by VOC's from over fifty years of aerospace and defense manufacturing, a significant portion of liability at the site is borne by current owners who purchased contaminated property at depressed prices. If these parties are suddenly relieved from liability, the $220+ million cost of remediation could be passed to the Fund. In addition, relieving these parties of their liability places other similarly situated property owners that fulfilled their obligations under CERCLA by performing a cleanup at a competitive disadvantage. Instead of promoting redevelopment, such as through prospective purchaser provisions, these provisions affect only those parties who should be required to conduct a cleanup.

OVER BROAD SMALL BUSINESS EXEMPTIONS IN H.R. 1300 AND H.R. 2247

While the Administration continues to support legislative provisions that address the liability of small parties, the Administration is concerned with the small busi-

ness exemption in H.R. 1300. The exemption in H.R. 1300 is available to a small business that contributed large amounts of highly toxic wastes. In order to hold such a business liable, EPA must show that the waste *contributes or contributed* significantly to the cost of cleanup. This language represents a change from several previous bills, which required only that the President determine that the waste *may* contribute significantly to the cost of cleanup. The absence of the word "may" represents an important shift in the burden of proof. Because of the "toxic soup" of wastes at most sites, it will be difficult, if not impossible, to show that a party's waste *actually* contributes or contributed significantly to the cost of cleanup. As a result, it is unlikely that any business meeting the requirements of H.R. 1300's definition of a small business will be held accountable, even for highly toxic waste. Further, such a standard will result in increased litigation and transaction costs.

While H.R. 2247 retains the same problematic "contribute significantly" language of H.R. 1300, it is particularly troublesome because it omits any restriction on the financial assets of the business claiming the exemption. H.R. 2247 exempts businesses based solely on their number of employees—in this case, 100 or less. Historically, the rationale touted in support of a small business exemption is that it would act as a surrogate for an "ability-to-pay" analysis. H.R. 2247 rejects this rationale by failing to include a revenue ceiling. For example, at the Laurel Park Site in Connecticut, EPA has identified a business with 75 employees, but with *over $4 billion* in annual revenues.

EPA has made significant efforts to administratively address the concerns of small businesses by offering ability to pay, de minimis and de micromis settlements, as well as developing a municipal solid waste settlement policy. To date, EPA has entered into de minimis settlements with more than 18,000 parties and continues to take into consideration a party's ability-to-pay in our settlement processes. In addition, the Administration's legislative proposals for innocent landowners, prospective purchasers, contiguous property owners and small quantity generators of household MSW would provide further liability protection for parties.

OVER BROAD MUNICIPAL SOLID WASTE (MSW) EXEMPTION

As a threshold issue, the MSW settlement policy is working. The Agency continues to support the policy because it is a fair and reasonable method to address the fact that MSW alone generally does not create Superfund sites, and will continue to defend it against any challenges. While the Administration sees no need to codify the policy, any attempt to codify the policy in legislation should properly do so. We will strongly oppose improper attempts to codify the policy, such as the provision in H.R. 1300.

While H.R. 1300 has been amended to address the problematic definition of municipal solid waste in the introduced version, we believe that the provision is still flawed. The provision exempts past contributors of MSW, unless the President determines that the person is engaged in the business of transporting such waste, AND the contribution of MSW *contributes or contributed* significantly to the cost of cleanup. The first condition is overly limiting, in that it applies only to commercial municipal waste haulers, exempting large waste generators of the same type and volume of waste, but in a different business. The second condition is troublesome for the same reasons as described above. As a result of this high burden, it is unlikely that even commercial waste haulers could be held accountable for their contribution, beyond the 10% cap.

OVER BROAD RECYCLING EXEMPTION

Finally, while the Administration has supported exempting parties for legitimate recycling transactions, H.R. 1300 goes too far. In previous legislative proposals, the allocated shares of liability attributable to recyclers were not shifted to the Superfund Trust Fund but rather were borne by other responsible parties at the site. H.R.1300 would shift the share of cleanup responsibility attributable to these parties to the Trust Fund and/or the taxpayer, and in many cases, the remaining owners/operators are insolvent and defunct, which means the Trust Fund must cover the entire cost of cleanup. Additionally, the Administration continues to oppose exempting parties who disposed of used oil. There are fundamental differences between used oil and other materials addressed under the bill's recycling provisions. Used oil is toxic, and generally very mobile, and thus presents unique obstacles to cleanup. In addition, "recycling" of used oil commonly involves the burning the oil, which leaves large volumes of heavy metals and contaminants behind.

Further, the bill's provisions extend the used oil exemption to essentially all petroleum products and could provide liability exemptions to large shipyards, ports and motor pools. Some used oil sites have been virtual pools of contamination that

have been extremely harmful to the environment and difficult to clean up. Many of the parties at these Superfund sites should remain liable for the cleanup for which they are responsible. Targeted legislative provisions protecting small businesses, small volume parties, and parties with limited ability to pay should address the liability issues at these sites. Finally, the Administration has concerns regarding the scope and applicability of the newly-added provision addressing copper production byproducts, and believes that this language ventures far beyond the original intent of the recycling provision (e.g., to remove unnecessary obstacles to post-consumer use of recycling efforts).

EPA'S ABILITY TO RECOVER IT'S COSTS IS RESTRICTED

H.R. 1300 inserts a new cap on oversight costs EPA can collect, which will make it difficult for EPA to ensure cleanups are protective. If parties provide EPA with an accounting of the direct and indirect costs incurred at a site, EPA may only recover oversight costs up to 10% of total cleanup costs. The amount of oversight necessary at a given site is in no way related to the cost of the cleanup, or the costs incurred by PRPs. In many cases, it is PRP expertise or community concern that dictates the amount of EPA oversight required. As a result, EPA's oversight costs should not be arbitrarily capped based upon what PRPs are spending at a site.

PRE-EMPTION OF STATE LAWS

Current law already affords favorable treatment for response action contractors (RACs). Under Superfund, RACs are subject only to a negligence standard. EPA is also authorized to indemnify contractors for liability arising out their negligent performance, unless the conduct was grossly negligent or constituted intentional misconduct. H.R. 1300 would change current law and pre-empt state negligence laws and statutes of repose. This provision is unnecessary and is not supported by the Administration.

OTHER LIABILITY CONCERNS

As stated in previous testimony, the Administration remains concerned with the "Brownfields" provisions of some of these bills (H.R. 1300 and H.R. 2580) which limit EPA's authority to protect public health and the environment at certain sites. In addition, the Administration is concerned with additional provisions of the liability title in H.R. 1300, including, but not limited to, the inclusion of special interest exemptions for "dipping vats," the limitations on enforcement of 106 orders, the requirement to provide final covenants, and the unreasonable time limits in the expedited settlement process.

NPL LISTING

The Clinton Administration continues to oppose provisions that restrict EPA's ability to list sites on the NPL without a Governor's approval. EPA has worked closely with States and seeks Governor concurrence before listing, but needs the ability to list otherwise eligible sites opposed by States—in the case of Natural Resource Trustee issues, tribal or interstate migration of contamination, or where the State is a PRP.

While a Governor's concurrence is not mandatory under H.R. 1300, the bill does require a one year wait for final NPL listing upon request from a State that is attempting to obtain an agreement to perform remedial action. In addition, H.R. 1300 generally defers listing a facility on the National Priorities List if remedial action that will provide long term protection is underway at the facility under a State response program.

H.R. 2580 requires State concurrence before EPA can list a site on the NPL. This approval requirements applies even in situations where Tribal, local community, or interstate impacts exist, or where the State is a PRP. In addition, HR 2580 prohibits listing of sites to the NPL if a Governor assures the site is being addressed or will be addressed in the future. The bill has no provision for when in the future a promised action to address contamination might occur.

EXPIRATION OF TAX

The Superfund tax authority expired December 31, 1995. The President's fiscal year (FY) 2000 Budget requests reinstatement of all Superfund taxes (including excise taxes on petroleum and chemicals, and a corporate environmental tax). The Trust Fund balance (unappropriated balance) was roughly $2.1 billion at the end of fiscal year 1998. The Trust Fund balance will be approximately $1.3 billion at the end fiscal year 1999.

In the absence of the taxes, we estimate a windfall of approximately $4 million per day for those parties that would normally pay the tax. To date, the *Trust Fund has lost approximately $5 billion* as a result of the failure of Congress to reinstate the taxes. This $5 billion windfall has been passed on to those that would normally be funding cleanups. It is important that Congress reinstate the Superfund tax authority.

CONCLUSION

The Superfund program has been fundamentally improved through administrative reforms and is faster, fairer, and more efficient. The significant progress the Clinton Administration has achieved in protecting public health and the environment through the clean up of toxic waste sites must not be undermined by the passage of ill conceived Superfund legislation based upon outdated information and misconceptions about the current program. EPA's administrative reforms, and the resulting Superfund cleanup progress, have eliminated the need for comprehensive Superfund legislation. We look forward to working with Congress to reinstate the Superfund taxes and enact the narrowly targeted Superfund legislation that we described in our testimony that builds upon the success of administrative reforms.

Mr. OXLEY. Thank you, gentlemen, for your excellent testimony as usual.

Let me begin the questioning Mr. Fields.

I have heard your testimony and there is simply no evidence in my mind that any of the administration's actions in the 106th Congress indicates that the administration is getting the message. Sixty Democrats from the House are sending you a message. They no longer want to pursue this strategy where the administration can only say nice things about purely Democrat bills and otherwise oppose meaningful bipartisan efforts. We should probably also add about 10 or so of the 19 Democrats that cosponsored H.R. 3000 with the last Congress to this list. That gets us to about 70 Democrats who are supporting bipartisan legislation. A strong bipartisan majority in the House wants meaningful Superfund reform and based on your testimony and that of your colleague, Mr. Herman, today, if I heard it correctly, you oppose all of the bipartisan bills and only support the Democrat alternative.

Based on your testimony in August and today, the administration is out of touch with the Governors, out of touch with the Conference of Mayors, out of touch with the Conference of Black Mayors, out of touch with the cleanup agencies, out of touch with small businesses, out of touch with recyclers, out of touch with service station dealers, out of touch with the cleanup contractors, out of touch with realtors and homebuilders and out of touch with labor unions.

If I read the Allied Signal case properly, the administration is out of touch with the courts in claiming to have solved problems that could only be solved by real statutory reform.

Where the agency does seem to be in perfect synch is the national activist groups. What I read in your testimony is the unending movement of the goalposts. Provisions that were part of your Superfund reform principles last Congress are now the object of your criticism.

Now Mr. Fields, can you name an area in the last 2 years that the administration has moved in our direction? Is there any area that you would cite that you have moved toward our efforts?

Mr. FIELDS. I think there are several.

I would cite the agreements around Brownfields cleanup and redevelopment where——

Mr. OXLEY. But you have opposed Mr. Greenwood's bill, is that correct?

Mr. FIELDS. We said we could work with Congressman Greenwood and Congressman Towns and try to get some reconciliation among their bills. That is what we said at the last hearing, and there have been meetings that we have participated in with your staff and our staff, working together to see if there can be some agreement.

We agreed that prospective purchasers, innocent landowners, and contiguous property owners ought to be given liability relief. We have indicated that we agree that small generators and transporters of municipal solid waste ought to be given liability relief. I think those are several examples where we, the administration, have agreed that we could benefit from targeted legislation in that regard and we have indicated at the last hearing that Congressman Towns' bill is a great start for the kind of legislation that we, the administration, would be for.

Mr. OXLEY. Can you name the areas in H.R. 1300 or H.R. 2580 that you support without significant modification? What areas of commonality do we have in those two pieces of legislation?

Mr. FIELDS. Well, we have some significant issues that we have discussed in our testimony with H.R. 1300——

Mr. OXLEY. I am looking at areas that you could agree to without modification.

Mr. FIELDS. We could look at some of the elements of liability relief and look at accepting some of that.

Mr. OXLEY. Some of the liability relief?

Mr. FIELDS. Yes. But we can't——

Mr. OXLEY. And what about the allocation?

Mr. FIELDS. Allocation? No. We have serious problems with the mandatory allocation——

Mr. OXLEY. Isn't it a fact though that in the past you supported allocation?

Mr. FIELDS. But Mr. Chairman, as we have indicated, we have learned a lot from the 103d Congress and allocation policy we've done. We found the prescriptive, one-size-fits-all allocation process does not work and now in the 106th Congress we believe that that type of allocation process described in H.R. 1300 is not the way to go. We have learned a lot in the last 6 years of implementing our administrative reforms.

Mr. OXLEY. What specific liability relief issues would you support?

Mr. FIELDS. The ones that we have gone on record indicating that we support.

Mr. OXLEY. In 1300, in the legislation that has already passed the Transportation Committee, what can you support?

Mr. FIELDS. Well, the types of liability relief that is provided for prospective purchasers, innocent landowners, contiguous property owners—we would look at working with you to try to carve out appropriate liability relief for those types of parties.

Mr. OXLEY. My time has expired. The gentleman from New York, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Many of the provisions you have posed in 1300 look as if they are trying to fix problems the agency has already fixed. It seems that if the problems are fixed administratively we don't need sweeping Superfund reform.

I have a two-part question. First, the statute need a lot of amending, No. 1, and the second one, what does the program need to further improve it?

Mr. FIELDS. The first part of your question, Congressman Towns, we do not believe the statute needs a lot of amending. We no longer support comprehensive reform of the Superfund statute. We believe that narrowly targeted legislative reform is all we need at this time. We believe that the types of liability relief that are in your bill, H.R. 1750, is the type of liability relief we could support as well as the Brownfields grants and loans program that is provided there as well.

Further, we would support liability relief for generators and transporters of municipal solid waste.

Those are the types of legislative reform we think would further the program. We don't need changes to remedy, for example, as proposed in 2580 or H.R. 1300.

Mr. TOWNS. All right, thank you. I wanted to first applaud you really for the improvements in the Superfund program, the progress made in the cleanups. You are to be commended.

Given the progress currently going on in the Superfund program, what specific provisions would or could undermine the progress of the program?

Mr. FIELDS. I just want to add one other thing to your previous question, and I would like Mr. Herman to add to this one as well. I would just add that an additional element that is probably most important for legislative change and that the administration really needs is a reinstatement of the Superfund taxes that expired on December 31, 1995. I would like Mr. Herman to address some of the areas of concern that would undermine the current program.

Mr. HERMAN. If I may, Mr. Chairman, one of the primary objections that we have, Mr. Towns, is to the mandatory allocations process laid out in H.R. 1300. As mentioned before, we piloted an allocations process several years ago at sites, and what we found was prescribing one-size-fits-all to all sites results basically in a gridlock at the site.

As written, the mandatory allocation scheme in 1300 does several other things. First of all, rather than getting small parties and small businesses out of the process, it inevitably will bring them into the process. Even if they are exempt, the parties who may be on the hook for a share will bring in the small parties to determine what share they should be allocated so that the other parties will not be charged for that share. This will involve them with lawyers, it will involve them with litigation. The allocations will eliminate the incentive to settle and get on with the cleanup. There will be no incentive to resolve things first. The allocations will be very, very time-consuming and resource-consuming.

Allocations are provided for at all sites. There are some sites, owner-operator sites, some others, where an allocation system is totally inappropriate. What you have are some serious legal questions as to potential liability, but certainly not factual situations.

Finally it will actually encourage litigation because everything will have to be done to get the allocation process—it will have to be done under the auspices of a court, and to the extent that we have been able to drive the great majority of sites and speed cleanup through settlement and get PRP's to do the work, this will hinder and in some cases cripple that effort.

Mr. TOWNS. Litigation. Could you sort of be specific in terms of ways that H.R. 1300, you know, would do that, increase litigation?

Mr. HERMAN. Increase litigation?

Mr. TOWNS. Yes.

Mr. HERMAN. Yes, sir. Well, first of all, there is—there are several things. One is the allocation process, which basically does not reward people who settle; people who settle and people who litigate can wind up pretty much even. So you have an advantage in holding out and litigating. Second, there are new terms used in the legislation which have not been used before in the 20 years of Superfund. These will have to be defined further by the courts in litigation. It will open up a whole area that is basically settled now.

Mr. OXLEY. The gentleman's time has expired.

Mr. TOWNS. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. Fields, in the testimony you mention 18,000 settlements with small business. What are the parameters of each of these settlements?

Mr. FIELDS. These are de minimus settlements that we have entered into at a variety of sites across the country. We have entered into these settlements in more than 400 Superfund sites across the country.

Mr. SHIMKUS. Let me——

Mr. FIELDS. 18,000. And we have offered——

Mr. SHIMKUS. Let me ask, if you have had 18,000 settlements, why will not the administration come forward with legislation to codify the parameters of these exemptions and allow us to remove some small business liability? I mean, if you have the parameters because you have exempted 18,000, then just give us the parameters so that we have a basis to start on a legislative remedy for small business, because obviously you have the facts.

Mr. FIELDS. Yes, I will start, and Mr. Herman should definitely add to this.

We obviously have done a lot through our administrative reforms to address small businesses. We have come out very strongly in support of further legislative change that would also——

Mr. SHIMKUS. Do you have the language for those further legislative changes?

Mr. FIELDS. Small generators and——

Mr. SHIMKUS. Mr. Fields, the language. I am involved in another legislative issue.

Mr. FIELDS. Right.

Mr. SHIMKUS. And you can—the administration can talk policy——

Mr. FIELDS. Right.

Mr. SHIMKUS. And how you have been in favor of small business liability protection from day 1.

Mr. FIELDS. Right.

Mr. SHIMKUS. But if you don't come to the table with language, we don't know where the starting point is to get some negotiation. So when you talk about you have been to the table and you have come to staff——

Mr. FIELDS. Yes.

Mr. SHIMKUS. And you haven't brought language, you have brought zero.

Mr. FIELDS. No, no. I beg to differ, Mr. Congressman. We actually have discussed——

Mr. SHIMKUS. Well, then give me——

Mr. FIELDS. Since the 103d Congress.

Mr. SHIMKUS. Okay, let me reclaim my time. Then what is the exact language for small business liability protections that this administration has brought to this committee?

Give me one piece.

Mr. FIELDS. During the 103d Congress we, the administration, supported 50 or fewer employees and $2 million in annual revenue as being a definition of what small business——

Mr. SHIMKUS. So would the administration support that now?

Mr. FIELDS. No, we are now—because there is a lot of disagreement. Your bill, for example, includes, as you know, less than 100 employees and no revenue cutoff.

Mr. SHIMKUS. But you had 50 and $2 million.

Mr. FIELDS. Some people have proposed $3 million, and——

Mr. SHIMKUS. So will the administration support 25 and 750,000?

Mr. FIELDS. Well, that is something that is going to have to have a lot more discussion. We within the administration are not prepared to offer up a precise——

Mr. SHIMKUS. Okay. Then let me ask this question.

Mr. FIELDS. Number of——

Mr. SHIMKUS. I know I am hot, but I have got businesses in Quincy that are going under. You all have 18,000 cases of documentation where you have absolved them of responsibility.

Mr. FIELDS. Right.

Mr. SHIMKUS. And you have settled with them.

Mr. FIELDS. Right. We settled, yes.

Mr. SHIMKUS. Now, that would tell me that you have some criteria by which you are exempting these small businesses. Draft legislation based upon that 18,000 caseload and get it up to our committee so that we can evaluate it. Because I am not—if you don't codify this, the exemptions you have given to a small business in Gettysburg, how do I know that that's the same exemption that you have given to my small businesses in Quincy, Illinois? There is no assurance. It is in some little black box stowed away in the EPA that you only know.

Mr. FIELDS. Many of these businesses would be exempted under what we proposed——

Mr. SHIMKUS. We don't know that.

Mr. FIELDS. No, no, many small businesses are included in those who send generators and transporters of municipal solid waste, we have proposed in our legislative reform agenda that those——

Mr. SHIMKUS. Do you have language for your proposed legislative agenda?

Mr. FIELDS. We have provided language on that to members of this committee.

Mr. SHIMKUS. Have you presented it to me?

Mr. FIELDS. We would be happy to share it with you personally. That language is something we support, and we believe many small businesses would be exempted by that type of legislative reform. That is one example of the benefits to small businesses.

Yes, we have supported de minimus and de micromus liability relief. Those are elements of the small business liability relief question. There is some disagreement among Members of Congress and the administration as to how you precisely define a small business, but what we have proposed as an administration would provide liability relief for a lot of small businesses that are impacted by Superfund liability.

Mr. Herman.

Mr. SHIMKUS. I will spare—I will pause and I will yield back my time.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The gentlelady from Colorado, Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman.

Mr. Fields, you know that a lot of the elected officials and citizens of Denver and I have been worried for a long time that this Shattuck remedy is inadequate. Now we get these reports that the mound is sinking, that cap has cracked; contamination might have already seeped into both the groundwater and the Platte River.

Last Thursday your emergency response team issued a summary of a report that said that the Shattuck site is susceptible to long-term degradation. It went on to say that this cap that is supposed to last 200 years "will not survive more than 15 unless a costly monitoring and maintenance system is installed." That was in the Denver Post this Saturday.

And then the director of your ERT said to assume that it would last any longer is foolhardy. The newspaper said that the monitoring system will cost as much as the EPA estimated that it would cost to remove the waste in the report I asked for last spring.

Now in response to this report, the Denver Post said that you said that this new information "raises significant questions about the cleanup remedy at Shattuck," and then you went on to say, at least as quoted in the Denver Post, there will have to be "at a minimum some significant changes to the current remedy or a complete alternative remedy as opposed to the option of letting the waste stay onsite."

So I guess my question to you today is do you have a concept of what those significant changes are, and does that mean that the EPA will now move this waste offsite as many of us believe should have been done.

And by the way, I always point out this remedy was not a Clinton administration remedy. It was done in 1991, but the Region 8 EPA seems to have adopted this remedy as its own child, which I don't understand. But my question is, what do you mean when you say significant changes?

Mr. FIELDS. Well, there has been a review, several reviews have been done of the current remedy. The U.S.——

Ms. DEGETTE. I know what the reviews are——

Mr. FIELDS. Geological survey——

Ms. DEGETTE. Yes.

Mr. FIELDS. The 5-year review——

Mr. GREENWOOD. What do you mean——

Mr. FIELDS. Those reviews are all going on, and those reviews indicate at a minimum you are going to need 17 more groundwater monitoring wells around the current remedy, because the groundwater monitoring system is not adequate——

Ms. DEGETTE. Mr. Fields, I only have 5 minutes.

Mr. FIELDS. All right, I am just trying to respond to your question.

Ms. DEGETTE. I know what they have all done, yes, but if you can tell me what do you mean when you think you are going to have to look at an alternative remedy or a modification? Do you think you are going to move it?

Mr. FIELDS. This is what I am referring to.

Ms. DEGETTE. Okay.

Mr. FIELDS. I am referring to the fact that in order to modify—in order to address the current remedy, you have to put at a minimum new groundwater monitoring systems in place, you are going to have to put in place a cap that has greater long-term protection, because right now the 5-year-review contractor has raised concerns that the current cap would not comply with the UMTRCA regulations that require 200-to-1,000-year protections in the long term.

The contractor has also raised issues about whether or not long-term groundwater protection would be provided with the current remedy. So there are two alternatives. Either you fix the current remedy in a way that allows you to comply with the UMTRCA 200-to-1000-year requirements, or you decide that the remedy is going to be so costly to fix that you move it to an alternative location.

The contractor is going to be coming in on October 1 and 2 to give us a detailed briefing on this, and then we will make a judgment after that as to which of those two alternatives we will be implementing. One of those two is where we are going to go. The issue is which one. That has not been decided. The further technical data coming in early and mid-October will let us decide whether or not we should—we can fix the current remedy, is that feasible, or do we have to move it in order to protect the citizens of Denver.

Ms. DEGETTE. So when is it you are looking to make some kind of announcement as to which remedy you are going to be recommending?

Mr. FIELDS. We will be making an announcement I would say the third or fourth week of October. All the information will be in by mid-October, and then we would be making a decision by the third or fourth week as to which of those alternatives is the one we select for that remedy.

Ms. DEGETTE. Okay. Thank you.

Now following up quickly on my opening statement, the issue of the relevant and appropriate standard. H.R. 1300 and 2580 elimi-

nate the use of State and Federal environmental standards that are both of these things.

Mr. Chairman, may I have unanimous consent for another 1½ minutes to ask this question?

Mr. OXLEY. Without objection.

Ms. DEGETTE. Thank you.

There is a change in current law in both of these bills that State officials and community representatives strongly oppose, and we are going to hear that from the second panel today.

If you can quickly tell us, Mr. Fields, what effect this change to current law would have on EPA's ability to ensure that cleanups are protective of human health and the environment and things like Shattuck don't happen in the future.

Mr. FIELDS. Dropping relevant and appropriate requirements would have a major impact we believe on the protectiveness of Superfund cleanups. There are many Superfund sites like the Shattuck remedy that you referred to, Glen Ridge, Montclair, which is another Superfund site in New Jersey, the J&L landfill site in Michigan. These are all sites where we have used relevant and appropriate requirements.

There are sometimes State standards, there are sometimes Uranium Mill Tailing Control Act requirements. There are sometimes RCRA requirements that were relevant and appropriate. We would have to develop a whole new paradigm and new cleanup requirements for those many sites where we adopt relevant and appropriate requirements.

So we think that dropping relevant and appropriate requirements would be a major mistake from current law. We worked very carefully and quite cooperatively with States over the last 6 years. We are implementing RAR's. We think State standards, we think other Federal agency requirements, RCRA requirements are very appropriate for cleanup at Superfund sites, and dropping RAR's would have a major impact we believe on defining appropriate cleanup requirements for many Superfund sites.

Mr. OXLEY. The gentlelady's time has expired.

The gentleman from California, Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman.

Mr. Fields, when we talk about the issue of appropriate mitigation or treatment, does your department consider at all the adverse impacts of the implementation of the existing law, adverse environmental impacts? I am not talking about economic.

Mr. FIELDS. When we are evaluating alternatives for cleanup we do look at the impact of various remedies, of various alternatives when deciding on what remedy to select at a Superfund site. We work carefully with the health officials in Atlanta, the Agency for Toxic Substances and Disease Registry in looking at what impacts a remedy might have. Would an incineration option, for example, cause air emission impacts to that community? That is part of our consideration.

Mr. BILBRAY. I know from when I was serving on the State Air Resources Board in California, the remediation of a lot of sites ended up becoming such an identified problem in nonattainment areas that we specifically had to develop criteria and try to mitigate the adverse air pollution impacts of a lot of remediation. Not

specifically to Superfund, but Superfund was part of that problem. And I think that one of the concerns that we had was how much of the Federal Government allowed a no-project option based on the fact that the best environmental health approach was not to do anything at that site except cap.

One of the problems with that proposal of capping, and I think you have run into those, is then you end up creating a Brownfield. I mean, how much discussion is there about the huge environmental damage of creating a Brownfield? The fact is you destroy five-to-one ratio of Greenfields in lieu of utilizing a Brownfield. And how much is your department involved in this issue of saying we have got to stop mandating a lot of this sprawl because we have basically outlawed reuse of the inner city core?

Mr. FIELDS. Well, that is a concern. We have certain types of sites that we have no alternative for but to leave it in place, the waste in place, and capping. There are 20 percent of the Superfund sites as you know are landfills, industrial, municipal waste landfills that we typically cap, put in place a groundwater monitoring system, containment, and you leave waste in place. There are mining sites where it is not feasible to remove the material. So in some cases we do not have an alternative.

But we have implemented a major initiative using the Brownfields model over this past summer where we have discovered that more than 150 Superfund sites have had major reuse and redevelopment. And so now while we are cleaning up Superfund sites, we are applying the Brownfields model and we are looking at how we can find ways to reuse, recycle, redevelop for economic, ecological, or recreational uses many of these Superfund sites after the cleanup job is done, even in those cases where we have waste left in place, like the Anaconda Superfund site near Butte, Montana, where—I was there on Monday, and we created a world-class Jack Nicklaus golf course on top of contamination that existed at the ARCO Superfund site there.

So just because sometimes wastes are left in place, it does not have to be a Brownfield that is not available for reuse. We have created metroplexes, you know, shopping centers on these former Superfund sites even in those cases where waste has been left in place.

Mr. BILBRAY. I can only imagine the challenge of trying to explain taking a Superfund site and then doing all the irrigation and putting all the water on top of it that it takes. One of the big reasons why landfills are no longer allowed to be converted to parks, at least in the West, is over that issue.

Mr. Fields, you were talking about changing the liability aspect of it. My concern is that we had a situation in Clearwater, Florida, where you had a company, a small company, that was basically being held liable as a major contributor mostly because its 55-gallon drums of polyester which had been left out in the sun for over 2 years, and thus had solidified and did not constitute, should not have been considered as hazardous material, was held as a major, major contributor mostly because it was one of the few that they could find to that site, basically almost a joint and several liability issue. You are the only one that we can identify your material in here, we are going to nail you.

What are you doing to stop that kind of abuse of the system where you have somebody that not only is not a major contributor, but from the data that we got from this individual really wasn't a contributor, was a contributor of metal and basically solidified polyester, which I think you and I would not constitute as hazardous, but because it was in the middle of hazardous materials, somebody in the Department decided the was a waste stream, and thus they were going to nail whoever they could?

Mr. FIELDS. I will let Mr. Herman respond.

Mr. HERMAN. Mr. Bilbray, several things. First of all, I am not familiar with that specific fact pattern, but will get, you know, more information on that site for you.

However, let me say this. First, with regard to a contributor like yours, we do have the de minimus settlement policy which gets small contributors out. We have de micromus policy where we settle out for——

Mr. BILBRAY. Let me stop you right there.

Mr. HERMAN. Yes.

Mr. BILBRAY. But the settlement policy that he was offered was to pay for cleanup, a portion of cleanup, and he was not—his waste stream was not a problem. Any scientist would tell you that. But the problem was he was hit with a large hit, and one of the arguments was he was one of the few that we had to be able to go after.

Go ahead.

Mr. HERMAN. In terms of one of the few we had to go after, I don't know what, you know, what his—what the size was or what his ability to pay was. We have instituted ability to pay policies to take care of a situation like that. In terms of his being caught in the legislative web, somebody thought that he played a part in polluting that site, and that is what the process is supposed to do, is to get——

Mr. BILBRAY. I agree.

Mr. HERMAN. And we are trying to kick those people out.

Mr. BILBRAY. I think the ability to pay was the problem. He had the ability to pay. And all I can say is I read the report and the recommendations from the Department of what he should have done with his waste stream, and what he should have done, according to them, is use, you know, acetone or MEK as a solvent and cleaned out those cans before he disposed of it.

The fact is anyone who knows the qualities of polyester knows that 6 months to a year in the Florida sun kicked it off and solidified it to where it wasn't a waste stream. So what was recommended by the Department was more environmentally damaging than what the company did. But that didn't follow suit for them. They had a policy that if you don't handle this the way we think it should have been handled, we don't want to sit down and talk with you. And frankly, I thought it was outrageous that somebody who did the environmentally proper thing was being held up. But what I sense was it was the ability to pay. You go for the dollars.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman.

I think today it was indicated that we may be acting on this piece of legislation or another piece of legislation in the next week or two, and I certainly understand Mr. Shimkus' frustration in not having the language that he would like to see from the administration. So to the extent that that exists, I would like a copy of that as well.

But because H.R. 1300 at least seems to be a train with a lot of steam right now, I just want to take a look at a specific section in this bill that raises some concerns with me to get your read on it. And that is section 307, which I understand creates a new 6-year statute of repose, and it is established for the negligent conduct of cleanup contractors, and that this would preempt State law. My understanding is it does not apply to grossly negligent or wanton-type behavior. But it still raises some questions for me.

According to the assistant attorney general of New York, who will appear on the second panel, the bill, "carves out a radical and unfair new exemption for these parties and deprives potential victims of rightful compensation where due to a latency period that is often associated with exposure to hazardous substances or for other reasons, the injury is not discovered within the 6-year timeframe." I know Mr. Dingell also had concerns, and he contacted the Acting Administrator for the Agency of Toxic Substances and Disease Registry to ask which chemicals off the top 50 of that agency's list may fit within this category, and among those that were reported to him were vinyl chloride, benzene, PCB's, and lead. All these chemicals and others have latency periods for humans potentially developing cancer at least 6 years after exposure has ended. And that's what concerns me. If we are going to be letting negligent parties off the hook for causing damage that does not appear until 6 years later, yet their legal responsibility ends at 6 years, are we creating a huge new loophole?

Mr. FIELDS. We are concerned about some of the elements of section 307, as you indicate, and for the reasons you indicate. I want to say that, you know, the contractor community is an integral part of our cleanup process, and they have done a very effective job in helping us clean up sites. We though are not clear as to why we need to expand response action contractor coverage to what these areas—that are in 307.

We do not believe that it is appropriate to implement this statute of repose after 6 years. We think that that along with several other provisions in section 307 would preempt State law, the changes in RAC liability proposed in 307 would extend beyond Federal law to cover State laws. And we are concerned about broadening the negligence standard and preempting State action for this type of liability.

We believe that the issue of negligence should be left to the States and remain a State responsibility. We believe that the current section 119 indemnification requirements of CERCLA have been implemented quite well. We have not had any new claims in the last 5 years. So we don't think we need major changes to response action contractor liability, and we would be opposed to several of the elements, including the element you just mentioned, about statute of repose, because of the impact on State laws and

the preemption of State laws in many cases for several of these elements that are proposed in section 307 of this draft legislation.

Mr. BARRETT. Well, the section that I refer to does have a modifying clause that says that the section shall not apply in any State or political subdivision thereof if the State has enacted a statute of repose determining the liability of a response action contractor. So it would seem at least at my initial reading here that if the State has any type of statute of repose, whatever it is, that it is not going to be covered. But my concern is wrongful-death actions, personal injury actions——

Mr. FIELDS. Yes.

Mr. BARRETT. And property damage actions, obviously more of the wrongful death and the personal injury actions. And I just—I want the record to be clear as to what this bill does with regard to this issue.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Maryland, Mr. Ehrlich.

Mr. EHRLICH. Obviously if there is a message here today, it is that there is bipartisan frustration with—to put it mildly—with the present statute and the way the present statute is being implemented.

I understand fully, as most of the people in this room do, that part of this discussion is simply a philosophical disagreement that will never lend itself to a compromise because we simply view these issues in such a different way, and either we are going to lead or you are going to lead and that will be a big difference, so—however, sir, given that as someone who practiced in this area for a number of years, let me ask you a couple of things.

You talked about contractor liability. You are familiar with case law, I am sure, where contractors, cleanup contractors have now been brought into Superfund litigation, sued for contribution by potentially responsible parties, not on the basis of negligent action by the contractor. These contractors, as you know, face a joint and several liability scheme, so you potentially have situations where non-negligent parties are facing significant actions to defend from other defendants in cross-claims where they have not been negligent. My question to you is how fair is that, particularly in the context of your previous statement that you see nothing particularly wrong with the present statute with regard to contractor liability.

Mr. FIELDS. Well, we have agreed in the past that amending the statute in that area is an area that we could support——

Mr. EHRLICH. Where is your language?

Mr. FIELDS. We provided language during the 103d Congress and we would be happy to share it with you again.

Mr. EHRLICH. We were not here in the 103d Congress, sir.

Mr. FIELDS. We will be happy to give you that language, but the problem is that that is only one of seven elements of Section 307. I cannot say I support a section when there are several elements in the section that we have serious problems with.

Mr. EHRLICH. I fully understand that, and we are all trying to break these issues down to separate, independent issue areas, as you know, and maybe that is one where we can come——

Mr. FIELDS. That's one we——

Mr. EHRLICH. [continuing] so I respectfully request language from the administration with respect to innocent party contractor cleanup and liability standards that in your view should pertain thereto.

Mr. FIELDS. We would be happy to provide that language to you, sir.

Mr. EHRLICH. With regard to statute of repose and State pre-emption, is it your position that, putting aside the issue of pre-emption, that there should not be a statute of repose given—what my friend from Wisconsin was alluding to with regard to potential long latency periods in some of these disease processes.

I understand your point with regard to pre-emption and what State statutes and what State legislatures in their wisdom have done. Is it your position, however, that any statute of repose is inappropriate in that context?

Mr. FIELDS. We would be opposed to a statute of repose.

Mr. EHRLICH. At any—20 years?—25 years? You would just be opposed?

Mr. FIELDS. We believe that element of 307 is unnecessary and we would be opposed to it.

Mr. EHRLICH. Okay, thank you.

With regard to an issue that—I have a lot of questions obviously. I have 5 minutes, but let me get into something I really have just recently been made aware of, and I do not have a great deal of knowledge about, with regard to the issue of recycling used oil.

You are familiar I think with case law, the National Association of Auto Dealers and trucking associations and other parties have I know proffered testimony and have positions with regard to this issue, the issue obviously being liability relief for a party that arranges for used oil to be recycled rather than disposed of and then finds itself as the joint tort leasor and brought in as a cross-claim in Superfund litigation. Can you give me your present view of this situation?

Mr. FIELDS. Well, your question, do we believe that used oil should be——

Mr. EHRLICH. Yes, sir.

Mr. FIELDS. [continuing] exempted?

Mr. EHRLICH. Yes, sir.

Mr. FIELDS. No. We do not believe that used oil should be included in any kind of recycling exemption. Used oil is a major problem in more than 130 Superfund sites, almost 10 percent of the sites on the list. It contains a lot of hazardous substances that we are concerned about and we found a lot of mismanagement of that material, so we would be opposed to that type of exemption being included in a recycling exemption.

Mr. EHRLICH. Well, if I could just have, you know, another minute, Administrator Browner testified before the Water Resources Subcommittee in 1999, the 106th Congress, that the administration was not opposed to such a narrow exemption for recycled oil, and my thought was that your testimony today would comport with that testimony.

Mr. FIELDS. I am fully comportable with our Administrator, but I want to clarify something of what the Administrator said.

There are various categories of recyclers of used oil. Some of those are large recyclers including motor pools, large shipyards and ports, which would be exempted under the legislation before us today, and we would be very concerned about that type of operation being included in a recycling exemption, so we would have to go back and look at precisely—we have obviously supported a recycling exemption in the past, but we are concerned about making sure that the proper parties are included in a recycling exemption and we would want to look very carefully at used oil because of the problem that has occurred at, as I said, more than 10 percent of our Superfund sites associated with used oil operations.

Mr. GREENWOOD. The time of the gentleman has expired. The gentleman from Michigan, Mr. Stupak, is recognized.

Mr. STUPAK. Thank you, Mr. Chairman. I apologize for being back and forth. I have been up at the radioactive plutonium one we have been doing up with the other committee—Investigation Oversight—so I have been back and forth.

I did come in on some discussion. First, I would ask unanimous consent my opening statement be made part of the record.

Mr. GREENWOOD. Without objection.

Mr. STUPAK. I did come in on some of the discussions going on here about small businesses being exempt and innocent landowner protection and prospective purchaser protection.

I would just like to remind my colleagues at the last Congress we had H.R. 2485, which has been endorsed by the EPA publicly and everything else, and Mr. Goodling joined with me on this bill, the Common Sense Superfund Liability Reform Act, and it takes care of the small business exception that we need. As we define small business it refers to any business entity that employs no more than 100 employees and—and—is a small business concern as defined under the Small Business Act, 15 U.S.C. 631.

Mr. Shimkus' questions to you I felt was a little unfair because after I had that legislation last year, he came to us. We tried to negotiate and work together on a bill, but he wanted $3 million in revenue or 75 employees and our concern is you could have a company with 60 employees or 75 employees and have $3 billion in revenue, therefore they are not really a small business.

So I think we have some common ground we could work from. H.R. 2485—it's really a fantastic bill when it takes care of your small business concerns, it takes care of the innocent landowner protection that Mr. Ehrlich brought up. It also takes care of prospective purchaser protection. Those are found in Section 3 and 4 of this great bill.

I would suggest we take a look at it, and if we are going to move legislation on Superfund reform, if that is truly your concern, maybe we could then offer it as a bipartisan amendment and strengthen some legislation that we on this side at least have some very big concerns, so I am willing to work with Mr. Ehrlich or Mr. Shimkus to that, but I think publicly EPA has endorsed the small business exemption, the de minimis polluter and try to give him some relief underneath Superfund.

My question though for Mr. Fields would be if we look at the big picture, GAO has recently found that half of all Superfund sites have all cleanup activities been completed and at the 600 or so re-

maining sites, two-thirds of the cleanup work is completed or underway.

If we go to my own State of Michigan at the end of this Congress approximately 3 out of every 4, or three-fourths of them, will be completed. The Chamber of Commerce says the existing sites will be restored to environmental health within 3 to 5 years up there, so my question, Mr. Fields, the administration and the States have criticized H.R. 1300 because it will have an effect of delaying cleanups.

Can you provide me some specific ways which H.R. 1300 would delay the cleanups?

Mr. FIELDS. Yes, Congressman. We believe that H.R. 1300 would have some significant impacts on the cleanup of those remaining Superfund sites that still need to be construction completed.

This particular bill has new terms on risk assessment and requirements that are putt into the remedy selection title. They, we believe, would open this remedies up for litigation because of having to define new terms associated with how you conduct and risk assessment would require revisions to the current national contingency plan that would take several years and we believe enter into further litigation.

We think that H.R. 1300 codification of the administrative reforms that they have attempted to do is counter-productive. One of the key benefits of the current administrative reforms is the flexibility. We would rather not put them into law but rather have the ability to see how they work and improve them over time.

Putting them into law would not allow us to implement further improvements to those reforms over time. We have learned from experiences that some administrative reforms have problems like allocation pilots we did several years ago which taught us that prescriptive, one-size-fits-all allocation processes are not appropriate, so those are the kinds of—H.R. 1300 underprotects groundwater. It backs off of the current standard we use for restoring groundwater to beneficial uses—so those are just a few examples of how H.R. 1300 would delay cleanup and weaken, we believe, environmental protection in cleanup of Superfund sites.

Mr. STUPAK. Are there some ways that we could—I know this administration has a good track record of cleaning up Superfund sites. At least in my own State of Michigan it has been going quite well.

Is there some suggestion though that you need legislation that would further enhance or expedite cleanups? Are there some things that you would like to see—"you" being the EPA—I mean besides my bill, anything else?

Mr. FIELDS. We said earlier that obviously want—we need to have the tax reinstated. We want the Superfund tax reinstated to move this program forward.

We talked about some liability relief that we would support, but in terms of the remedy provisions, the cleanup provisions of Superfund, we do not see a need for any changes, for Congress to enact any legislative changes to the current remedy provisions of the current law. We think those provisions that are there now are all we need to move forward on effective cleanup of Superfund sites.

Mr. OXLEY. The gentleman's time has expired. The gentleman from Pennsylvania.

Mr. GREENWOOD. Thank you, Mr. Chairman, and my questions follow pretty precisely on your last comment.

In June 1995 Carol Browner stated to Congress that, "The administration supports the elimination of relevant and appropriate requirements because they have proven to be a source of delay and unnecessary expense in selecting remedies" and I don't recall anybody calling that gutting Superfund or rolling back protection.

In April, 1997, sir, you stated, "We believe things like the future anticipated land use that everybody agrees to, it would really help to have that in law as opposed to just guidance."

You also stated at the time that we should drop the, "relevant and appropriate" requirement. The administration's Superfund reform principles stated that we should use the MCLs, which are drinking water standards, instead of requiring cleanup below drinking water standards—and nobody accused you of gutting Superfund or rolling it back.

In 1995 Patricia Williams of the National Wildlife Federation testified, "NWF also recommends that future land use be considered in remedy selection. There should not be an unfair paradox between environmental protection and economic development. We believe that consideration of future land use will be a further catalyst in putting abandoned industrial waste sites back into economic reuse."

No one accused her of rolling back protections.

In May, 1999 the National Association of Industrial and Office Properties testified, "Cleanup standards that are site-specific, risk-based, and which take into account future land use are important factors to unlocking the potential for Brownfields revitalization."

In August, 1999, the National Association of Local Government Environmental Professionals listed the, "use of risk-based cleanup standards that can be tied to reasonably anticipated land use" as important criteria for cleanup programs to help Brownfields redevelopment.

The State Governors, cleanup agencies and cleanup contractors have supported these issues and more. They all have stated that the remedy selection provisions H.R. 3000 from last Congress would improve and speed up cleanups.

Some of these changes are elements of Section 9 of my bill, H.R. 2580. Shouldn't we make these changes, such as reasonably anticipated land use and elimination of reasonable and appropriate remedies, which will improve remedy selection for those sites both on and off the National Priorities List? Why has the administration changed its position on issues like reasonably anticipated land use, RARs and drinking water standards? Aren't you just moving the goal posts on us year after year?

Mr. FIELDS. Congressman Greenwood, I want to make clear that in the 103d Congress when we proposed to drop RARs it was in conjunction with the States having the option of repromulgating State relevant and appropriate requirements that are no longer required to be attained by Superfund. We did not propose to drop relevant and appropriate requirements without the States having the

ability to repromulgate those as applicable standards, but bottom line is we are—we have changed, we have changed our position——

Mr. GREENWOOD. Let me just insert something there.

Mr. FIELDS. Yes.

Mr. GREENWOOD. Under the legislation that we are considering under Mr. Boehlert's legislation and my legislation the States would still nonetheless have the legal authority to do that, would they not?

Mr. GREENWOOD. We do not see that in your legislation. We see the dropping of relevant requirements but it does not provide for the States repromulgating RARs that would be dropped.

Mr. GREENWOOD. We don't require the States in our legislation but we certainly don't prevent them from doing that.

Mr. FIELDS. I do not know if your legislation would prevent them but you do not explicitly come out and say that, but bottom line I just want to clarify what our provision was in the 103d Congress—the bottom line is the reason we do not think we need changes to remedy now is where we are in this program.

Half the sites have construction completion, 90 percent of the remedies have already been chosen for Superfund sites. That is where we are. That is the reality of where we are now. We don't see a need to change the remedy provisions of Superfund when 90 percent of the cleanup decisions have already been made, half of the sites have construction complete and many others have construction underway. Given where we are and given the success of the administrative reforms over the last 6 years, we, the administration, are saying we no longer need comprehensive reform. We only need a narrow set of changes, and we believe it is not necessary to make changes to remedy now given where we are in this program.

Therefore, we think we do not need to drop RARs. We don't need to put in place specific requirements regarding land use in remedy because of where we are with most—a lot of the job done and the cleanup progress having been significantly improved by the administrative reforms over the last 6 years to cut costs by 20 percent, cut time by 20 percent. We think remedy is not an area that Congress needs to focus on in terms of legislative change to Superfund.

Mr. GREENWOOD. Mr. Chairman, I would ask unanimous consent for an additional minute.

Mr. OXLEY. Without objection.

Mr. GREENWOOD. Mr. Fields, Section 121 of CERCLA begins by stating, "The President shall select appropriate remedial actions determined to be necessary to be carried out under Section 104 or secured under Section 106 which are in accordance with this section."

Isn't it true, then, Mr. Fields, that any remedial action under CERCLA must comply with Section 121 regardless of whether the site is on the National Priorities List or not?

In addition, under Section 107 any non-Federal party cleaning up a site and seeking to use CERCLA to obtain contribution from a potentially responsible party must show that the remedial action costs are, "consistent with the National Contingency Plan"—thus even in the universe of voluntary cleanups CERCLA's remedy selection requirements can have legal relevance in court.

Isn't it your reading that the remedy selection provisions of the National Contingency Plan are relevant legal standards for contribution actions under Section 107? As I understand it, last year EPA added approximately 43 sites to the National Priorities List. Is this number correct, and is EPA planning to add fewer and fewer sites or continue at the current pace?

Mr. FIELDS. Mr. Congressman, we will get back to you with a more complete response for the record. We agree that contribution protection elements might apply, but we don't believe that the remedy selection requirements would apply to non-NPL sites. We will do further research with our counsel and get back to you on the record on that point, but we are not, I am not fully convinced right now that all the remedy elements would apply to sites that are not on the NPL and I think that is what you were indicating, that they would apply to non-NPL sites. I am not sure that is quite correct, but we will——

Mr. GREENWOOD. In your written reply, I wish your staff or your attorneys would particularly pay attention to 107.4 which says, "Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person from which there is a release or a threatened release which causes the incurrence of response costs of a hazardous substance shall be liable for (a) all costs of removal or remedial action incurred by the U.S. Government or a State or an Indian tribe not inconsistent with the National Contingency Plan and (b) any other necessary cost of response incurred by any other person consistent with the National Contingency Plan."

Mr. FIELDS. We will review that, sir, and get back to you through the record.

Mr. OXLEY. The gentleman's time has expired. The gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Mr. Fields, I would like to inquire about the costs of all of the many liability exemptions and initiatives, but I would like to ask one question first, which is am I correct that H.R. 1300 creates mandatory spending for liability exemptions in the amount of $300 million for 5 years and $200 million for the next 3 years or $2.1 billion over the 8-year authorization period of the bill?

Mr. FIELDS. That is correct, sir. That's right.

Mr. MARKEY. Does this violate the Balanced Budget Act of 1997?

Mr. FIELDS. We believe it would in the sense that the Act provides for $200 million per year, expiring in the year 2002 and we believe that some of these exemptions would cost up to $500 million, so we are concerned about that.

Mr. MARKEY. Now would that violate the Balanced Budget Act of 1997?

Mr. FIELDS. Yes.

Mr. MARKEY. It would? Are there any offsets in H.R. 1300 for the mandatory spending?

Mr. FIELDS. We do not see offsets.

Mr. MARKEY. Are they required to come up with offsets?

Mr. FIELDS. I believe——

Mr. MARKEY. Let's turn to costs. What is the cost of the small business generator-transporter exemption that they have?

Mr. FIELDS. We have estimated preliminarily $75 to $85 million per year.

Mr. MARKEY. What is the cost of the municipal solid waste, municipal sewage sludge exemption for generator-transportors?

Mr. FIELDS. We estimate $51 to $57 million per year for those costs.

Mr. MARKEY. What is the cost of the municipal owner-operator cap on liability?

Mr. FIELDS. $25 to $28 million per year.

Mr. MARKEY. What is the cost of the recyclers' exemption?

Mr. FIELDS. Our cost estimate is $61 to $69 million annually.

Mr. MARKEY. What is the cost of the ability to pay delta?

Mr. FIELDS. We have estimated $19 to $22 million per year.

Mr. MARKEY. What is the cost of the liability exemptions for current owners?

Mr. FIELDS. $69 to $78 million per year.

Mr. MARKEY. What is the cost of the nonvariable defunct party orphan share payment?

Mr. FIELDS. $116 million to $131 million per year is our estimate.

Mr. MARKEY. Then H.R. 1300 also requires the Fund to pay for the cost of private contribution claims against exempt parties. What does that cost?

Mr. FIELDS. $69 to $96 million per year is the cost estimate we have.

Mr. MARKEY. And these are just some of the exemptions in the cost shifts in H.R. 1300, but am I correct that for just the ones I mentioned the total cost of exemptions and contributions and claim payments is $397 million to $528 million per year?

Mr. FIELDS. That is consistent with our estimates.

Mr. MARKEY. So at the same time this Congress is cutting funding for the Superfund program, H.R. 1300 is breaking the cleanup bank to pay for the liability of polluters, is that right?

Mr. FIELDS. That is our reading, sir.

Mr. MARKEY. Okay, so this Congress is saying no to a prescription drug benefit for seniors, no to increased funding for education, no to increased funding for veterans, no to increased funding for the environment—no, no, no—but in H.R. 1300 it is saying they can scrape together $397 million to $528 million a year, every year, in order to take the costs off of the backs of polluters who are responsible for leaving messes in hundreds of communities all over the country.

That is the priorities as far as I—is that a correct analysis, Mr. Fields?

Mr. FIELDS. Our cost analysis is consistent with your analysis.

Mr. SHIMKUS. Will the gentleman yield?

Mr. MARKEY. I will be glad to yield.

Mr. SHIMKUS. What if they are not polluters?

Mr. MARKEY. What if they are not polluters? Well, we are talking here—I am going——

Mr. SHIMKUS. No, I am just, you know, what about the small business in the Gettysburg, Pennsylvania issue where it was a restaurant?

Mr. MARKEY. See, the exemptions and waivers are for people who otherwise would have been identified as polluters responsible for cleaning up the sites.

Mr. SHIMKUS. But there is no statutory language that defines who a polluter is, so the problem with this is that they go based upon trash haul to a site, not any standard or proof that there was materials, and we are talking about small businesses, and the other follow-up is how many businesses have—based upon all the businesses have been under Superfund, how many businesses have closed because they have gone bankrupt trying to make the settlement payment? And then how much income has no longer been generated by the Federal Government because of the loss of these businesses?

If we are going to talk dollars and cents, we need to have those answers.

Mr. MARKEY. Okay. I will reclaim my time just to say that we are all willing a la Mr. Stupak's good questions to exempt the household trash people, we are willing to go through and exempt all the people who should be exempt, but what you are talking about in your bill is you are exempting the people who are clearly liable under the law. We will look at all the innocent people, get them out of it, but that is not what you are doing.

Do you understand, you are lumping the guilty and the innocent, okay?—so if you want to put together a list of people who you think should get out, I will work with you to get those people out, but you are endorsing a bill that lets out the guilty people too, so I am willing to work with you on getting out the innocent people if you are willing to work with us and nail the guilty people, and you are not willing to do that.

Mr. SHIMKUS. Will the gentleman yield?

Mr. OXLEY. The gentleman's time has expired. We can save this debate for the markup.

The gentleman's time has expired.

Mr. MARKEY. Preview of coming attractions, thank you.

Mr. OXLEY. The gentleman from Iowa is recognized.

Mr. GANSKE. Thank you, Mr. Chairman, and I will be brief because, like Mr. Stupak, I am juggling a couple hearings and some other things too, and also I am battling a cold and a sore throat so earlier in the year I had thought in looking over the Superfund issue that maybe we just ought to move a more limited Brownfields type piece of legislation and try to get a large bipartisan consensus on that, because so many people have worked so hard for so long on doing it, and I think there is bipartisan concern about unintended consequences of CERCLA.

You can see that from comments of both sides, members from both sides have made today, but I must admit that I am very impressed with the movement that Mr. Boehlert has been getting. I mean he was able to pass a pretty good bill through his committee with only two dissenting votes. I mean that is progress and I suppose I could spend my time debating Mr. Fields but after I went head-to-head with an official from HCFA last week in which he admitted that they clearly had made mistakes on a funding formula, clearly had made big mistakes, but, you know, they weren't going

to go back and fix it, you only have so much psychic energy to use in a week, and so I am not going to try and score debating points.

Mr. Chairman, let us move quickly to a markup. I think that we can develop a large bipartisan majority on a good bill. I think it has been clearly demonstrated that there has been a movement of the goalposts, so to speak, by the administration on this, but if you put together a big enough vote then it doesn't matter, and I thank you for your work on this issue and Mr. Greenwood and Mr. Towns and a whole bunch of people who have worked on this and I will yield back.

Mr. OXLEY. I thank the gentleman and I thank him for his comments and we are going to try to go along on this one and that is exactly what that is all about.

The gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. Mr. Fields, I was not here for your testimony but I understand that you basically suggest that both H.R. 2850 and H.R. 1300 lower the standard for restoration or cleanup of contaminated groundwater, something that concerns me.

Both of these bills protect groundwater only for its reasonably anticipated use, a change from the current law, rather than current or potential beneficial use—which is the standard today.

I wanted to ask how do these changes affect your ability, first, to clean up contaminated groundwater and, second, to prevent contaminated groundwater from spreading to uncontaminated groundwater.

Mr. FIELDS. Well, these provisions would underprotect that. We have—85 percent of the Superfund sites have contaminated groundwater as a major problem and this bill would create a bias against protecting uncontaminated groundwater by only requiring groundwater to be protected, as you said, to reasonably anticipated future use. We believe that it ought to be current or potential beneficial uses that ought to be protected.

We believe that that is a proper standard and this law would change that and cause some groundwater not to be protected and we believe that groundwater ought to be protected, beneficial reuse ought to be the goal, and we don't think we should back off of that—what is in the current statute—and these provisions in the current remedy provisions of H.R. 1300 would do that and we are very concerned about that.

Mr. PALLONE. Well, just so I understand, so you would then support a provision that affirmatively protects the groundwater that has not yet been contaminated? Is that part of what you propose? In other words, for that groundwater that has not yet been contaminated?

Mr. FIELDS. No, we are proposing that the current statutory language be retained.

Mr. PALLONE. Okay.

Mr. FIELDS. That provides all the flexibility we need to implement our approaches to groundwater. We have a dual approach to groundwater remediation which provides for containment of the groundwater plume and then treatment to prevent that contaminated groundwater from contaminating uncontaminated groundwater.

All the flexibility we need for implementing that approach in Superfund is in the current statute.

Mr. PALLONE. Okay.

Mr. FIELDS. We do not believe that the remedy provisions including the language that is in the current bill regarding protecting reasonably anticipated future uses of groundwater is necessary. We would be opposed to it because we think it is unnecessary and it would be a backing off of what we are doing in practice in Superfund cleanups.

Mr. PALLONE. Okay. Well, let me ask you another question.

I have expressed concern that both H.R. 1300 and H.R. 2580 are designed to undermine the requirement for permanent remedial solutions and the preference for treatment in current law, and, you know, this is something that I am not just opposed personally. My communities oppose it, and I think, you know, it is the polar opposite of the intent of the Superfund bill that I introduced today and that I talked about in my opening statement.

But I wanted to know if you would comment on how H.R. 1300 and H.R. 2580 change these provisions of current law and the effect these changes may have on your ability to select remedies which permanently eliminate the hazards in a community.

Mr. FIELDS. We think those two bills would significantly change our preference for treatment and permanence. The current law requires the treatment of waste be permanently and designed to significantly reduce the volume, toxicity and mobility of hazardous substances.

The preference for treatment in the current program reflects public concern that cleanups be protected over the long term and facilitate the return of previously contaminated material to beneficial uses.

Treatment provides the only permanent protection for highly toxic or highly mobile hazardous waste. EPA is willing to recognize that treatment is not appropriate in all cases, but EPA focuses on treatment of principal threats—those that are most highly toxic or most highly mobile and we do not believe that those goals and those requirements ought to be backed off of, and both H.R. 2580, which changes the current preference for treatment, as well as H.R. 1300 could cause the backing off of both our permanence and preference for treatment goals and we would be opposed to that because we do believe that treatment is a critical element of assuring long-term protection at cleanup of Superfund sites.

Mr. OXLEY. The gentleman's time has expired.

Mr. PALLONE. Is the chairman—could I just ask for 30 seconds to just——

Mr. OXLEY. Without objection.

Mr. PALLONE. You know, I just wanted to say I don't bring these things up just in an abstract sense. I mean to give you an example of the chemical insecticide site which is in Edison in my district. They produced Agent Orange and the residue of that is all over the place. A few years ago the community really was very much opposed to the idea of just capping and fencing the site, and they fought the battle and won. You know, there would be a permanent solution and that capping and fencing would only be temporary, but we would move to the permanent solution, and this is what the

community people say, and that is why I have a problem with the legislation. Thank you.

Mr. OXLEY. The gentleman's time has expired. The gentleman from New York, Mr. Fossella.

Mr. FOSSELLA. Thank you, Mr. Chairman.

Mr. Fields, H.R. 1300 would appropriate significant funding for the Superfund program and proposes to do so on a declining basis, starting out with $1.5 billion per year, decreasing to less than $1 billion per year in 2007.

Mr. FIELDS. Right.

Mr. FOSSELLA. We have heard testimony at prior hearings this year from GAO and others that the Superfund program should begin to, "ramp down"—are you familiar with that?

Mr. FIELDS. Yes, sir.

Mr. FOSSELLA. Last year GAO estimated that no more than 232 sites would likely require listing on the NPL in the future. Are you familiar with that?

Mr. FIELDS. Yes.

Mr. FOSSELLA. Even more significantly, GAO also labelled the Superfund program as one that is at high risk for waste, fraud and abuse, specifically noting that EPA was paying overhead costs as high as 78 percent at some sites and continuing to pay contract overhead costs despite the fact that there is not enough work to keep them busy.

Are you familiar with that?

Mr. FIELDS. Yes, sir.

Mr. FOSSELLA. Given these findings, I am curious as to your response as to why shouldn't appropriations to the Superfund program be scaled back, and just as important, what is EPA doing to respond to these documented concerns by GAO that EPA's management of the Superfund program is exposing it to significant risk of waste, fraud and abuse?

Mr. FIELDS. Thank you, Congressman Fossella.

On the three points you raise, we obviously are very concerned about the funding level in the current H.R. 1300 We have gone on record saying that we believe that we need a $1.5 billion budget a year for the next 5 years to allow us to achieve our goal of getting to 1180 construction completions by 2005.

We think it is premature now to estimate what the cost beyond that timeframe is. Both Congress, this House of Representatives and the Senate have both recommended in their appropriation bills that there be a 10-year study of the future funding needs for the Superfund program. We agree with that and we will be willing to work with Congress in projecting cost beyond that, but we are concerned that the current legislation would be a premature ramp-down of the Superfund levels—$1.4 billion in 2004 and $1.3 billion in 2005, et cetera.

We would be very concerned about that, and we really need the $1.5 billion to allow us to achieve the cleanup pace that we are operating in.

Second, we are not in agreement with the General Accounting Office regarding their cleanup portions that go—in terms of their studies of cleanup of Superfund. They obviously have done several studies and we worked cooperatively with them, but we don't share

the same agreements regarding how you define cleanup and what costs go to cleanup and we believe that there is still quite a bit yet to be done.

We do agree with them on the 232—the estimate they did in terms of the universe of sites in the pipeline—we do agree. Our own internal estimates indicate that roughly 200 sites are in that queue of sites that might potentially be listed over the next several years. That is in the relative ball park of where we are as well in terms of how many sites might be listed on the NPL over the next several years.

But the Superfund program needs a firm base of funding and we are concerned that the current legislation would not provide sufficient funding, particularly in the out years, to allow us to achieve our cleanup goals reflective of our administrative reforms.

Mr. FOSSELLA. I asked specifically about—that at some sites, the overhead cost was as high as 78 percent and that there was some contract over at COS that was being paid despite the fact that there was not enough work to keep them busy. Do dispute that portion of it? Do you disagree with it?

Mr. FIELDS. I disagree with those numbers. We've had discussion with the General Accounting Office about that. We do agree we've had a goal for the last more than 5 years now of trying to achieve—make sure that oversight costs for Superfund contractors is in the 10 to 15 percent range. We recognize that in awarding new contracts, like we just—we just recently awarded new response action contracts, that the overhead rate is high when you initially award a contract. But once you start hiring some hiring staff and that contractor begins to conduct cleanup work in the field, those overhead costs go down.

And we believe we've put in place proper controls to assure that overhead rates are maintained at a lower rate. We think in the 10 to 15 percent range, it is an appropriate goal. And we believe the rates right now are roughly, for those new contracts, in the 20 percent ballpark. And we think as more cleanup work is done, they will come back into the 10 to 15 percent range and that's what we think is appropriate.

Mr. OXLEY. The gentleman's time has expired.

Mr. FOSSELLA. Mr. Chairman, 30 additional——

Mr. OXLEY. Without objection.

Mr. FOSSELLA. Mr. Fields, a couple—the last point, however, I don't think you answered. What is the EPA doing to address what the GAO determines as a significant risk of waste, fraud, and abuse with the Superfund program?

Mr. FIELDS. We've implemented a set of administrative reforms. We've implemented controls on our contract processes, putting in place a process for independent government cost estimates, putting in place a program with—that program is being done, by the way, with the U.S. Army Corps of Engineers, who went to each of our 10 regions to look at how we can better improve cost controls and program management costs and develop better independent government cost estimates for what the cost of jobs would be, so we would not be relying on contractor estimates prior to initiating cleanup work. So, we've done a lot over the last several years to better control costs and make sure that we're properly managing our re-

sources, including contract resources that we're so dependent on in Superfund.

Mr. FOSSELLA. But—okay, Mr. Chairman, thank you for your time, but these statements are this year. I know——

Mr. FIELDS. Right, but those were the issues that the General Accounting Office addressed: program management costs and independent government estimates. And we have implemented programs to try to reduce program management costs and make sure that our staff are trained on preparing independent government cost estimates, which are the two areas that the General Accounting Office addressed in their report to us.

Mr. FOSSELLA. Thank you. My time has expired. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired. The panel wants to thank you. The Chair wants to thank both of you for being here for the better part of 2 hours. And once again, Mr. Fields, it's always a pleasure to have you here. And this panel is dismissed.

Mr. FIELDS. Thank you, very much, Mr. Chairman.

Mr. OXLEY. The Chair would like to recognize our second panel and will introduce each one of you. Our first witness, Mr. Chris Jeffers, is City Manager for Monterey Park—let me see, Monterey—is that Monterey Park, California?

Mr. JEFFERS. That's correct.

Mr. OXLEY. Okay, I guess we're supposed to know that, sorry about that—representing the National Association of Counties; Mr. Mike Nobis, JK Creative Printers, on behalf of the NFIB; Mr. Gordon Johnson, Deputy Bureau Chief of the Office of the Attorney General from New York State, and I understand one of Mr. Towns's constituents, although you may not admit that on the record; Ms. Jane Williams, Chair for the Waste Committee from the Sierra Club; and I guess we're waiting for Dr. Jackson.

Mr. DANIEL. He'll be back in the room shortly.

Mr. OXLEY. Okay. We'll begin with Mr. Jeffers. Mr. Jeffers?

STATEMENT OF CHRISTOPHER JEFFERS, CITY MANAGER, MONTEREY PARK, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

Mr. JEFFERS. Thank you. Mr. Chairman, representatives, the distinguished members of this committee, thank you for allowing me to appear before you today. As stated, my name is Chris Jeffers. I'm the City Manager for Monterey Park, California. I'm pleased to be here today to testify regarding the need for local government—for municipal Superfund liability relief. I am here representing nine national municipal organizations that have worked together for many years to seek municipal Superfund relief, so that we can resolve our involvement in these toxic waste sites, reduce litigation, transaction costs, and to get on with the business of cleaning up and recycling these blighted sites into productive redevelopment parcels within our community.

Local governments have a serious problem. We have been saddled with years of delay, millions of dollars of liability and legal costs under Superfund law, simply because we owned or operated municipal landfills or sent municipal solid waste or sewage sludge to landfills that also received industrial and hazardous waste.

Local governments have faced costly and unwarranted contribution lawsuits from industrial Superfund polluters seeking to impose an unfair share of cost on parties that contributed no toxic waste to those so-called co-disposable landfill sites.

We've estimated that as many as 750 local governments and over 250 sites nationwide are affected by this co-disposable Superfund issue. In my case, the city of Monterey Park has felt the pain of Superfund issue. At the OII, Operating Industries, Inc., Superfund site in our city, 29 cities were sued by industrial PRPs, who contributed over 200 million gallons of hazardous industrial waste to that landfill. The industrial PRPs claimed that municipalities should pay 90 percent of the estimated $500 million cleanup, despite the fact that municipalities contributed only garbage and sewage sludge and no hazardous waste.

More than 15 years later, the cities have spent more than $9 million in legal costs and more than $34 million in liability costs. The site still sits polluted and undeveloped. Local governments that contributed no toxic waste to Superfund sites believe the Superfund process can and should be better and less costly.

Early in 1998, with our support, EPA finalized an administrative settlement policy to deal with those municipal Superfund issues. Policy sets a settlement amount of $5.30 per ton for municipal solid waste and sewage sludge for generators and transmitters and 20 percent overall site costs for municipal owners and operators at co-disposable landfills. However, as fair and appropriate as the administrative policy has been, we strongly believe that legislative action is needed to resolve municipal Superfund liability issue. The EPA policy is subject to continuing threats of litigation. Local governments have just not made much use of the policy, because the status is so uncertain.

Indeed, just a month ago, a Federal district judge in New York ruled that EPA settlement figures should not be applied for—in relation to four very small localities involved in the Sidney landfill site, but the liability should be determined through trial. The estimated total liability of those localities is likely to be less than 100,000. The delay in transaction costs of rejecting municipal settlement just is not fair.

For these reasons, we support legislative resolution of municipal Superfund problem. It is clear that there's broad and bipartisan consensus that the numbers set forth in the EPA municipal policy are fair, equitable, and workable. We believe that the time to enact these into law is now. Specifically, we support the liability caps for generators and transporters, the $5.30 per ton. We support the set liability caps for local government owners and operators of co-disposable landfills, based on a percentage apportionment of liability of 20 percent or less. We, also, support the provisions that provide for expedited settlement procedures and recognition of ability to pay factors and protection from contribution suits.

I wish to conclude with some well-known words that convey the need for municipal Superfund legislation and our hope that the ability of Congress to move this ahead—these issues ahead now. And if I may, too, I sort of brought one of my child's books, called the Lorax. And what Dr. Suess sort of said in here is, "Now that you're here, the word of the Lorax seems perfectly clear; unless

someone like you cares a whole awful lot, nothing is going to get better, it's not."

We're at that point, now. Local governments across the Nation thank you for the opportunity to talk before the subcommittee on these important issues. We urge you to resolve the municipal Superfund problem this year. I'd be happy to answer any questions and, again, thank you, very much, for listening to us.

[The prepared statement of Christopher Jeffers follows:]

PREPARED STATEMENT OF CHRISTOPHER JEFFERS, CITY MANAGER, CITY OF MONTEREY PARK, CALIFORNIA ON BEHALF OF NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; AMERICAN COMMUNITIES FOR CLEANUP EQUITY; AMERICAN PUBLIC WORKS ASSOCIATION; ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS; AND SOLID WASTE ASSOCIATION OF NORTH AMERICA

Chairman Oxley, Congressman Townes, and distinguished members of the committee, thank you and good morning. My name is Chris Jeffers. I am the City Manager of Monterey Park, California, a city of 65,000 on the coast of southern California that has experienced the problems of Superfund. I am also the chairman of American Communities for Cleanup Equity, or "ACCE," which represents local governments across the nation who are dealing with Superfund. I am pleased to be here today to testify regarding the needs of local governments for municipal Superfund liability relief.

I am here representing nine national local government organizations that have worked together for many years to seek municipal Superfund liability relief so that we can resolve our involvement at these toxic waste sites, reduce litigation and transaction costs, and get on with the business of cleaning up and recycling these blighted sites into productive redevelopments in our communities. These organizations include the National Association of Counties, the National League of Cities, American Communities for Cleanup Equity, the American Public Works Association, the Association of Metropolitan Sewerage Agencies, the International City/County Management Association, the International Municipal Lawyers Association, the National Association of Towns and Townships, and the Solid Waste Association of North America. Collectively, our organizations represent thousands of cities, towns, counties, and local agencies across the United States. We are responsible for the health, safety and vitality of our communities and, at the same time, for fulfilling the governmental duty to provide for municipal garbage and municipal sewage collection and disposal.

The nation's local governments are calling upon the Congress to provide municipal Superfund liability relief now. There has been broad, bipartisan, multi-stakeholder consensus on this municipal Superfund relief issue for many years. EPA has developed a fair and equitable municipal Superfund policy that provides a basis for legislation. The Republicans and the Democrats in the Senate Environment and Public Works Committee have proposed municipal Superfund legislation. We believe that there is widespread, bipartisan agreement here in the House on fixing the municipal Superfund problem. We hope that the parties will continue to work to get this municipal Superfund issue resolved, this year.

Local governments have a very serious problem. We have been saddled with years of delay, and millions of dollars of liability and legal costs under the Superfund law because we owned or operated municipal landfills or sent municipal solid waste or sewage sludge to landfills that also received industrial and hazardous wastes. Local governments have faced costly and unwarranted contribution suits from industrial Superfund polluters seeking to impose an unfair share of costs on parties that contributed only municipal solid waste to these so-called "co-disposal landfill" sites. We estimate that as many as 750 local governments at 250 sites nationwide are affected by the co-disposal landfill issue. The costs that our citizens bear as a result are unfair and unnecessary.

Local governments are in a unique situation at these co-disposal sites. First, municipal solid waste and sewage sludge collection and disposal is a governmental duty. It is a public responsibility to our communities that we cannot ignore, and we make no profit from it.

Secondly, the toxicity of municipal solid waste and sewage sludge bears virtually no relationship to the toxicity of conventional hazardous wastes and, as such, represents only a small portion of the cleanup costs at co-disposal landfills. EPA has

recognized the difference between MSW/MSS and the types of wastes that usually give rise to the environmental problems at NPL sites. MSW is defined by EPA as "household waste and solid waste collected from non-residential sources that is essentially the same as household waste." MSW is generally composed of non-hazardous substances, such as yard waste, food waste, glass or aluminum, along with small amounts of other types of wastes. MSS, which is strictly regulated by Section 503 of the Clean Water Act, is any solid, semi-solid or liquid residue removed during the treatment of municipal waste water or domestic sewage sludge, but does not include sewage sludge containing residue removed during the treatment of wastewater from manufacturing or processing operations. Although MSW/MSS may contain small concentrations of hazardous substances, EPA has found that landfills at which MSW/MSS alone was disposed of do not typically pose environmental problems of sufficient magnitude to merit designation as NPL sites. With rare exceptions, only when other hazardous wastes—such as industrial wastes—are mixed with MSW/MSS, will landfills become Superfund sites.

The City of Monterey Park has experienced many years of costly delay at a Superfund co-disposal site in our community. The Operating Industries Incorporated, or "OII" Superfund site was first listed on the National Priorities List in 1984. At this site, 29 cities were sued for up to 90 percent of an estimated $500 million in clean up costs at the site. In December, 1989 these 29 cities, the County of Los Angeles, five county municipal solid waste disposal districts, and the State of California Department of Transportation were sued for contribution by 64 corporate PRPs on the claim that the municipalities were liable for the cleanup of the 190 acre site. The evidence in this case indicated that the industrial generators dumped more than 200 million gallons of liquid industrial hazardous waste on essentially non-hazardous garbage from nearby municipalities, and that the garbage absorbed this waste, creating a sodden mass of dangerous pollution. In many cases, the municipal PRPs had no more direct connection to the garbage disposal at the site than to issue business licenses and, in some instances, franchises to private haulers, who in turn picked up the trash. Claiming that municipal sites are expensive to clean up because of the large volumes of municipal garbage, the industries argued that the local governments should be made to bear a volumetric share of liability for clean up costs, which translated into 90 percent of $500 million.

Five cities were eventually dismissed from the suit. Ten cities arrived at *de minimis* settlements with EPA and the industrial waste generators, in part to avoid substantial future litigation costs. Fourteen other cities fought for several years, because each faced enormous liability and could not afford the initial settlement offers. For example, the City of Alahambra faced an initial settlement demand of $11.6 million. Yet its General Fund budget was only $26 million. After several years of hard-fought negotiations, those 14 cities settled in 1995. In total, the 24 involved cities assumed a total liability of $34 million, and the cities' waste haulers assumed an additional liability of $11 million. In the aggregate, the cities paid more than $5 million in legal costs for in-house and outside counsel. In a number of cities, quality and quantity of municipal services suffered because of the large costs associated with the Superfund site.

Today, the OII site is still not cleaned up. It is still a drain on our community. We have not yet been able to redevelop the property as a productive part of our tax base and economy.

I am here today because the organizations I represent believe that the process of resolving liability and cleaning up Superfund co-disposal sites can and should be better for municipalities. We believe that legislative enactment of municipal co-disposal Superfund liability relief will spare millions of dollars in transaction costs and many years of delay for our local communities. That is why we support legislative enactment of a Superfund law that will provide a simple, expedited, and fair method for resolving local government liability associated with these co-disposal Superfund sites.

Indeed, there is broad consensus that municipalities need and merit liability relief. For nearly a decade, our coalition has worked with you and other members of Congress, and with the U.S. Environmental Protection Agency, to formulate a reasonable solution to the problem. In February 1998, with our support, the EPA finalized an administrative settlement policy to limit liability under Superfund for generators and transporters of municipal solid waste and sewage sludge, and for municipal owners and operators of co-disposal landfills. We continue to support this reasonable and fair EPA policy.

However, as fair and appropriate as the administrative policy is, we strongly believe that legislative action to resolve the municipal Superfund liability issue is necessary and justified. First, the EPA policy is only a policy, non-binding on the Agency and subject to change or challenge.

Second, this policy has already been the subject of litigation, and the real threat of further litigation involving local governments in individual cases remains. Just a month ago, a federal district judge in New York rejected the use of the EPA municipal policy to settle the liability of four very small towns and villages involved in the Sidney Landfill site. The judge ruled that the unit cost for municipal solid waste set in the EPA policy should not be applied, but instead should be determined at trial. Litigation and the associated transaction costs are unnecessary when a fair, conservatively estimated settlement policy figure could be applied in a way to quickly resolve municipal involvement at these sites. While we will continue to defend the EPA policy in court, as we did in federal court in 1998, and to advocate its use by our members, we believe a change in the Superfund law to address this issue is necessary to reduce the costly litigation and delay that municipalities may continue to face at co-disposal sites.

Third, we believe that legislative enactment of municipal Superfund liability provisions will give localities the certainty and confidence to make use of this settlement mechanism—much as the codification of lender liability Superfund provisions has provided certainty for the banking industry.

For these reasons, we support a legislative resolution of the municipal co-disposal liability problem. We believe the numbers used in the EPA municipal Superfund settlement policy would accomplish that objective. We urge the members of this committee to enact legislation that codifies the figures used in the EPA policy, making those figures solid and certain for municipalities across the nation that need a settlement mechanism that provides more confidence than EPA's policy can provide.

Specifically, we have following comments about the need for municipal Superfund liability clarification:

- We support set liability caps for generators and transporters of municipal solid waste and sewage sludge, based on a per ton assessment. We believe that local governments who delivered municipal solid waste or sewage sludge to a landfill in good faith should have the option to settle out their liability at a reasonable and fair rate that is set by legislation. The $5.30 per ton assessment in the EPA settlement policy was determined based on an analysis of post-closure costs at RCRA Subtitle D landfills—in other words, the best estimate for what it would have cost the local government to close the facility if the facility were not a Superfund site contaminated with other parties' toxic waste.
- We support set liability caps for local government owners and operators of co-disposal landfills, based on a specified percentage apportionment of liability. We believe that local governments should have the option to settle out their liability for 20 percent or less of the total cost of site cleanup. In addition, the liability share borne by local governments should be aggregated when two or more local governments, who owned or operated the facility either concurrently or sequentially, are identified as potentially responsible parties.
- The Environmental Protection Agency should be required to notify municipalities if they are eligible for the municipal solid waste and sewage sludge settlement mechanisms outlined above. Likewise, we support the approach of providing expedited settlement mechanisms to eligible municipalities. Finally, we support the approach of precluding third-party contribution suits or administrative Superfund orders against eligible municipal parties prior to their opportunity to settle their liability, or after they have settled their liability.
- We believe the ability-to-pay provisions of the law should apply to local government parties utilizing the municipal liability caps.
- We support legislative language that protects from liability those owners and operators of publicly owned treatment works or "POTWs" that, at the time of a release or threatened release, were in compliance with their Clean Water Act pretreatment standards under Section 307 and were not otherwise negligent in operating or maintaining their sewer system. Without specific protection from liability, otherwise compliant POTWs can be exposed to Superfund liability from industrial discharges into the public sewer system.

In summary, the local government organizations on whose behalf I am testifying today believe a legislative resolution of municipal co-disposal Superfund liability is of critical importance. Thank you, Mr. Chairman, for the opportunity to testify. I would be happy to answer any questions you or other members of the committee might have.

Mr. OXLEY. Thank you, Mr. Jeffers. Mr. Nobis?

STATEMENT OF MIKE NOBIS, JK CREATIVE PRINTERS, ON BEHALF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. NOBIS. Mr. Chairman and distinguished members of this committee, my name is Mike Nobis and I am from Quincy, Illinois and I'd like to thank you for allowing me to speak today and share my home town's experiences with a landfill that became a Superfund site.

I'm the general manager and part owner of JK Creative Printers. My company, which our family has owned for almost 30 years, employs 43 full-time people. We're proud to be members of the National Federation of Independent Business, the NFIB, and I am honored today to present this testimony on behalf of the NFIB's 600,000 small owner members.

A few months ago, our town was hurt by a Superfund landfill settlement forced onto us by United States EPA. It was a terrible situation that was totally unfair and it held 149 small businesses responsible for the cost of cleaning up a portion of a hazardous waste site at our landfill that we were not responsible for. The waste that was found to be polluting the surrounding area was linked to six large local manufacturers; yet, 149 small businesses were forced to pay for the cleanup of the site, even though what we put there over 20 years ago was totally legal and not hazardous.

For my company, it started in February 1999, when we received a letter in the mail from the EPA that stated that the six large local corporations and the city of Quincy were looking to recover some of their costs for the cleanup of that local landfill. And even though the majority of what we had hauled there was only trash and legally disposed of at the time, the EPA said that because our trash was sent to that site, we were potentially responsible for paying our proportional share of the cleanup.

It's important to understand that most of the 149 companies forced to pay, they were widows, elderly people, retired small one-person waste haulers, and small businesses with less than five employees. The financial settlements forced onto us were harsh and made it very difficult for some of our businesses to continue. I'm confident that Congress did not intend for the Superfund law to hurt so many small businesses, but that's exactly what's happening at many of our Superfund sites today. The small businesses in Quincy are looking to leaders like you for help right the wrong on the Superfund law.

Small business should not have to—small business should not have to face the threat of being dragged into Superfund for legally throwing away our garbage that was over 20 years ago, especially when the trash that is there is not what's driving the millions of dollars it cost to cleanup the site. The EPA is wasting the money that should be used to cleanup the Superfund sites by having its government lawyers track down small business owners, forcing us to hire attorneys and wasting more money, and then the large companies are paying lawyers to hunt down the small business and then forcing them into settlement. All of this money should be used to cleanup hazardous waste sites, but it isn't. Most of our money paid out in our settlements went to the lawyers. Getting small

business out of Superfund is the right thing to do for fairness and for the environment.

So, in conclusion, I say this: commend this committee for looking seriously at this problem and hope that this is going to be the year the small business owners will gain freedom from this unfair system. Small business needs your help now. Please change this law for the benefit of small business owners. Please help restore some common sense to the Superfund law. Thank you.

[The prepared statement of Mike Nobis follows:]

PREPARED STATEMENT OF MIKE NOBIS, JK CREATIVE PRINTERS ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman and distinguished members of this committee, my name is Mike Nobis and I am from Quincy, Illinois. I would like to thank you for allowing me to speak to you today and to share my hometown's experiences with a landfill that became a Superfund site. I am the General Manager and part owner of JK Creative Printers. My company, which our family has owned for almost 30 years, employs 43 full time people. We are proud to be members of the National Federation of Independent Business (NFIB) and are honored to present this testimony on behalf of NFIB's 600,000 small business owner members.

Quincy is a small community of 42,000 people, located on the banks of the Mississippi River just 150 miles north of St. Louis, MO. Our town is a great place to live and to raise a family. We have enjoyed years of good economic growth, good schools, strong community involvement and good city leadership. Of all the expectations we have for our town, having our local landfill declared a Superfund site was not one of them. In 1993, the Mississippi River reached its highest flood stages in history prompting our community to rally together and beat back the flood and its effects. Now, my community has been forced to band together again—to fight the unfairness of a Superfund law that is punishing us for legally disposing of our trash. Companies that once worked together to save our town from the flood, are now suing each other because of this Superfund landfill. Companies who have worked together for so many years are now suing one another.

For my company, it started on February 10, 1999 when we received a letter in the mail from the EPA that stated 6 large local corporations and the city were looking to recover some of their cost for the cleanup of our local landfill. Even though the majority of what we had hauled there was only trash and legally disposed of at that time, the EPA said that because our trash was sent to that site, we were potentially responsible for paying our proportional share of the cleanup.

When I read the letter, I felt sick. For me and the 148 other companies that received the letter, it was unexpected and without warning. At first, we had no idea of what the letter was telling us. It was asking us, as small companies, to "contribute" 3.1 million dollars. I laughed at the language they used, contribute. They weren't asking us to contribute; they were threatening us to pay. My company's designated amount to pay was $42,000, and I consider myself lucky. There were several other companies and individuals being asked to pay $70,000, $85,000 and some to pay over $100,000. As I read through the list, I saw Catholic grade schools, our local university, bowling allies, restaurants, small Mom and Pop trash haulers, furniture stores and our local McDonald's listed to pay. Most of the companies named only generated waste like plain office trash or food scraps. In the mid 70's, when our company's trash began to be put in the landfill, I was in college. One of the owners of another company was only 7 when this landfill was in use. Yet we are being held responsible. The document made it sound as though we were major hazardous waste dumpers. Yet, nowhere in the document did it list what waste we were accused of dumping. It only said that our trash was hauled to the landfill during the time in question and we now have to help pay for the cleanup, regardless of the fact that there was no other place to dump our trash.

On February 24, 1999, the EPA sent one of their attorneys to Quincy to help explain the letter and to answer questions. The meeting lasted for over two hours. The EPA attorney tried to answer questions and to comment on how the law was being applied. Many people stood up and pleaded their situations and how unfair and un-American this whole situation was. He admitted to everyone there that the law was probably unfair and very harsh. He said it was intended to be harsh, but he couldn't do anything about its unfairness. Even though the law seemed unfair, he said that it was all he had to work with.

The EPA and the 6 major PRP's weren't concerned about the waste that was sent to the landfill as being hazardous. The make-up of what we sent there was irrelevant. It was the volume that we sent to the landfill that they cared about, even if the trash was not dangerous. They knew many of us didn't send hazardous waste and they knew we couldn't afford to fight them. We became an easy money source for them because of the real threat of litigation by the major PRP's. And when you think about it, what small company can take on 6 large corporations and the EPA alone and win? If we didn't accept the settlement offer, the major PRP's would sue us for the entire cleanup cost. We were stuck. Pay up or be wiped out. The attorney for the EPA admitted that it would cost us more to fight them in court to prove we didn't haul hazardous waste to the landfill than to just go ahead and settle. It all came down to money . . . and they had more than we did.

Who were the small companies forced to pay this settlement? Most of the companies were individual people. Some were independent trash haulers; mom and dad hauling to help supplement their income to help raise their families. If you talk to them, you will notice they didn't make much money hauling trash. Others were small building contractors. Some are people in their retirement years. Some are widows whose husbands have passed away and they now have this settlement to deal with. Some are sons whose fathers once owned the business and now, years later, they have inherited the problem. We have business owners who bought businesses a few years ago who had nothing to do with this landfill, yet are being forced to pay up because they now own the assets and are the present money source. If they could have known this liability was going to be theirs in the future, they never would have bought the business. Mothers and fathers would have been reluctant to pass a family business—and its liability—to the next generation. We have some men in their late 70's and early 80's that could lose their life's savings when they should be enjoying their retirement years. They are spending their time and money paying the EPA for something they did 25 years ago that was legal. Are these the people Superfund was designed to collect from or has something gone wrong? It is needless business pressures like this that destroy small businesses and cause undue pain and hardship. Victimizing small businesses is not going to help speed the cleanup of Superfund sites.

Most of the cost contributed by our companies to this site didn't clean one ounce of the landfill. The money went to attorneys. Of all the money spent, the attorneys received the most. Consider how much the EPA and the major PRP's paid attorneys in order to obtain a settlement with the 149 small companies. The EPA itself admits that a major portion of the money in the Superfund is spent on litigation, not cleaning up the hazardous sites. In a 60 Minute documentary on the Superfund problems in Gettysburg, PA, Mike Wallace from CBS reported that ⅔ of the money from the Superfund is spent on litigation, not on clean-up costs. The estimate for the legal help that some of us received in Quincy (not including the settlement amounts) is close to $200,000. This is hard stuff. And for what? Who wins? The attorneys are the winners. It has been reported in our local newspaper that the EPA and the major PRP's are now suing many of those companies who didn't settle, resulting in more business for the attorneys. As I understand it, these companies will be allowed in later months to bring third party lawsuits. Where will it end? I do not think this law's intent is to place hardships on small business when the ultimate winners are the attorneys, not the environment.

Today our country's leaders need to look again at the intent of this law called Superfund. I don't believe you intended for it to burden or destroy individuals and small businesses in order to clean up hazardous sites. We have a chance to help small businesses get out from under this problem by supporting the small business liability relief language in HR 1300, "The Recycle America's Land Act," and HR 2247, "The Small Business Superfund Fairness Act of 1999," introduced by my friend, Representative John Shimkus who has helped all of us in Quincy get through this painful situation. A copy of the letter that I sent to Chairman Boehlert is attached to my testimony.

I commend this Committee for looking seriously at this problem, and hope that this is the year small business owners will gain freedom from this unfair system. Small businesses need your help now. Please change this law for the benefit of small business owners and help restore some common sense to the Superfund law.

Mr. OXLEY. Thank you, Mr. Nobis. Mr. Johnson?

STATEMENT OF GORDON J. JOHNSON, DEPUTY BUREAU CHIEF, OFFICE OF THE ATTORNEY GENERAL, STATE OF NEW YORK, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEY'S GENERAL

Mr. JOHNSON. My name is Gordon Johnson. I'm the Deputy Bureau Chief of the Environmental Protection Bureau in the Office of New York Attorney General Eliot Spitzer. I'm appearing today on behalf of Attorney General Spitzer and on behalf of the National Association of Attorney's General. We very much appreciate the opportunity to appear before the committee and thank the committee and its members and staff for their consideration and assistance. The Association has been deeply involved in Superfund reauthorization for many years. At its summer meeting in 1997, the sole resolution adopted by NAAG addressed Superfund reauthorization. A copy is submitted with our written statement.

While the State agencies that administer the cleanup programs are very knowledgeable about the engineering issues involved in the remedial process, it's the State Attorney's General, who can best evaluate the legal consequences of changes in the current statutory scheme, as how amendments are likely to be interpreted by the courts and their effect on enforcement, settlement, and cleanup. We're pleased to be able to bring this knowledge to the committee.

Although there were significant problems in the Federal implementation of CERCLA during the 1980's, the current statute is now getting the job done. In New York, because of the powers provided in CERCLA, the State has obtained cleanups at over 600 hazardous waste sites in New York. Responsible parties have contributed more than $2 billion to site cleanups and two-thirds of the sites are being cleaned up by private parties. Most States have had similar results.

On a Federal level, some $15 billion of public money have been saved, because 70 percent of remedial actions at Federal Superfund sites are being performed by responsible parties. A major reason for this success is the cleanup liability under CERCLA is now clearly understood. Most PRPs understand the statute and are now ready to settle their liability with government and perform cleanups. EPAs practices have also evolved, resulting in earlier settlements and quicker implementation of remedial decisions. State Superfund programs have matured, many of which are modeled on the Federal program and use the Federal statute to get appropriate cleanups at minimal taxpayer expense.

The message to us is clear. We must avoid changes in CERCLA that will reignite courtroom battles over the meaning, scope, and implementations of the law. At the same time, we must not lose sight of our primary goal, clean up of sites and protection of the public and future generations. We are pleased the H.R. 1300, as reported for the Committee on Transportation, modified the bill as introduced and is beginning to reflect our conclusions on the direction for reauthorization. The bill contains one revision we've sought for use, the cap at 10 percent for the State share of remedy operation and maintenance costs. H.R. 1300, as reported, is also more selective than its amendments. It doesn't amend the natural resource damage provision to CERCLA and some of the more extensive and we believe unnecessary and counterproductive amend-

ments to remedy selection provisions and the portions of the liability provisions have now been removed. As a result, the defense bar will have fewer opportunities for legal challenges than under earlier bills.

Unfortunately, other needed revisions we have been seeking for many years are still absent. One, we need clarification of the sovereign immunity waiver regarding Federal facilities and delegation to the States of EPA's authority over Federal facilities in appropriate situations. Two, the statute should make clear that remedies selected by States are reviewed on the administrative record. And three, States should be protected from counterclaims asserting liability on the basis of their ownership as sovereigns of stream beds, rivers, and other natural resources. One provision that was in H.R. 13, as introduced, was removed when it was reported out and we ask that it be restored. That was the portion authorizing the Fund to pay State natural resource trustees assessment costs.

There are still serious problems with H.R. 1300's revisions to liability and allocation provisions of CERCLA. While NAAG supports limited exemptions from liability for truly micromus parties and a reasonable limitation on the liability of municipal solid waste disposal, many of the provisions of H.R. 1300 now go too far. Cleanups need to comply with the relevant and appropriate State standards. The proposed mandatory allocation process is unwise and rather than making settlements easier and quicker, will complicate and delay settlements and cleanups. Cleanups should come first, not arguments. We go into greater detail in our written testimony.

Thank you, for your attention.

[The prepared statement of Gordon J. Johnson follow:]

PREPARED STATEMENT OF GORDON J. JOHNSON, ASSISTANT ATTORNEY GENERAL, STATE OF NEW YORK

My name is Gordon J. Johnson, and I am a Deputy Bureau Chief of the Environmental Protection Bureau in the office of New York Attorney General Eliot Spitzer. I am appearing today on behalf of Attorney General Spitzer and on behalf of the National Association of Attorneys General (NAAG). We very much appreciate the opportunity to appear before the Committee to comment on H.R. 1300, as reported out on August 3, 1999, by the Committee on Transportation and Infrastructure (hereafter referred to as "H.R. 1300, as reported" or "August amendment"), and section 9, regarding remedy selection, of H.R. 2580.

The State Attorneys General have a major interest in Superfund reauthorization legislation. As chief legal officers of our respective states, we enforce state and federal laws in our states. We help protect the health and welfare of our citizens, our environment and natural resources. Because many steps in the Superfund cleanup process necessarily involve legal issues, we often are called upon to advise our client agencies—both response agencies and natural resource trustee agencies—on how the law should be interpreted and implemented to achieve the desired cleanup or restoration goals. We often are also responsible for negotiating cleanup and natural resource damages settlements, and when a settlement cannot be reached, it is our responsibility to commence and litigate an enforcement action. We also defend state agencies and authorities when Superfund claims are made by the United States Environmental Protection Agency (EPA) and other federal agencies against them.

NAAG also has been deeply involved in the Superfund reauthorization process for many years. At its Summer meeting on June 22-26, 1997, the sole resolution adopted by the state Attorneys General addressed Superfund Reauthorization; a copy of this bipartisan Resolution is attached. The Resolution directly addresses many of the issues that are the subject of this hearing. The NAAG Resolution arose from the State Attorneys General's recognition of the critical importance of the Superfund program in assuring protection of public health and the environment from releases of hazardous substances at thousands of sites across the country. We want to make

the tasks of cleanup and protecting the public less complicated and more efficient, and to reduce the amount of litigation and the attendant costs that result.

While the state agencies that administer cleanup programs are very knowledgeable about the engineering issues involved in selecting remedies and the cleanup process, it is the state Attorneys General who can best evaluate the legal consequences of changes to the current statutory scheme, such as how amendments likely will be interpreted by the courts and the effect of the amendments on enforcement, settlement, and cleanup. We are pleased that we will be able to bring to this Committee our insights and experience in administering the Superfund statute.

INTRODUCTION

In New York, our office has been litigating Superfund cases since 1981. A major impetus for the passage of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was the chemical dumps exemplified by the infamous Love Canal and related Hooker Chemical Company sites in Niagara Falls, New York. CERCLA provided both the federal and state governments essential legal tools to address the dangers posed by those and thousands of other sites in New York and throughout the country.

Although there were significant problems in the federal implementation of CERCLA during the 1980's, the current statute is now getting the job done as intended. As a result of CERCLA, our office and the State's Department of Environmental Conservation have been able to obtain cleanups at over 600 hazardous waste sites in New York. While state voters in New York approved bonding for and New York committed $1.1 billion for site cleanups, because of the powers provided in CERCLA, responsible parties have contributed more than $2.35 billion toward site remediation and two-thirds of sites are being cleaned by the private parties responsible for their creation. Most states have had similar results. On the federal level, some $10 billion of public money has been saved because 70% of all remedial actions at federal Superfund sites are being performed by responsible parties.

A major reason for this success is that cleanup liability under CERCLA is now clearly understood by responsible parties and government. It was not always this way. In the 1980's, the meaning of numerous terms, the reach of the liability provisions, and the application of the remedy selection provisions were the subjects of contentious litigation. These lawsuits caused delays in cleanups, imposed substantial burdens placed on federal and state programs, and increased everyone's transaction and cleanup costs. Those days are now over: potentially responsible parties (PRPs) now know what the statute means and where they stand, and thus most are ready to settle their liability with the government. EPA's practices also have evolved, and it knows what it can require of PRPs. Moreover, EPA has developed practices that lead to earlier settlements and the quicker implementation of remedial decisions. Finally, the states' own Superfund programs have matured. Many of them are modeled on or mainly utilize the federal statute. State officials too understand what CERCLA means and how to use it, and can obtain appropriate cleanups at minimal taxpayer expense.

The message is clear: we must avoid changes to CERCLA that will reignite the courtroom battles over the meaning, scope, and implications of the law. At the same time, we must not lose sight of our primary goal—cleanup of sites and protection of the public and future generations. We have no desire to replay the 1980's, even though we were generally successful in the courtrooms.

TITLE I. BROWNFIELDS REVITALIZATION

As stated in the NAAG Resolution, the Attorneys General support the strengthening of state voluntary cleanup and brownfields redevelopment programs by providing technical and financial assistance to those programs, and by giving appropriate legal finality to cleanup decisions of qualified state voluntary cleanup programs and brownfield redevelopment programs. Therefore, we strongly support the provision in H.R. 1300, as reported, for assessment grants, remediation grants and technical and financial assistance to state voluntary cleanup programs. Federal statutory provisions should be flexible enough to accommodate different state voluntary cleanup laws. States should be able to self-certify, subject to EPA's approval. After such approval, the state should be authorized to issue a release from federal liability when a volunteer complies with a federally-approved state brownfields program. In this fashion state brownfields and voluntary cleanup programs can work to their fullest potential.

However, there are a number of provisions in H.R. 1300 which do not strengthen these state programs. For example, under the provisions of § 104 of H.R. 1300, as reported, a PRP can largely shield any site against federal enforcement or cost re-

covery action just by commencing a response action in compliance with "a State law that specifically governs response actions for the protection of public health and the environment." That clause is ill-defined, and could be construed easily beyond a typical brownfields redevelopment statute. Nor is there any requirement that the response action necessarily result in cleanups protective of the public health or environment. In contrast, we note that one criterion for grants under Title I is the "ability of the eligible entity to ensure that a remedial action funded by the grant will be conducted *under the authority of a State cleanup program that ensures that the remedial action is protective of human heath and the environment*." (Emphasis supplied) We are concerned that the vague language in § 104 of H.R. 1300, as reported, which varies from the language governing grants, may leave the public unprotected.

In addition, there is no requirement for public participation in the state cleanup programs that can shield a PRP from liability. New York believes that public participation in the investigation, remedy selection, and cleanup of hazardous substance sites is a bedrock of CERCLA. H.R. 1300, as reported, undermines that bedrock.

TITLE II. COMMUNITY PARTICIPATION AND HUMAN HEALTH

We support the public participation provisions of Title II which provide affected communities, local governments and the states further information, public meetings and the right to comment on various steps in CERCLA response actions. We also support the "Technical Assistance Grants" amendments, especially those making it easier for citizens to participate in the often complicated processes involving CERCLA cleanups.

We are also pleased that the August amendment to H.R. 1300, as introduced, removed provisions in § 202 directing the President to provide the public with what often can be confusing and misleading risk comparisons. However, it is important that a new provision requiring disclosure of information concerning releases before and during a removal action not cause delays in the initiation and completion of removal actions, particularly in emergency situations. As currently drafted, the language of proposed § 117(b)(2)(i) regarding removal actions is confusing with respect to when information must be disclosed. We suggest that the provision be rewritten to excuse the disclosure of information before and during the removal action when its disclosure would delay the removal action or imperil public health or the environment, and in such circumstances the information be made available as soon as practicable after the initiation of the removal action.

TITLE III. LIABILITY REFORM

The core liability provisions of CERCLA, and analogous liability laws which have been enacted by the majority of the states, are an essential part of a successful cleanup program. They provide strong incentives for early cleanup settlements, and promote pollution prevention, improved management of hazardous wastes, and voluntary cleanups incident to property transfer and redevelopment. Unfortunately, H.R. 1300, as reported, still would make substantial and problematic changes to those core provisions. These changes will trigger another decade of litigation, with the attendant drain of government resources, escalation of private transaction costs, and delays in cleanup.

A. GENERAL PROVISIONS

1. Amendments to Section 106—Sufficient Cause

Section 301(a) of H.R. 1300, as reported, provides that a liable party must comply with an administrative order even if another party is complying with the same or a similar order. This provision allows EPA to issue "participation and cooperation" orders. EPA currently uses such orders to require additional liable parties to contribute to a cleanup that is already underway. However, at least one court has ruled that such orders are unlawful after EPA has already obtained "complete relief" from other parties. *United States v. Occidental Chem. Corp.,* 29 Envtl. L. Rep. (ELI) 20,276 (M.D. Pa. 1998), *appeal argued July 27, 1999,* No. 99-3084 (3d Cir. 1999).

The proposed amendment in § 301(a) would allow EPA to issue "participation and cooperation" orders, effectively overruling the contrary case law. Such orders increase the fairness of the CERCLA liability scheme by helping ensure that all liable parties contribute to the cleanup. The Attorneys General therefore support this provision.

The August amendment removed a provision formerly set out at § 301(a) of H.R. 1300, as introduced, that would have placed inappropriate limitations on the issuance of administrative orders under section 106. However, a related provision that would have the same practical effect—§ 301(a)(4) of H.R. 1300, as reported,

adding a new § 106(b)(1)(B)—remains. This provision effectively prohibits enforcement of a § 106 order pursuant to both §§ 106(b)(1) and 107(c)(3) of CERCLA against any parties not liable for response costs under § 107.

Administrative orders under § 106 are a very important tool that EPA has to compel cleanup actions and to protect public health and the environment. Sometimes, albeit infrequently, it becomes necessary to order a party not liable under § 107 to take actions necessary to a cleanup. For instance, the South Valley Superfund site in Albuquerque, New Mexico, encompasses several square miles of industrial facilities in the Rio Grande valley which produced a number of distinct plumes of contamination in the aquifer that supplies the City of Albuquerque with its drinking water. Several municipal wells have been taken out of service because of the contamination. In 1990, EPA entered into a consent decree with Univar Corporation to clean up a plume of chlorinated solvents from Univar's Edmunds Street facility using extraction wells. After Univar Corporation constructed and began operating a system, the extraction wells began drawing a nearby plume of petroleum contamination towards the Univar system. Had the petroleum compounds entered the system, they would have ruined the Univar treatment system. Under the petroleum exclusion in § 101(14) of CERCLA, the parties responsible for the petroleum plume were not liable under § 107(a). Nevertheless, on February 8, 1991, EPA issued a unilateral administrative order (Docket No. CERCLA-VI-14-91) under § 106 of CERCLA against the parties responsible for the petroleum plume, ordering them to take all necessary action to prevent the petroleum compounds from interfering with the Univar remedial action. The parties responsible for the petroleum plume, although not liable under CERCLA, complied with the § 106 order. Under the bill's limitations on § 106 orders, such an order could not be enforced because the good faith belief in the absence of liability would become a defense to the enforcement of such an order.

We note that § 106(b)(2) of CERCLA already provides that a person who complies with a § 106 order but is not liable under § 107 is entitled to reimbursement of its reasonable costs in complying with the order. It is important that, at a minimum, EPA be able to enforce a §106 order pursuant to §106(b)(1) of CERCLA under these and similar circumstances. Implementation of an order predicated on the existence of an imminent and substantial endangerment to public health, welfare, or the environment should not be stymied so parties can litigate their good faith belief or their ultimate CERCLA liability. To the extent that the federal government's current enforcement powers at hazardous substance sites are significantly curtailed, the states often are left with the costs of remediating and taking enforcement action at such sites, and the states do not have the resources to do so. We have seen no indication that EPA has abused the authority to issue such orders, and see no reason to limit that authority.

B. EXEMPTIONS AND LIMITATIONS TO LIABILITY

NAAG is pleased that the August amendment removed proposed changes to §107(a) liability provisions of CERCLA. This deletion will save all interested parties substantial transaction costs and resources. Other problems remain, however.

1. Owners/Operators

Section §302 of H.R. 1300, as reported, would make substantial modifications to the scope of defenses available to current owners under §107 of CERCLA. The existing "innocent purchaser" protections, created through the definition of "contractual relationship" in §101(35) of CERCLA, apply only to owners, while H.R. 1300, as reported, extends these protections to owners *and* operators.

Under current law, the definition of "contractual relationship" implicates current owners if they are related to a PRP through the chain of title. In H.R. 1300, as reported, there is no definition for "contractual relationship," and, under new §107(b)(5), a current owner who is linked only by a chain of title is not liable.

Under existing law, current owners can escape liability by proving they are "innocent" purchasers, i.e., they did not know or have reason to know that the property was contaminated before they bought it and complied with the "due diligence" requirements. Under H.R. 1300, as reported, a current owner which knew before purchase that the property was contaminated will escape all liability, even if the owner paid a reduced price for the land because of the contamination. Moreover, H.R. 1300, as reported, adds further protection for owners which acquired a facility after March 25, 1999, exempting such owners from any liability so long as they developed the commercial or industrial facility under certain federal, state or local redevelopment programs, even if such owners acquired the property fully knowing it was contaminated. What constitutes an applicable redevelopment program remains unaddressed, leaving a substantial hole for any current owner to bury its liability

for cleaning up a hazardous substance site. Unless narrowed, this shifts to the taxpayers the costs and burdens of cleanup, thereby improving properties owned by knowing purchasers at governmental expense.

Under H.R. 1300, as reported, current owners and operators are further insulated from any liability because of the new, substantially relaxed standard of "appropriate care." For instance, as long as the government is conducting any "response action," such as a Preliminary Site Assessment, the owner/operator can avoid any liability by simply letting the government onto the property and getting out of the way, which conduct would constitute "appropriate care" under H.R. 1300, as reported.

The effect of all these protections for current owners/operators is to obliterate the current owner/operator category from CERCLA liability. This is contrary to one of the important tenets of the CERCLA liability scheme. In addressing an owner's liability, CERCLA was intended not only to hold responsible those whose activities created the contamination, but "to provide incentives for private parties to investigate potential sources of contamination and to initiate remediation efforts." *Foster v. United States,* 922 F. Supp. 642, 656 (D.D.C. 1996). Moreover, CERCLA's provision for current owners is modeled after common law tort liability rules that seek to address the social cost of hazardous waste contamination by controlling the behavior of landowners and other relevant actors. Indeed, landowners have long had a duty under common law to maintain their properties free of nuisances, such as chemical contamination, and upon learning of a nuisance are required to abate it even when they did not create the nuisance themselves. *See, e.g., RESTATEMENT (SECOND) OF TORTS* §§ 351 *et seq.* and §§ 822 *et seq.; State of New York v. Shore Realty,* 759 F.2d 1032, 1050-52 (2d Cir. 1985).

For the reasons stated, we oppose these amendments.

2. Governmental Entities, Contiguous Property Owners and Others

We support the intent of the changes to the long-standing "Innocent Governmental Entities" exception to liability under new § 107(b)(2)(D), §302(b)(1) of H.R. 1300, as reported, although it is drafted too narrowly to address current abuses where, for example, states are subject to counterclaims based on sovereign interests in groundwater, stream and river beds and banks. Also, the provision addressing Governmental Entities in H.R. 1300, as reported—proposed §107(b)(2)(D)—was slightly changed from the similar provision in H.R. 1300, as introduced, resulting in a distortion of the meaning of the provision. We urge the Committee to return to the previous language. We also support the relief for "Contiguous Property Owners" amending §101(20) of CERCLA, §302(c) of H.R. 1300, as reported.

3. Livestock Treatment

Section 304 of H.R. 1300, as reported, would amend §107(i) of CERCLA to expand the exemption for pesticide application to cover any release of a hazardous substance "resulting from" the application of a pesticide for the treatment of livestock.

We believe this provision is overly broad. Pesticides are typically applied to livestock in large "dipping" vats; the vats are filled with water, pesticides, and solvents, and livestock are herded into the vats, one at a time, for treatment. Eventually the dipping solution becomes dirty or "spent," and is replaced with fresh solution. The spent solution, which often contains highly toxic pesticides, must be disposed of, usually off-site. Under the bill's exemption, past disposal of such pesticide solution, unless shown to be contrary to law, would be exempted from CERCLA liability.

Our concern is not a theoretical one. For example, the Oklahoma National Stock Yards Company arranged for the disposal of some 211,900 gallons of cattle dipping waste at the Royal Hardage site in Criner, Oklahoma. Included in that waste was approximately 2,000 gallons of toxaphene, a highly toxic pesticide which is listed as an acutely hazardous waste under RCRA, 40 C.F.R. § 261.33(e). Pursuant to a court order, the Stock Yards Company is currently helping pay for the clean up of the Hardage site. If this "livestock treatment" exemption were to be enacted in its current form, the Stock Yards Company's liability would be eliminated.

4. Small Businesses Exemption

Section 107 of CERCLA would be amended by §305 of H.R. 1300 to include a new subsection (o), limiting liability at NPL sites for small businesses which are generators or transporters. "Small" is a business that had no more than 75 full-time employees, or equivalent, on the average, *and* had $3 million or less in "gross revenues" over the previous three years preceding the date of notification by the President that the entity is a PRP. If the company qualifies, it escapes liability for costs or damages, unless its hazardous substances contribute significantly to the costs of the response action.

We oppose the proposed exemption in H.R. 1300 since the exemption is based on the status of the PRP and applies no matter what volume of waste was disposed.

The exemption would eliminate many PRPs, especially at municipal-owned, co-disposal facilities, and the Fund and the states would have to make up for this share of liability. The states do not have the resources to absorb these shares. Also, experience shows us that it is often smaller companies that pay less attention to their environmental responsibilities than larger companies.

As noted, H.R. 1300, as reported, provides that the exemption applies to such small businesses unless its hazardous substances contribute significantly to the costs of the response action. Introducing this new standard into CERCLA litigation would undermine the critically important strict liability provisions of existing law, increase litigation and all its attendant transaction costs, and undermine recovery of the public funds at CERCLA sites.

5. MSW Exemption

Section 107 of CERCLA would be amended by §305 to include a new subsection (p), providing a liability exemption for generators and transporters of municipal solid waste ("MSW") and municipal sewage sludge ("sludge") at NPL sites, unless, in the case only of transporters, the transporter's wastes contribute significantly to the costs of the response action and the transporter is in the business of transporting waste. Even such transporters, which disposed of waste that significantly contributed to the cost, are provided further protection, as the liability at an NPL site for *all* MSW generators and transporters who are not exempt would be capped at ten percent.

Under H.R. 1300, as reported, MSW includes *all* waste generated by households, hotels and motels, and by commercial, institutional and industrial sources to the extent (i) such materials are essentially the same as household waste, *or* (ii) the material is waste that is collected with MSW and contains hazardous substances that would qualify for de micromis exemption under §107(r). [110 gals. or 200 lbs.]. The term includes food, yard waste, paper, clothing, appliances, consumer product packaging, disposal diapers, office supplies, cosmetics, glass and metal food containers, wooden pallets, cardboard, grade and high school lab waste, and household hazardous waste ("HHW"). Exemption from liability is also provided for certain residential property owners and lessees, small businesses, and charitable organizations.

NAAG supports reasonable limitations on liability for disposal of municipal solid waste. Unfortunately, the limitations provided under § 107(p) of H.R. 1300, as reported, are much too broad. A substantial portion of PRPs would be relieved of liability if these changes were adopted because the exemption applies to not just households, but a wide, almost all-inclusive group of business, commercial, institutional and industrial sources. For instance, at a number of hazardous waste sites, cosmetic manufacturers have disposed of sometimes substantial quantities of their waste containing a variety of hazardous substances, *e.g.,* acetone. Under H.R. 1300, as reported, such PRPs would escape liability because their wastes, at least arguably, are "essentially the same" as waste materials normally generated by households, *i.e.,* cosmetics thrown away by households. Or, as another example, at municipal-owned co-disposal facilities, it is common to have a large volume of MSW and then a small volume of waste from commercial and industrial sources which is highly toxic. Many commercial, institutional and industrial facilities have used solvents in large quantities, and those wastes were often disposed in landfills over the years. PRPs could argue that their solvents are "essentially the same as" solvents used in households and, therefore, exempt.

The exemption applies regardless of the volume of the MSW waste as long as the waste is essentially the same as household waste. While NAAG historically has supported liability reforms for small MSW generators, such broad-based exemptions, which would apply to major waste handling companies, go too far.

6. Municipal Owners/Operators

Section 107 of CERCLA would be amended by §5 to include a new subsection (q), limiting liability for municipal owners/operators at NPL sites. With respect to facilities that are not subject to RCRA subtitle D criteria and proposed for listing before March 25, 1999, small municipalities (less than 100,000 in 1990 census) have an aggregate liability for response costs incurred after March 25, 1999, of the lesser of (i) 10% of total response costs at the facility, or (ii) the costs of compliance with subtitle D, if the facility continued to accept MSW through January 1, 1997. Large municipalities (100,000 or more), under the same conditions, are limited to 20% or costs of subtitle D, whichever is less.

NAAG supports provisions that recognize the burden on local governments. However, it must be noted that to the extent that the other exemptions are applicable, and the exempt and limited liability parties avoid sharing in the costs of cleaning up these toxic waste sites, that burden will fall on municipalities and the states,

even with the proposed limitations, should the Fund no longer be adequate to pay for cleanups because of its assumption of the costs of the new exemptions for generators of wastes. And the burden also will fall on the states which will be responsible for a portion of the operation and maintenance costs otherwise assumed by the Fund.

7. "De micromis" parties.

NAAG supports reasonable liability exemptions for truly "de micromis" parties. However, it is important that these provisions be narrowly and carefully written to avoid inappropriate releases from liability. We note that CERCLA always allowed EPA to settle matters quickly and in recent years EPA has been aggressively entering into such settlements without any changes in the law.

Section 305(c) of H.R. 1300, as reported, adds a proposed §107(r) which would exempt from liability "de micromis" parties that sent less than 110 gallons or 200 pounds of material containing hazardous substances to a NPL site. We support an exemption for truly de micromis parties, such as Elk Clubs, pizza parlors, and Girl Scout troops, that sent minimal amounts of low-concentration and low-toxicity mixtures to a site. However, depending on site-specific circumstances and the type of hazardous substances involved, 200 pounds of solid material or 110 gallons of liquid (which is more mobile than a solid material and will usually have a weight of approximately 880 pounds—four times the weight exemption for solid materials) can constitute a substantial contribution to a release. For instance, 110 gallons of a spent solvent, such as trichloroethylene, could contaminate 10 billion gallons of drinking water to levels twice the drinking water standard for the solvent. We believe exempting such a party statutorily and presumptively would be unfair and inappropriate, particularly without full consideration of concentration or toxicity, and would lead to extensive litigation by parties near the specified weight or gallonage.

While H.R. 1300, as reported, voids this liability exception when the President determines that the material "has contributed, or contributes, significantly to the costs of response," the unfairness of an exception to liability that ignores concentration of a chemical and contains an exceedingly more favorable treatment of liquid wastes remains.

8. Response Action Contractors

In §307 of H.R. 1300, as reported, the bill would limit the liability of response action contractors. We oppose these limitations. First, there is no evidence that contractors are reluctant to perform cleanup activities under current law, and therefore there is no compelling reason to radically rewrite the current law. Second, the bill supersedes existing limitations of actions that run from the time that an injury is discovered, and replaces it with a six year period that is triggered by completion of the work. Thus, the bill carves out a radical and unfair new exemption for these parties, and deprives potential victims of rightful compensation where, due to a latency period that is often associated with exposure to hazardous substances, or for other reasons, the injury is not discovered within the six year time frame. Because the amendment is not necessary, unfair, and preempts state law unless a state has specifically legislated the liability of response action contractors' liability, we oppose it.

9. Recyclers

Under the new §130 added by § 309 of H.R. 1300, as reported, there is no liability at any site for a person who arranges for the recycling of recyclable material. "Recyclable material" is defined to include (1) paper, plastic, glass, textiles, rubber (now including whole tires) and metal (now including certain copper and copper alloy operations byproducts), as well as minor amounts of material incident to or adhering to such scrap; (2) spent batteries; and, (3) used oil. Special rules are then provided for transactions involving these different kinds of recyclable materials. Section 130 of the bill is encaptioned a "clarification of liability." It is not a clarification, but is rather a substantive change in the law.

Preliminarily, it is unclear whether H.R. 1300, as reported, intends that this change in law be retroactive. While §305(e), which adds proposed §107(u), provides that the new limitations and exemptions for small businesses, municipal sold waste and sewage sludge, municipal owners and operators, and de micromis generators and transporters shall have not affect settlements and judgements approved by a court or any administrative action that has become effective not later than thirty days after enactment, the bill is silent on the recycling exemption. It would not be appropriate to reopen past settlements and judgments that parties entered into in good faith, particularly because that would require a wholesale shift and reallocation of costs among parties. We urge the Committee to avoid this possibility by amending proposed §107(u) to include recyclers.

While we agree that recycling activities should be encouraged, we are nevertheless troubled by this exemption because it is too broad. For instance, the exemption is particularly inappropriate as it applies to spent lead-acid batteries. Such batteries contain large quantities of lead, an especially toxic substance. Much of the lead in these batteries is in the form of lead oxide and lead sulfate, compounds that are relatively mobile and bioavailable in the environment. Moreover, the sulfuric acid in these batteries (which has a pH approaching 0) greatly enhances the solubility and mobility of these metals.

The secondary lead smelter industry has repeatedly argued that the RCRA regulations—under either federal or state authority—do not apply to spent batteries. These batteries, the industry argues, are raw material; they are not discarded, and thus not solid wastes and not subject to regulation under RCRA. *See United States v. ILCO, Inc.,* 996 F.2d 1126 (11th Cir. 1993). The lead components of spent lead-acid batteries would also fall within the definition of "scrap metal." The limitations on the exemption for scrap metal are significantly less stringent than the limitations on the exemption for spent batteries. As the exemptions are currently drafted, a person recycling the lead from spent lead-acid batteries could take advantage of the less stringent limitation for scrap metal. At a minimum, these problems need to be addressed.

In addition, used oil is included as a recyclable material, yet used oil often contains hazardous substances. The disposal of such material has created many hazardous waste sites subject to CERCLA enforcement action in the past, and was an activity often conducted by parties not particularly attentive to environmental concerns. The inclusion of waste oil, particularly waste oil intended to be burned, in the exemption from liability is unwise.

10. Oversight Costs

Section 305(e) of H.R. 1300, as reported, would add an additional limitation of liability directly affecting every state: a cap on recoverable oversight costs incurred by any government at 10% of the costs of the response action. This cap is unfair, for the cost of appropriate oversight often does not bear a direct relationship to the cost of the response action. Some PRP's implementation of response actions requires very close monitoring, particularly when the PRP's prior activities have not been conducted well or when the PRP is less experienced. Oversight is needed to protect the public, and without oversight public confidence in cleanups conducted by private parties will be severely undermined. There should not be an artificial limitation on oversight costs based on cost percentages.

Quite simply, state governments in particular do not have the personnel and other resources needed to inflate or perform unnecessary oversight. This provision will only encourage further litigation on oversight and efforts to reclassify government activities as oversight in order to fall within the cap, and might well result in some states foregoing needed oversight. The result could well be fraudulent or shoddy cleanups. This provision should be stricken.

C. ALLOCATION

NAAG supports reasonable statutory changes that encourage early settlements with de minimis and de micromis parties that sent minimal quantities of waste to a site. However, H.R. 1300, as reported, still would create a mandatory process for allocating liability among responsible parties at any NPL site, except some "chain of title sites," where the costs are estimated to exceed $2 million (likely most sites) and there is no consent decree or administrative order by March 25, 1999. While liability allocation can be worthwhile in some cases, the decision to conduct such an allocation, and the timing and procedure for allocation, should be left to agency discretion and should not be prescribed by statute. Historically, most allocations have been done by responsible party groups themselves, not by government agencies. Moreover, recent experience with administrative allocations conducted by EPA and by state agencies has demonstrated the need for flexibility. The governments should be allowed to structure allocation procedures to fit the particular facts of each case. While the August amendment to H.R. 1300, as introduced, eliminated some of the most serious obstacles to settlement created by the allocation process imposed by that version of the bill, there still are significant problems.

1. Delay of Cleanups

By creating a mandatory process for allocating liability among responsible parties, H.R. 1300, as reported, will likely delay cleanups and substantially increase costs. Under current law, the governments are empowered to clean up first and protect the public, then allocate responsibility and costs. The August amendment sensibly removed the requirement that the President file a district court action to begin the allocation process at all NPL sites. However, H.R. 1300, as reported, still requires

the President to "ensure that a fair and equitable allocation of liability is undertaken at an appropriate time," language which is likely to lead to litigation when EPA fails to proceed on a timetable desired by a PRP. Thus, the bill may well require that liability disputes be resolved first, while cleanups wait until later. This "argue first, clean up later" approach turns the purpose of CERCLA on its head. In addition, the provisions are unfair to those who have settled and to the governments with which they settled, since the mandatory provisions could result in settling parties being forced to participate in the allocation demanded by those who refused to settle.

Besides this fundamental flaw in the allocation provisions, there are a number of specific problems created by the bill. Our experience has been that conducting time-consuming and expensive allocations before cleanup delays the cleanup and discourages PRPs from participating in the cleanup, particularly when, as allowed by H.R. 1300, as reported, parties which have accepted the allocation of liability may still challenge the remedy. We expect that PRPs will decline to perform cleanups and opt to wait for an allocation because the government's ability to impose joint and several liability on major PRPs is effectively eliminated by a mandatory allocation process.

We are opposed to any provision that delays cleanups, or that impedes the mechanisms for enforcing cleanups, such as § 106 orders, consent decrees, or notice letters. The states cannot allow any further delays in cleaning NPL sites given the risks they can pose for our citizenry.

2. Inappropriate Liability Determinations

The provisions allow the allocator to make determinations of liability. It is inappropriate for someone who is not a judicial or adjudicatory officer to make legal determinations as to which parties are liable under the statute. This provision is particularly troublesome because, under the bill, the responsible parties participate in the selection of the allocator. Moreover, the many changes in the liability provisions will require a whole new set of rulings on who qualifies for which exemption, limitation, and clarification, and it would be a private party allocator making these determinations in the first instance. Further, the bill expressly provides that an allocation will apply to subsequent removal or remedial actions "unless the allocator determines" that the allocation should only address a limited number of response actions, even if additional information on parties' activities, conditions at the site, the identity of toxic substances, or additional costs caused by a particular PRP's waste becomes available after the initial allocation. In effect, the allocator becomes a judge in a setting lacking the procedural and appellate protections afforded parties in a courtroom.

Allocation of the share of liability for each PRP at sites with multiple PRPs is possible because, and only because, the issue of who is liable has been settled through the past twenty years of litigation. Because H.R. 1300, as reported, significantly alters the liability sections, it will be difficult if not impossible to sort out shares of liability when the many questions about liability itself remain open. An allocator cannot assign shares to "liable" parties before it is determined who is "liable."

Furthermore, NAAG opposes the provisions to the extent they impose a stay of any state enforcement action. The provisions on allocation also bind the hands of the states to long and involved allocation procedures without giving the state any influence or control over the effect of offers or settlements. For instance, only the United States can reject the allocator's report. Also, de micromis and exempt PRPs, and PRPs which have a limited ability to pay their fair share likely would be trapped in a complicated and time-consuming allocation.

3. Inappropriate Evidentiary Provisions

H.R. 1300, as reported, wisely removed the provision allowing a court to use the allocation report as a basis for its allocation of liability in the legal action, even if the report had been rejected by the government. However, the bill should provide that the report may not be used by any party in a legal proceeding. This will eliminate likely efforts by PRPs (or the governments) to introduce the report into evidence and obtain court approval for the specific allocation. If an allocation report becomes a document that might be used in a legal proceeding when the allocation does not result in a settlement, the parties will turn the allocation into the very trial that allocation is supposed to avoid, together with a trial's attendant costs and delays.

In sum, while we support the use of allocation in appropriate cases, we oppose the prescriptive approach of H.R. 1300, as reported. Especially when read with the liability changes, H.R. 1300's allocation process will substantially increase all par-

ties' costs, bind smaller PRPs to a mandatory, unmanageable process, and delay both cleanups and costs recovery efforts.

D. MISCELLANEOUS PROVISIONS

1. Windfall Liens

Only the United States gets the "windfall" lien to recover costs under proposed §107(b)(6), added by §302(a). As a result, an owner or operator could receive the protection against state enforcement and enhancement of its property's value at no cost, but the state would not get the lien's benefit allowing recovery of unrecovered response costs when the property is sold. The states, which play a role virtually identical to EPA's, also should be entitled to such liens.

2. Statutory Construction

Section 303 of H.R. 1300, as reported, modifies the provisions for natural resources liability under § 107(f) of CERCLA by adding a new § 107(f)(3) on "Unitary Executive." Under this subsection, any brief or motion filed by the United States defending against any action seeking recovery for natural resources shall be admissible and deemed the position of the United States with respect to the interpretation and construction of this subsection in any other action at other sites seeking recovery for natural resources damages.

The unitary executive provision of the bill violates fundamental tenets of the doctrine of separation of powers as articulated by the Supreme Court in *Morrison v. Olson,* 487 U.S. 654, 101 L.Ed.2d 569 (1988). It is inappropriate for Congress to dictate litigation positions to be taken by the executive branch. Furthermore, by requiring that environmental defense positions be deemed to be the position of the United States, Congress would put an unreasonable burden on states to either intervene in any federal natural resource damages litigation to create or preserve precedents favorable to trustees, or risk having an adverse body of case law. Assuming that the approach was constitutional, there is no justification for choosing the defense positions over the enforcement positions. Deeming enforcement provisions to be the position of the United States would similarly provide for a unitary federal position without harming the trustee interests of the states.

TITLE IV. REMEDY SELECTION

As set forth in NAAG's Superfund Reauthorization Resolution, remedy selection in a Superfund statute should contain certain minimum requirements. Remedial actions should attain, at a minimum, applicable state and federal standards. Cost-effectiveness should continue to be a factor considered among other factors. While consideration of future land uses is proper when selecting remedial actions, land use should not be the controlling factor, and when remedial decisions are less stringent because they are based on future land use, there must be appropriate, enforceable institutional controls.

H.R. 1300, as introduced, corrected some of the deficiencies of prior bills regarding remedy selection, for instance, foregoing provisions creating cumbersome remedy review boards and continuing to require that cleanups attain applicable state standards. We are pleased that the August amendment to H.R. 1300 went further by retaining most of the current provisions of §121 of CERCLA and approving certain EPA guidance. In this fashion, seemingly endless litigation over the meaning of new terms and the implications of the changes in remedy selection is less a likelihood should the bill be enacted, and the reforms undertaken administratively by EPA can continue. However, we are still concerned about the changes H.R. 1300, as reported, would bring in remedy selection.

A. ANTICIPATED USE OF LAND, WATER, AND OTHER RESOURCES

NAAG supports the consideration of future land uses in selecting remedial actions, provided that future land use is not the controlling factor. We are concerned about the downgrading of cleanups from those accommodating all reasonably likely land uses, which is required under the current NCP, to an apparent emphasis on cleanups which accommodate existing uses. At sites where the existing use has been commercial and industrial but the municipality and nearby residents might want to convert the site to residential and recreational uses, it is important that the PRP not be able to implement an incomplete cleanup that thwarts future community objectives because the change in use had not been planned or received any approvals. Many other sites may be in their last years of industrial or commercial use, as indicated by clear trends in the region or the neighborhood, and to limit cleanups to a vestigial use is dangerous to public health, regressive for community development, or both.

Thus, language in §401(c) H.R. 1300, as reported, which compels identification of "the current and reasonably anticipated uses of land, water and other resources . . . and the timing of such uses" must not be interpreted narrowly. By not cleaning property for any uses other than those currently existing, there will be no other uses in the future. Indeed, brownfields redevelopment often depends upon a departure from current and anticipated uses; under the proposed language, it is important that such redevelopment not be thwarted. We understand that under the EPA guidance approved in the bill, the reasonably potential uses of land also are identified when determining site remedies so a truly informed decision on cleanup can be reached. The provision should be read with that understanding.

Proposed language in §9 of H.R. 2580, which adds the clause "to the extent practicable, considering the nature and timing of reasonably anticipated uses of land, water, and other resources" to the first sentence of §121(b)(1) of CERCLA, is flawed and more limited than that of H.R. 1300. The quoted language from H.R. 2580, together with the elimination of the word "maximum" in the penultimate sentence of §121(b)(1), also inappropriately modify the current remedy selection process. H.R. 2580's proposed changes to CERCLA contained in §9 should be rejected.

Under H.R. 1300, as reported, groundwater is protected only for its "current and reasonably anticipated future use," and there is no provision for protecting groundwater that has not yet been contaminated but is not used, or has not yet been planned to be used, for drinking water or otherwise. Such provisions fail to sufficiently protect future groundwater supplies. We prefer the EPA's current requirement that contaminated groundwater be restored to beneficial uses whenever practicable, and that uncontaminated groundwater be protected. This issue is particularly critical for the arid western states where groundwater resources are scarce.

Moreover, we are concerned that the "Special Rules for Ground Water" set out in §401(c)(2) of H.R. 1300 will result in inappropriate federal oversight of state groundwater protection programs. Before EPA can adopt determinations of a state comprehensive groundwater protection program, the program must first receive "a written endorsement by the President," and up to $3,000,000 of authorized funds may be spent per fiscal year on assistance to states by EPA. See §601(a)(2), adding a revised §111(d)(11). EPA is given no standards or criteria for making an "endorsement," and effectively a new, ill-defined federal mandate is being imposed on the states. It would be more appropriate for the President to defer to state determinations unless EPA demonstrates that the state has failed to identify current and potential beneficial uses of its groundwater. However, we do note that the presumption that groundwater is drinking water is sound, and will help protect the quality of precious groundwater aquifers. See proposed §121(d)(3)(D)(ii), added by §401(c) of H.R. 1300, as reported.

B. PROTECTION OF PLANTS AND ANIMALS

Section 401(c)(2) adds a new subparagraph governing the determination of the significance of impacts of a release on plants and animals. The mandate that the President base biological protectiveness determinations on the "significance of impacts from a release or releases of hazardous substance from a facility to local populations" of biota or ecosystems could seriously undermine ecological protections. For instance, if local populations of birds are high, PRPs might well argue the impacts of releases that kill only a small percentage of the birds must be ignored because the overall impact on the local population is not "significant." There is no reason to create issues for litigation by enacting these limiting requirements.

C. REMEDY SELECTION CRITERIA

Section 401(c)(3), which amends a redesignated §121(d)(4)(A) [currently §121(d)(2)(A) of CERCLA], is problematic in several ways. Like §9 of H.R. 2580, while retaining compliance with "legally applicable" state standards as a minimum requirement for remedies, remedies no longer would have to meet "relevant and appropriate requirements." Relevant and appropriate requirements remain an important threshold criterion in remedy selection, particularly with regard to state drinking water standards, solid and hazardous waste laws, landfill remediation, radioactive waste remediation, and mining reclamation standards, and should therefore be retained. For instance, most landfill closure requirements are not "legally applicable" to land disposal sites unless the site received waste after a date in the 1980's. Nevertheless, these requirements establish important remedial requirements and represent the best engineering judgment on protecting the public and the environment from releases of toxic substances after inappropriate land disposal. Eliminating "relevant and appropriate" standards from those which a cleanup presumptively must meet will severely complicate the remedy selection process, delay cleanups, and increase litigation costs as regulators are compelled to justify remedy deci-

sions over and over again in each case that otherwise would be based on such standards.

Section 401(c)(3)(F) of H.R. 1300, as reported, appears to have been drafted in order to eliminate the applicability of state requirements at federal or other facilities that engage in activities unlike those of other facilities in the state. It requires the President to "closely examine" state requirements at those facilities when deciding whether a standard is of "general applicability." However, state requirements applicable to certain types of chemicals, such as plutonium, sometimes will only apply to federal facilities because they are the only facilities authorized to handle such materials. The fact that the requirement only applies at that facility is not an indicator that the state promulgated the standard in order to penalize or impose unfair or overly stringent standards on a federal facility. Rather than trying to devise a subjective test, Congress should retain the objective standard under current law, *i.e.,* the terms of the standard alone should be examined to determine whether it is of general applicability, and, as in current law, compliance can be waived by the President if he demonstrates that the requirement has not been applied consistently.

Section 401(c)(5) would add a new § 121(d)(7), which excludes compliance with standards that require reduction of contaminants to concentrations below "background levels." This provision creates significant uncertainties that could adversely affect the cleanup of sites near other sources of contamination. Throughout the country, numerous smaller industrial concerns have contributed to the contamination of the soils and groundwater in industrial parks and areas of mixed commercial and residential use, particularly in low income and minority neighborhoods such as the New Cassell site in eastern Nassau County on Long Island, New York, or the Rocky Mountain Arsenal site adjacent to Commerce City, Colorado. If background is measured immediately off-site, EPA could not require any cleanups at a particular facility because its neighbors have contaminated the immediate background. Whole communities could remain contaminated because cleanups could not be compelled at any facility. Current law, § 104(a)(3)(A) of CERCLA, forbids cleanup of naturally occurring substances, and is sufficient to prevent the mandatory removal of contaminants to levels below the true natural background.

D. INSTITUTIONAL CONTROLS

H.R. 1300, as reported, addresses institutional controls in several significant respects. We strongly support the inclusion of a mandatory review of the effectiveness of and compliance with any institutional controls related to the remedial action when EPA undertakes a five-year review under §121(c) of CERCLA. Similarly, the requirement that institutional controls be "effective, implemented, and subject to appropriate monitoring and enforcement" when a remedy leaves contaminants on-site, and that reviews be conducted to ensure that they remain so, is an important codification of common sense requirements. Finally, we support the provision that only allows the President to use institutional controls "as a supplement to, but not as a substitute for, other response measures at a facility, except in extraordinary circumstances." *See* §401(b) of H.R. 1300, as reported.

As recognized by H.R. 1300, as reported, notice of and enforcement of institutional controls and similar environmental easements integral to a remedy cannot be left to chance. While the bill includes measures to ensure the continued implementation of such controls and easements, the provision providing for the recording of hazardous substance easements acquired as part of a remedy is incomplete. Assignments by the President must be recorded and approved by "State or other governmental entity." However, further assignments are not subject to any review or approval process, nor even a recording requirement. Also, the President could evade *state* approval of an assignment by seeking instead the approval of the "other governmental entity," an undefined term. Such entities presumably could include local development agencies and others whose interests in the use of sites are very different from state agencies charged with protecting public health and the environment. State approval should be a nonwaivable condition for the transfer of any easement by any person or entity.

E. RISK ASSESSMENT PRINCIPLES, GUIDELINES AND REVIEWS

Section 403 of H.R. 1300, as reported, and §9 of H.R. 2580 would add provisions to CERCLA addressing principles to be followed when conducting risk assessments. While the August amendment removed some very troublesome clauses from the original section in H.R. 1300, as introduced, the need for this type of provision in the first place is not clear. Inclusion will probably not alter risk assessments conducted by EPA or states, and instead could only provide fodder for litigation. In any

event, we do note that the language used by §9 of H.R. 2580 is overly restrictive, and the provision set out in §403 of H.R. 1300, as reported, is less troublesome.

TITLE V. GENERAL PROVISIONS

NAAG strongly supports §504, which amends CERCLA §104(c)(3). This provision alters the cost-share formula to limit a state's share to 10% of the remedial and operation and maintenance costs at NPL sites. This change should result in swifter cleanups by eliminating any tendency to shift cleanup costs to the states which, under current law, are responsible for 100% of operation and maintenance costs. We also support the modification of current law by §505 of H.R. 1300, as reported, to provide that states, as well as localities, are eligible for reimbursement for up to $25,000 for a single response.

Section 506 of H.R. 1300, as reported, addresses the state role at federal facilities. NAAG's Resolution regarding CERCLA reauthorization called for clarification of the waiver of sovereign immunity and for transfer of EPA's regulatory authority at federal facilities to states. On July 26, 1999, forty-one Attorneys General reiterated the need for clarification in a letter to the Senate Armed Services Committee, a copy of which is attached. We strongly urge the adoption of language that is contained in the DeGette/Norwood bill, H.R. 617, as it represents the compromise reached between states and federal agencies in 1994, and would clarify the waiver without disrupting the status quo with regard to the issue of dual regulation at NPL sites.

We also urge that §506 include additional language to clarify that states do not impair their independent enforcement authority by entering into site-wide interagency agreements that combine state law requirements with CERCLA requirements. Proposed language for such a provision is contained in §5 of H.R. 617, and is necessary to preclude any arguments that might be made by federal agencies based on the decision *Heart of America Northwest v. Westinghouse Hanford Co.,* 820 F. Supp. 1265 (E.D. Wash. 1993). In *Heart of America,* an environmental organization brought a citizen suit under the Clean Water Act, among other claims, to force the Hanford facility to comply with state water quality regulations as they pertained to a surface water discharge at the facility. The discharge was specifically identified in the Hanford Interagency Agreement ("IAG"), not as a CERCLA response action, but rather as a discharge to be regulated under the state's water quality program. Nevertheless, the court dismissed the citizen suit on the ground that it constituted a challenge to a response action under CERCLA, and was therefore subject to the bar on pre-enforcement review in §113(h) of CERCLA.

This ruling could be utilized by federal agencies to argue that any federal or state environmental requirement that is referenced in a CERCLA IAG effectively becomes a CERCLA requirement and is therefore subject to the bar on pre-enforcement review. Such an interpretation could preempt the independent application of state law, even where such authority is expressly preserved in the IAG. Although the *Heart of America* ruling addressed only citizen suits, we are concerned that the holding could be used by the federal government to oppose state enforcement actions. On July 10, 1997, thirty-nine Attorneys General signed a letter in support of H.R. 1195, which would have clarified that state and federal governments can coordinate their cleanup activities at federal facilities without risking loss of their enforcement authorities. A copy of the letter is attached.

An additional provision is also necessary to provide for the transfer of EPA's oversight authorities. Although H.R. 1300, as reported, includes a provision at §506 for dispute resolution and enforcement of state selected remedies, the provision is limited to situations where "the President's authorities under subsection [104](c)(4) have been transferred pursuant to a cooperative agreement" to a state. Neither CERCLA nor H.R. 1300, as reported, allows for this transfer, and thus the provision is meaningless. Section 704 of H.R. 3595, introduced during the last Congressional session, included delegation language that was acceptable to the states and would allow for state decision-making. In addition, §120(g) of CERCLA should clarify that the administrator's oversight authorities cannot be delegated or transferred other than to states or other EPA employees. Such a provision is necessary to prevent the executive's delegation of these authorities back to the polluting federal agencies themselves, and is predicated on the same concerns underlying the restriction on the exercise of §106 powers by a liable federal agency contained at §301(b) of H.R. 1300, as reported.

NAAG also strongly recommends that Congress establish independent oversight of removals at federal facilities and strengthen protections for states and communities when federal facilities undertake transfer of contaminated federal properties prior to completion of cleanup activities.

Section 507 of the bill calls for a Federal study to determine Federal liability for natural resource damages based on a review of pleadings filed by the Department of Justice on behalf of a federal trustee seeking such damages from private parties. The study is unlikely to produce accurate estimates of the liability of the federal government for natural resource damages claims. In the fifteen-year history of the natural resource damages program, few if any natural resource damages claims have proceeded through trial and resulted in damage payments required by trustee assessments. They are inevitably settled for considerably less. To more accurately gauge the federal liability, therefore, the study should examine settlements, not pleadings.

Section 508 adds language reaffirming that §107 of CERCLA does not preempt state law claims regarding recovery of response costs. That concept is well established, and §302(d) of CERCLA already provides that "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." See also §114(a) of CERCLA. However, by not including natural resource damages in the section, the language of §508 might be read erroneously as suggesting that claims for such damages under §§ 107(a)(4)(C) or 107(f) preempt state law, unnecessarily creating an issue for litigation by overly zealous PRP attorneys. We urge this Committee to correct any misimpressions and eliminate an issue for litigation by either including all claims under §107 within §508 or eliminating the provision as unnecessary.

Mr. SHIMKUS [presiding]. Thank you, Mr. Johnson. And now the committee will hear testimony from Ms. Jane Williams, Chair of the Waste Committee of the Sierra Club. Welcome and, again, your—the formal presentations are in the record and if you can summarize, you have 5 minutes.

STATEMENT OF JANE WILLIAMS, CHAIR, WASTE COMMITTEE, SIERRA CLUB

Ms. WILLIAMS. Thank you. Good morning, Honorable Chairman and members of the committee. Thank you for the kind invitation to testify before you today in the liability and remedy selection provision of the Superfund.

As you know, the Sierra Club is an international and environmental organization with more than half a million members organized by chapters and groups in every State. The Sierra Club believe that the cleanup of our Nation's toxic waste sites is a critical issue for all Americans, especially minority neighborhoods and our children. EPA data show that 10 million American children live within a bike's ride of a Superfund site.

Repealing or weakening basic liability provisions of Superfund undermines the public interest in two major ways. Any costs shifted away from polluters will ultimately be paid by taxpayers and strict liability provisions create disincentive to polluters. As well, I want to talk about the comments of my neighbor here. The collateral damage that would be done to State cleanup programs that are non-Federal Superfund programs is great. In the State of California, for example, the State relies upon both NCP consistency and the strict—joint strict and several liability provisions for State Superfund program. So—and I know, as well, there are other many—there's many other States in the union that do that, as well.

I, also, want to point out, I do have my prepared testimony that I submitted to you. But, I come at this from a very different perspective. I live next to a Superfund site. In fact, I live next to two Superfund sites. And the one Superfund site I live next to is the largest Superfund site in the country. It's Edwards Air Force Base.

It has 456 sites that require cleanup. It's the size of a small State. It has PCBs, exotic rocket fuels, nuclear materials, all kinds of stuff. And we routinely fight with the Federal Government on the way in which the site would be cleaned up and the time line that the site would be cleaned up. The second site I live next to is a site, which is contaminated with dioxin. And children were riding their bikes next to the site and so we had to have an emergency response come in. Right now, the site is fenced and capped.

The small town that I live in, which is Rosemont, California, is one of the most polluted towns west of the Mississippi River. In one square mile area of the town, nine children contracted cancer and died, five of them from medulla blastoma, a brain cancer so rare you'd expect to find one case in my town in a decade and we found 5 in 3 years. All of those children died. Subsequently, 24 toxic sites were found in our town, none of which, I might add, are Federal Superfund sites, but are being cleaned up under our State Superfund program.

And so, I want to echo the comments of Mr. Pallone, and that is that I sat for many years in California and also on national committees looking at Superfund programs and RCRA programs and cleanup programs and I think too often we lose the face of the victim. We misunderstand that what we are talking about when we talk about changing liability provisions is slowing down a program that really has just hit strides. This is not the time to put the brakes on cleanups and the current provisions in H.R. 1300 would do just that.

The important provisions for the RARs, which are very important in the State of California, that is how we manage to protect groundwater. Groundwater is a very important resource, not only in the State I come from, but across the United States. And many of the provisions in H.R. 1300 can only be termed the "aqua for abandonment provisions," because they require the President to find consistency with basin plans. They roll back many provisions that States have taken to protect groundwater.

And so it's for these reasons that we are not supporting H.R. 1300, although we are very interested in working with the members of the committee. You, yourself, Mr. Shimkus, brought up very important and valid points about diminimus and micromus parties. I think that the Sierra Club, as well as many other environmental organizations, want to see the program be fair. I don't think that anyone thinks that the program should be unfair and to the extent that we can work together to make it fair, but, also, not slow down the pace of cleanups, because when we slow down those cleanups, there's a real cost to that and that's measured in people's lives and in further economic damage that already impact the communities.

Thank you for the opportunity to testify.

[The prepared statement of Jane Williams follows:]

PREPARED STATEMENT OF JANE WILLIAMS, CHAIR, WASTE COMMITTEE, SIERRA CLUB

INTRODUCTION:

Mister Chairman and members of the Committee, thank you for asking me to testify on this important topic. As you know, the Sierra Club is a national environmental organization. We are a grassroots organization with more than a half-million members, organized by chapters and groups in every state.

The Sierra Club believes that clean-up of our nation's toxic waste sites is a critical issue for all Americans, especially minority neighborhoods and our children. EPA data show that more than 10 million American children live within a bike's ride of a Superfund site.

Repealing or weakening basic liability provisions undermines the public interest in two ways.

First, it flies in the face of longstanding common law that pollution is not now, nor ever has been, legal. Changing the liability system, whether by 50 or 100 percent or by any other political tinkering undercuts the funding needed for the program. And if the polluters don't pay for this, ultimately, the taxpayer will.

Second, strict liability insures that the program remains as a disincentive to pollution. In other words, corporate actors will seek to minimize their risk—and maximize their pollution prevention efforts—if they know that hazardous waste cleanup costs will be borne by them, and not the public at large.

Changes to remedy selection provisions will only serve to weaken the environmental protections important for our land, air, and water. As evidence mounts that chemical exposures are having adverse effects on human health and the environment, we need to be ever vigilant to keep the releases at Superfund sites minimized. The protection of groundwater and air quality suffers already at Superfund site. It is only through expeditious use of relevant and appropriate provisions of state and federal statues that these important societal resources can be restored and that releases to the environment minimized during this restoration. And it is important to retain relevant state and federal standards if we are to protect public health.

In short, the important features of existing Superfund law that keep strict joint and several liability and the current remedy selection requirements should be retained.

H.R. 1300'S LIABILITY PROVISIONS

The liability provisions of H.R. 1300 make substantive changes to the current liability provisions of Superfund. These provisions, which maintain strict liability for polluters, have served the public well by creating a disincentive to contaminate new lands—few new Superfund sites have been created since the enactment of provisions which created this strong tie between polluters and the wastes they produce.

Some states, for instance California, use the joint and several provisions of the federal Superfund law in their state Superfund programs exclusively because they have found that federal provisions result in more expeditious cleanups.

1. Slowing the pace of cleanups by undercutting incentives to settle without increasing federal cleanup resources, and mandating time-consuming allocations.

One particularly disturbing feature of H.R. 1300 is the way it undercuts existing incentives for settling, incentives that now prompt polluters to use their own funds to clean up at about 70% of Superfund sites according to EPA reports (EPA uses federal funds for the remaining 30%).

Specifically, H.R. 1300 takes away one of EPA's most powerful incentives for getting polluters to settle: the ability to offer partial funding to settling parties, and *only* to settling parties. But H.R. 1300 directs EPA to enter into agreements to provide "mixed funding"—i.e., dollars from the public trough—to parties who do *not* settle, but who instead perform cleanup activities under an administrative order (p. 127).

Under H.R. 1300, many parties will await issuance of a cleanup order rather than settling. This will take much more time, and more EPA resources, than is currently the case. Because Superfund's bar on pre-enforcement review under section 113 is terminated by EPA enforcement of an administrative order in court, it can also open the door for litigation over the substance of the cleanup decision in advance of conducting the cleanup, further delaying cleanups by years.

Alternatively, EPA could itself conduct additional cleanups itself. But H.R. 1300 does not authorize any additional funding to enable EPA to do so. (Even if the bill provided for increased authorizations, which it does not, it seems unrealistic to anticipate that appropriations to the Superfund program will grow significantly—indeed both the House and the Senate FY 2000 appropriations bill would *decrease* funding for Superfund.) The pace of cleanups will slow as a result. Until the last several years, the pace of the Superfund program has been roundly criticized, and rightfully so. Now that the program's pace has picked up significantly, hitting the brakes by undercutting settlement incentives is highly counterproductive.

In addition, H.R 1300 creates a new mandatory "allocation" process (section 310, p. 118) for a wide array of sites. Under the bill, the allocation process determines the share of each party, as well as the Superfund trust fund. The latter includes costs for insolvent and defunct parties; for parties who settled for less than their

allocated share because of limited ability to pay; for parties exempted as small businesses, service-station dealers, or recyclers; and for municipalities and commercial waste-management firms who paid less than their allocated share because of the bill's other provisions (which generally limit these parties' liability to 10% of the cleanup costs). Apart from the fact that some of these parties should not be exempted (see below), the allocation process thus creates incentives to identify every possible exempt or insolvent party and to pull them into the allocation process in order to increase the share allocated to the Trust Fund. This will result in a time-consuming process with high transaction costs for all concerned.

Finally, while the bill nominally excludes from the allocation process the chain-of-title sites (e.g., sites where all potentially liable parties are current and former owner/operators, such as mining sites)and thus excludes these site from access to the Fund—it inexplicably provides that the exclusion doesn't apply to sites where the prior owner is insolvent or defunct (section 310, p. 120). This limitation on the exclusion potentially will impose massive costs on the Fund, and is unjustifiable.

2. Weakening the polluter-pays principle through extensive liability carve-outs and limitations.

Overview of H.R. 1300's financial implications.—Before looking at H.R. 1300's liability exemptions, it must be noted that the **bill as written shifts about $11 billion in costs from polluters to the general taxpayer,** because it fails to re-impose the polluter-pays taxes that provide the primary funding source for the Trust Fund. While the bill contains a statement that "it is the sense of the Committee on Transportation and Infrastructure" that the taxes should be re-imposed for the period 2000-2007 (Section 701, p. 177), this provision has absolutely no legal effect. In the meantime, industry continues its *$4-million-per-day* tax holiday that began when the polluter-pays taxes expired at the end of 1995—itself a major incursion on the polluter-pays principle already totaling more than $5 billion.

In addition to the tax issues, the bill also contains numerous liability exemptions and limitations. Theoretically, some of these will not compete directly with cleanup resources because they are to be paid from a segregated "pot" of funds within the Trust Fund (authorized at $300 million annually for 2000-2004, then $200 million annually for 2005-2007) (section 601, p. 165). However, there is no assurance that appropriators will not choose to fund the liability-relief pot in preference to the general Trust Fund, particularly if budget pressures are significant. And in any event, the liability-relief funds still comes within the same appropriations subcommittee cap as all other EPA programs, thus at least indirectly competing for resources.

At the same time, other provisions of H.R. 1300 impose additional costs on the Trust Fund's cleanups monies. For example, the increased need for EPA-lead cleanups caused by undercutting settlement incentives, as well as additional transaction costs imposed on EPA by the allocation process, will have to be met through Trust Fund monies. In addition, H.R. 1300 shifts significant costs that are now borne by the states onto the federal program as well. Under section 504 (p. 158), the States would pay only 10% of the cost of operation and maintenance, rather than the 90% provided by current law, thus decreasing the State's incentive to seek permanent remedies. And adding insult to injury, the bill also limits EPA's ability to collect oversight costs to 10% of the amount that the polluter spent on cleanup (p. 85). This provision undercuts incentives for polluters to avoid recalcitrant behavior that triggers greater EPA scrutiny, and indeed provides the greatest benefit to the worst-acting parties.

Exemptions for owners that knowingly bought contaminated property.—Under the guise of clarifying existing statutory protection for innocent parties, H.R. 1300 creates a major new liability loophole for owners who know that their property was contaminated when they bought it. Specifically, the bill eliminates the current requirement that the owner "did not know and had no reason to know" of the contamination when the property was acquired (for pre-1980 acquisitions) (p. 55). Thus, some owners will evade any liability for the cleanup of their own property, even if they bought the land cheaply *because* of the contamination.

These provisions will likely shift substantial costs onto the Superfund Trust Fund. To make matters worse, unlike many of the bill's other exclusions or limitations on liability, it appears that these costs are not among those to be paid from segregated "pot" of money for exempted parties (section 601, p. 166 and section 131, p. 119). Thus, these shifted costs will compete directly with cleanup dollars.

The bill also provides that owners can rely absolutely on a "no further action" determination by a relevant governmental agency (p. 65) to satisfy the "all appropriate inquiry" element of the current innocent-party defense. But such determinations are not necessarily based on in-depth evaluation of the property, nor are they always correct. This provision essentially turns the no-further-action determination into a

guarantee that the property is clean, thus eliminating one of the few incentives that now exists for careful evaluation of sites.

Other liability carve-outs are overly expansive.—In addition, H.R. 1300 contains a raft of inappropriate and overly broad liability carve-outs, each of which undercuts the polluter-pays principle and shifts more cleanup costs to the general public. These include exemptions for:

- "small" businesses with up to 75 full-time employees and $3 million in gross revenues (section 305, p. 74), even though almost 90% of the nation's businesses have fewer than 20 employees;
- generators and transporters of used oil (p. 113) (given the exemptions for small businesses and small-quantity generators, this provision just exempts big businesses that generated significant quantities of used oil);
- generators and transporters of copper by-products (p. 110), which are industrial process wastes;
- huge commercial trash companies (such as Waste Management and BFI), who are exempted from all liability in most instances for wastes dumped prior to the bill's enactment. Even if EPA determines that such companies dumped wastes containing hazardous substances, their liability is capped at 10% of the total cleanup costs (p. 74).
- negligent cleanup contractors, since the bill preempts general state tort law except for suits brought within six years of completion of work (p. 87, p. 89)—so that that sloppy cleanup contractors will evade any responsibility for chronic diseases with a latency period, such as cancer and developmental disabilities;
- many mining-site operators, given the limitations on the exclusion for the chain-of-title sites (p. 110), as noted above.
- other carve-outs for special interests, such as to releases from pesticide application (p. 72).

In addition, the bill caps the liability of all persons who generated or transported municipal waste after enactment of the bill at 10% of the cleanup costs (p. 75).

Shifting risks of long-term problems to taxpayers.—In addition, the bill also revamps current provisions governing settlements under Superfund, in ways that allow polluters to walk away from sites that have not been fully cleaned up. Specifically, section 308 allows for a complete waiver of future liability *even at sites with waste remaining in place* if the settlement contains a "premium to address possible remedy failure or any releases that may result from unknown conditions" (p. 95). But as a practical matter, how is it possible to calculate a premium for unknown conditions? And as a matter of public policy, why should taxpayers bear the risk of remedy failure?

These concerns are exacerbated by the fact that the bill allows—indeed, virtually *requires*—the use of less-than-complete cleanups. In selecting remedies, it demands consideration of "current and reasonably anticipated land use" (Section 401, p.136). In many cases, this is likely to involve industrial uses, which means allowing less-stringent cleanups than would be required if homes were to be placed on the site. But industrial-use cleanups must be accompanied by "institutional controls," measures that are designed to assure that an industrial site *stays* industrial unless more cleanup is done first. Such measures must be applied *virtually in perpetuity*. Moreover, *most* cleanups today use containment-based remedies, rather than taking the waste off-site or treating it on-site to permanently render it harmless.

While industrial-use and containment-based cleanups are sometimes appropriate, it is essential that polluters remain on the hook in case those non-permanent remedies don't work. This legal structure both protects the public fiscally, and creates powerful incentives for polluters to take steps to keep these remedies from failing.

Put another way, complete releases should *only* be available following complete cleanups.

In sum, many of H.R. 1300's liability provisions undercut good prevention, create bad ones, and will lead to slower cleanups.

H.R. 1300's Remedy Selection Provisions-

Abolishing the Relevant and Appropriate Provisions of CERCLA.—H.R. 1300 deletes the current requirement (Section 121d (2)(A)) that cleanups meet "relevant and appropriate" state and federal standards. (page 140) Current law requires that cleanups meet legally applicable state and federal standards *or* any environmental standard that is relevant and appropriate under the circumstances of the release.

The relevant and appropriate standards are an important provision of law since in many instances the "legally applicable" provisions do not address state and federal standards for air pollution created during cleanup activities, groundwater contamination, the integrity of landfill liners, long-term monitoring of remedies, impacts to animals and wetlands, and other important environmental and public

health safeguards. As well, the addition of "relevant and appropriate" standards avoids lengthy litigation over what is legally necessary and what is not.

For example, it is becoming common practice to use dual phase vapor extraction systems to extract contaminated groundwater and soil vapors from Superfund sites, these contaminates are then burned in on site incinerators (thermal oxidizers). These incinerators emit a host of dangerous chemicals into the air of communities already overexposed to chemicals from living on or near a Superfund site. At the Operating Industries site in California, an incinerator installed to burn soil vapors was required to meet the regulations for a hazardous waste incinerator under the Resource Conservation and Recovery Act (RCRA). A long battle over whether or not this statue was legally applicable was avoided by identifying the requirement as relevant and appropriate.

Liners and caps are used at many Superfund sites to isolate waste from the environment. The Resource Conservation and Recovery Act (Subtitle C) requirements serve to set standards for liner integrity, cap design, and vadose zone monitoring that help delay contamination of groundwater until more permanent remedies can be found. These provisions are crucial for groundwater protection, and in their absence, air emissions from poorly constructed and maintained caps and groundwater contamination from improperly installed and monitored liners, could increase. They are another example of important requirements that are relevant and appropriate.

State standards to protect drinking water and the beneficial use of aquifers are commonly applied relevant and appropriate regulations. At a mining site in Colorado, the beneficial use of a stream was protected even though the final designation of the stream' beneficial use was only in draft form. The designation was deemed relevant and appropriate though not legally applicable because of the interim nature of the state action.

The California State Water Board Resolution 9249 that applies provisions of the Porter Cologne Water Quality Control Act to the level of groundwater cleanup at Superfund sites are deemed relevant and appropriate and are routinely included in Superfund remedies under the auspices of the relevant and appropriate provisions of CERCLA, thus avoiding a lengthy dispute on whether or not they are legally applicable. Groundwater protection is extremely important in many parts of the United States because of its use for drinking water and agricultural production and states have a wide variety of laws enacted that serve to preserve these waters' beneficial uses. These laws would be ignored if the provisions for relevant and applicable were abandoned.

A recent cleanup of DDT in Los Angeles complied with a state designated particulate standard that mitigated blowing DDT-laden dust in a highly impacted minority community. This standard was identified by the local air board as relevant and applicable. In the absence of this standard this blowing DDT-laden dust would not have had any enforceable emission limit and the contractor would have had no requirement to mitigate the impacts on the community from this obvious public health threat.

H.R. 1300 fails to emphasize the return to beneficial use of groundwater and creates incentives to litigate, instead of mitigate, groundwater uses.—EPA issued guidance directing that "reasonably anticipated future use of the land" be considered in determining the appropriate extent of remediation. This directive does not apply to groundwater beneath contaminated sites.

H.R. 1300 interjects new terminology tied to "reasonably anticipated" future use of groundwater, which includes a requirement that state water protection plans receive a written endorsement from the President before being able to be considered as meeting the designation of drinking water. This creates a new mechanism for the designation of the beneficial use of water that requires federal concurrence with the designation. (page 138)

The presumption that water is drinking water can be rebutted through "site-specific information identified through the analysis of relevant factors under Subparagraph C (pg. 138)". But there are no "relevant factors" identified in Subparagraph C only relevant information such as the views of the interested parties. This creates a loophole so large you could drive a Sparkletts truck through it. Given the enormous costs of remediating groundwater, every responsible party will analyze "relevant factors" conclude that nobody will every use the water as drinking water, and it will be up to the President to refute the claim.

Prohibitions on "reductions below background" can become an excuse to do no cleanup.—Section 410(c) adds a new provision which states "the standards, requirements, criteria, and limitations referred to in paragraph (4) shall not include any requirement for a reduction in concentrations of contaminants below background levels." (page 141)

This provision will result in a lengthy debate determining what background is and where. For instance, historic goldmining in the foothills of the Sierras have resulted in arsenic and mercury contamination. If some of these levels (which pose public health risks) are considered background, arsenic and mercury would never require cleanup at a Superfund site. In many communities, if background is measured immediately offsite, EPA would not require cleanup because nearby properties are also contaminated. This is often the case in heavily industrialized areas of the inner city. Entire areas could remain contaminated because the contamination was defined away as "background".

Provisions exist in the current statue to prohibit the cleanup of naturally occurring substances; these provisions are sufficient to prevent removal of contaminants to levels below true background.

In summary, we urge members of the Committee not to roll back key provisions of the federal Superfund program that hold polluters responsible for the pollution they have created, create incentives not to pollute, and protect our precious groundwater, air quality, and lands from degradation. The federal safety net that is embodied in the current provisions of Superfund needs to be maintained for the protection of our families and our future.

Mr. SHIMKUS. Thank you. And now we'll hear from Mr. Jeremiah Jackson or Doctor, President-Elect of the Environmental Business Action Coalition. Welcome, again. Your formal testimony is inserted into the record; if you can summarize and you have 5 minutes. Thank you.

STATEMENT OF JEREMIAH D. JACKSON, PRESIDENT-ELECT, ENVIRONMENTAL BUSINESS ACTION COALITION

Mr. JACKSON. Thank you. Mr. Chairman, members of the subcommittee, my name is Dr. Jeremiah Jackson. I'm Director and Principle Engineer of Q&S Engineering in Escondido, California. I'm here today as President-Elect of the Environmental Business Action Coalition, or EBAC. EBAC is a coalition of 60,000 professionals. Thank you for holding this important hearing. My focus today is on three critical issues related to any Superfund or Brownsfield legislation: first, remedy selection; second, the so-called ASTM standard; and third, response action contractor liability.

On remedy selection issues, from our perspective, more flexibility in the law is needed. It is overly prescriptive and affords too little opportunity to accelerate cleanups or innovate with an existing Superfund processes. The goal should be timely, appropriate, and efficient cleanups, based upon intended use, instead of having to concentrate on producing evidence for litigation.

H.R. 2580 contains improved remedy selection provisions. While we fully support this well-crafted reform, the subcommittee is strongly urged to expand their number. Our added suggestions include the following eight: (1) implement a risk-based approach; (2) address serious environmental threats first; (3) promote cost effective remedies; (4) encourage flexible cleanup approached; (5) make the assessment, cleanup, and risk reduction process more streamlined, flexible, and realistic; (6) allow for earlier participation by stakeholders; (7) include future land use considerations in remedy selection; and last, encourage testing and implementation of new and innovative technologies.

As to the ASTM standard, EBAC again expresses strong disagreement with the requirement contained in H.R. 2580 for innocent land owners to undertake environmental site assessments, in accordance with ASTM phase one environmental site assessment

process. We strongly disagree with the premise that the so-called ASTM Phase I standard is actually a standard. A practice labeled as a standard implies that it is tried and true practice, which, if followed, yields reproducible, reliable, and trustworthy results, which is not true in this case. This so-called standard was finalized 5 years go, yet the profession has evolved significantly in the past 5 years. The right approach is an assessment conducted by qualified professionals, who allow the current standard of care.

Finally, on contract liability issues, there's been a lot of discussion in the Superfund reauthorization debate about the fairness of the Superfund liability scheme. Our member companies are directly involved in fixing the problems caused by the hazardous waste releases of others. The law's liability provisions ensnare contractors in the same liability scheme as the PRPs. CERCLA does not differentiate among participants or among degrees of error. To hold someone liable under the current Federal Superfund law, all you need is proof that someone was involved in the site, regardless if they were at the site.

Is this fair? Does it result in a speedy and cost effective cleanups? No. Does it hurt by business? Yes. In fact, it hurts every professional engineering and scientific firm by discouraging innovation, driving up cost, and delaying cleanup action.

How can fairness be brought back into the law for the cleanup firms? Well, begin by treating cleanup firms according to their normal standard of care, simple negligence. In the absence of fault or negligence, it is wrong to saddle cleanup firms with the strict liability standard prescribed for the PRPs. Additionally, the right answer is found in the RAC liability provisions in last year's H.R. 3000, which you, Mr. Chairman, sponsored in H.R. 1300. Significant among these provisions are a negligence standard, a statute of repose, and last, extension of Section 119's coverage to all response actions.

In conclusion, EBAC greatly appreciates the ability to testify before your subcommittee today. Thank you, very much.

[The prepared statement of Jeremiah D. Jackson follow:]

PREPARED STATEMENT OF JEREMIAH D. JACKSON, PRESIDENT-ELECT, ENVIRONMENTAL BUSINESS ACTION COALITION

Mr. Chairman, members of the Subcommittee, my name is Jeremiah D. Jackson, Ph.D., P.E. I am Director and Principal Engineer of Q&S Engineering, Inc., a Small Disadvantaged Business based in Escondido, California. I am here today in my capacity as President-Elect of the Environmental Business Action Coalition (EBAC), formerly known as the Hazardous Waste Action Coalition (HWAC). My background is in environmental technology and implementation of remedies at hazardous waste sites. During my career, I have overseen cleanups at Federal and state Superfund sites; some of these cleanups have won awards for technical merit. I also lecture on site assessment and remediation at the University of California.

EBAC, as you know, is a national, Washington, D.C. based not-for-profit business trade organization whose mission is to serve and promote the interests of engineering, science and construction firms practicing in multimedia environmental management and remediation. EBAC operates as a coalition of the 5,000 member firm American Consulting Engineers Council.

EBAC's President, Jonathan Curtis, who is also President and CEO of CDM Federal Programs Corporation, testified before this Subcommittee on August 4, 1999 on EBAC's support for the Brownfields provisions contained in H.R. 2580, Congressman Greenwood's Land Recycling Act of 1999. In addition, one of EBAC's former Presidents, Pat O'Hara, testified before this Subcommittee in March of 1998 on the need for remedy reform in Superfund reauthorization. Both Mr. Curtis and Mr.

O'Hara testified about contractor liability issues, and fielded questions about the harsh inequities of the Superfund law's legal impacts on cleanup firms. **The record is therefore clear—in order to facilitate cleanups, a combination of reforms to both the law's liability system as it applies to the firms that perform cleanup actions, and to the way remedies are selected and cleanups are performed, is needed to help ensure that Superfund operates efficiently and cost-effectively, while providing improved protection to human health and the environment.** I will testify today about the critical issues of remedy selection, the ASTM language in H.R. 2580, and the increased crisis it precipitates in the area of RAC liability.

Remedy Selection Issues

EBAC is proud to be here and able to provide our technical engineering expertise to the complex debate regarding the selection of remedies at hazardous waste sites. Our overriding concern is protection of human health and the environment. We believe that the Federal Superfund law and related cleanup activities, including Brownfields activities, should focus primarily on effecting cleanups. All too often, however, you hear fears of "bottled water" and "fences" discussed when remedy selection changes to the law are debated. As the CEO of one of our largest members said most eloquently several years ago, "Superfund is not designed to fix problems, it is a program designed to fix blame."

I am here to tell you that, as a representative of the professional community that recommends and implements cleanup actions, more flexibility in the law is needed. The present law is overly prescriptive and contains too little opportunity to accelerate cleanups or initiate rework within the Superfund "process." In addition, work is often performed for the sake of "producing evidence for litigation" instead of just to get on with cleanup.

Mr. Chairman, your bill last year, H.R. 3000, contained widespread remedy reforms which EBAC strongly supported. In fact, in our testimony we stated that H.R. 3000 "will ensure that innovations are applied to cleanups, will provide incentives for new technologies at hazardous waste sites, and will spur essential state and local voluntary cleanup programs that sometimes languish due to the shadow of potential CERCLA liability that runs from the Beltway to every Brownfields site in this country." Mr. Boehlert's legislation, H.R. 1300, which has widespread bipartisan support, also has significant remedy reform changes that will do a lot towards improving Superfund cleanups.

We are pleased that H.R. 2580, Congressman Greenwood's Land Recycling Act of 1999, also contains some remedy reform provisions. These provisions include:

- Consideration of future uses of land in remedy selection decisions.
- Addressing the preference for treatment and permanent solutions.
- Deleting the "RA" from "A**RA**Rs," meaning that only applicable requirements will apply. (Note: This is an important change because it is often difficult to determine what is also "relevant and appropriate" cleanup requirements).
- Making risk assessments more realistic and based on scientific evidence and site-specific information.

We fully support these well-crafted provisions. We understand that in the nature of compromise the listing of remedy changes that have been included in H.R. 2580 are relatively few. However, we strongly urge this Subcommittee to expand this listing. Why do we feel this way? The last time that Superfund was comprehensively reauthorized was in 1986 through the Superfund Amendments and Reauthorization Act (SARA). This means that 13 years have passed without substantive statutory change to "how" cleanups are performed. And, in that 13 years, there have been significant advancements in the professional practices of hazardous waste cleanup. I am proud to say that these advancements have, in large measure, resulted from the hard work, imagination, and innovative approaches employed by the member companies comprising EBAC!

Here are our suggestions for other issues to address in the remedy selection portions of any bill that is ultimately reported out of this Subcommittee and your full Committee:

- The law should emphasize a risk-based approach to encourage reduction of hazards associated with hazardous waste cleanup sites in an economical manner.
- Obvious and serious environmental threats should be addressed first.
- The goal should be to achieve the most risk reduction for the cleanup dollar.
- Cleanup plans should be flexible in anticipation of unknowns to allow for quick responses to newly discovered conditions that invariable arise in the course of a hazardous waste site cleanup.

All of the above recommendations are embodied in an engineering technique called the "Observational Method." This method was embodied in H.R. 3000 last

year, and is embodied in this year's H.R. 1300. More specifically, the Early Evaluation and Phased Remedial Action section of H.R. 3000 last year embodied this approach.

Other recommendations include the following:

- Make the assessment, cleanup and risk reduction process more streamlined, flexible, and realistic.
- Allow for greater participation by stakeholders in the cleanup process.
- Embody future land use considerations in remedy selection determinations.
- Encourage testing and implementation of new, innovative technologies in cleanup.

Finally, as EBAC testified last year, H.R. 3000 contained "excellent" criteria for selecting a remedy. The alternatives considered and factors balanced included the following:

- Effectiveness of the remedy in reducing risk.
- Effectiveness at promoting source control.
- Long-term reliability.
- Risks that are posed by implementation of the remedy.
- Acceptability of the remedy to the community.
- The reasonableness of the difference in costs between different remedial options.

We also have expressed support for requiring remedies to prevent or eliminate any actual human ingestion of groundwater that has any contaminant present above its Maximum Contaminant Level (MCL). We believe that this is appropriate and protective of human health. We have also expressed a desire to remove the preference for permanence and treatment in the Superfund law because such a preference results in favoring one cleanup strategy over another. This type of preference artificially reduces the range of technical solutions without providing additional protection. Finally, we support express legislative codification of EPA's Administrative Reforms, to include legislative embodiment of EPA's Remedy Review Board. It is only through legislation that EPA's reforms will be uniformly and fairly applied on a consistent basis.

H.R. 2580 would also allow for permit waivers for on-site response actions, which would remove the barriers to actual on-site cleanup and significantly increase the pace of Brownfields cleanups. Cleanup actions would still be protective of human health and the environment and subject to regulatory review and approval, of course, under such a scenario. We support this inclusion.

ASTM Standard

I must reiterate previous EBAC testimony where we expressed strong disagreement with the requirement of H.R. 2580 for "innocent landowners" to undertake environmental site assessments "in accordance with the standards set forth in the American Society for Testing and Materials (ASTM) Standard E1527-94, titled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." Please note that this standard is also proposed to be codified in Chairman Boehlert's bill, H.R. 1300, and in H.R. 1750.

EBAC, ACEC, and other professional organizations strongly disagree with the premise that the so-called ASTM Phase I "standard" is actually a "standard." A practice labeled as a "standard" implies that it is a "tried and true" practice which, if followed, yields reproducible, reliable and trustworthy results and is endorsed by the professionals who use it. That is not the case here. The scientists and engineers who, for the last several decades, have investigated contaminated sites know that it is foolish, even dangerous, to assume that using "cookbook" assessment procedures will uncover all significant contamination.

Except for a few simple sites, the technology required to peer underground and locate all significant sources of contamination has not been invented. Moreover, as the "94" suffix indicates, this so-called standard was finalized five years ago. As with the case of remedy selection, practice in the hazardous waste field has evolved significantly in the past five years; these lessons learned are not reflected in this "cookbook" approach.

Left with these uncertainties, the right thing to do is let the practitioners apply professional judgment to what is truly needed for responsible site cleanup. We recommend that you drop the requirement for using ASTM Standard E1527-94. We recommend instead that an appropriate inquiry conducted by a duly licensed or equivalently qualified professional who shall follow the current standard of care appropriate for the location and nature of the inquiry involved. If some kind of assessment guidelines are deemed necessary, then we ask that they be developed by EPA, using an open, transparent process, and incorporating substantial input from the licensed engineers who practice in this field.

The legislation allows EPA to set up an "alternative standard" through a formal rulemaking process. However, as long as the legislation identifies the specific ASTM

standard that qualifies for "innocent landowner" status, we believe that EPA will never get to the rulemaking stage to create an alternative standard. We urge that the legislation delete the ASTM standard, and require EPA to undertake a rulemaking to identify the professional judgment required for qualification as an "innocent owner" within a limited, specific date certain period of time after enactment of this Superfund reform/Brownfields legislation.

Contractor Liability Issues

There has been a lot of discussion in the Superfund reauthorization debate about the fairness of the Superfund liability scheme, particularly as it relates to small businesses. My small business is directly involved in fixing the problems caused by the hazardous waste releases of others. My small business nevertheless has Superfund liability issues, too. The law's strict, joint and several liability provisions ensnare me in the same liability scheme as it does a Potentially Responsible Party (PRP), rather than holding me appropriately liable for the engineering and remediation work that I perform. That's because the law does not differentiate among wrongdoers or among degrees of culpability. To hold someone liable under the current federal Superfund law, all you need is proof that someone was involved at a site regardless of their role at the site.

EBAC has been compiling information about lawsuits filed against those who have been performing cleanup activities for the past five years. There is a significant body of established caselaw whereby courts have allowed parties with direct CERCLA liability to bring suit under CERCLA against Response Action Contractors (RACs), drawing cleanup firms into the liability net without regard to fault or negligence in selecting or implementing cleanup technologies.

The case-law that we have compiled is comprised of approximately 40 cases that have worked their way through the courts—not including the cases that have been settled because the cost to litigate the claims (even when the firms are innocent of wrongdoing) is extremely high. Courts have allowed suits alleging that cleanup contractor activities, because they involved moving site contaminants, classified the contractor as site "operators" and "transporters" according to the definitions of these words in the Superfund law. Courts have also allowed nearby site residents to sue the government's cleanup contractor for damages incurred by exposure to site contaminants. A detailed listing of cases will be provided to this Committee for the record.

What you have is a practice whereby the huge costs of Superfund cleanups, and the absence of fairness in allocating the cleanup costs among responsible parties, creates an environment where responsible parties turn around and sue everyone else who may have touched a site to obtain contribution for cleanup costs. Is this fair? No. Does it hurt my business? Yes. In fact, it hurts every professional engineering and scientific firm in business to clean up America's hazardous waste legacy.

How can fairness be brought back into the law for the cleanup firms—regardless of firm size? First, treat cleanup firms according to their degree of negligence associated with a problem. If there is an absence of fault or negligence, then do not saddle the cleanup firm with strict liability. That's what the present Section 119 of Superfund was intended to do when it passed in 1986. In fact, this Committee's version of what was ultimately contained in the House-passed version of 1986 Superfund contained **a preemptive negligence standard** developed by the then Majority of the Committee. Unfortunately, this language was not contained in the final bill, having been one of the last issues debated by the Conference Committee. However, because of other omissions or loopholes in the law, PRPs have been able to circumvent Section 119 and seek to hold cleanup firms responsible as site operators, transporters, and generators.

It should also be noted that the present Section 119 allows EPA to indemnify cleanup firms for the claims brought against them. If indemnification is offered, a legislative change is needed that would make Section 119 consistent with the other parts of Superfund. Namely, the Superfund law applies to releases "and threatened releases." However, Section 119, due to a technical drafting error, only applies to "releases." There should be as much incentive to address threatened releases (i.e., *BEFORE* a release occurs) as there is to remediate a release after-the-fact. I urge you to undertake this technical correction.

What else is needed? You need look no further than the RAC liability provisions in last year's H.R. 3000, which you, Mr. Chairman, sponsored, and this year's Superfund legislation sponsored by Chairman Boehlert of the Water Resources and Environment Subcommittee (H.R. 1300). Both pieces of legislation thankfully included provisions that would address contractor liability issues. These provisions include the following:

- Negligence standard for cleanup firms that applies to claims brought under federal and state law.
- Statute of repose, which is common in the construction and engineering sectors, cutting off claims after a period of years.
- Extension of Section 119's coverage to "all response actions" (which is particularly important given the significant interest in Brownfields cleanups, voluntary cleanups, and state-led cleanup actions).
- Clarification that Section 119 is the sole authority to determine the liability of RACs.

I must point out that all of the above provisions are contained in Chairman Boehlert's bill, H.R. 1300. H.R. 1300 has the bipartisan support of over 120 members of this Congress, including Ranking Subcommittee Member Robert Borski (D-PA) and Ranking Full Committee Member James Oberstar (D-MN). RAC liability provisions are supported on a bipartisan basis. We support these provisions, and we urge this Committee to do the same.

Use of the ASTM standard referred to earlier in my testimony makes it all the more imperative that the Response Action Contractor liability provisions that I have just identified be included in any Brownfields/Superfund legislation. This is because the ASTM standard leaves the Response Action Contractors as the sole community left "holding the bag" as other groups receive liability relief appropriate to their status as innocent of creating hazardous waste pollution. This increases the already unfair liability exposure of the engineering community and increases the imperative need for RAC liability reform within this bill.

In conclusion, EBAC greatly appreciates the ability to testify before your Subcommittee today on remedy selection provisions in H.R. 2580, and on Superfund in general. The time to act is now. Much hard work has gone into moving H.R. 1300 on a nearly unanimous bipartisan basis through the Transportation and Infrastructure Committee. We encourage that it be the basis of this Subcommittee's markup vehicle. Please don't let partisan politics or environmental scare tactics hold up long overdue action on responsible Brownfields/Superfund legislation any longer! Thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to share the views of EBAC's membership on both key issues and the need for moving this vital legislation forward.

Mr. SHIMKUS. Thank you, Dr. Jackson. Now, I will start with my 5 minutes. Set the clock and move in regular order.

To no one's surprise, my first question will be to Mike. Again, I'm sorry I missed your opening statement. We have the congressional baseball game pizza party going on right now, where we deliver the checks. And although I should be up there, the coach of the team needs to be up there more than I do, and that's the chairman. So, I'm a pinch hitter and so I missed your opening statement. But, of course, I've read it and you followed the discussion I had with the EPA.

The EPA seems to be readily—characterizes its administrator reforms as being successful for small businesses, and they cite their 18,000 cases. In particular, the Agency cites to its use of the status comfort letter, to notify and settle with small business over their liability before contribution suits by larger PRPs are levied. From your statement, I get the sense this form of settlement has done anything but bring you comfort. Can you elaborate on how the process works and why you believe, obviously as I do, that it is so fundamentally unfair to the small businesses involved?

Mr. NOBIS. First of all, there's two perspectives, I guess, on success. If you're the EPA, and I've talked with—the people that have been involved with us say, yes, it was a successful settlement, in that they did get us to settle. From our perspective, though, it wasn't a success, because about 149 companies in Quincy were not responsible for the hazardous waste that caused the—our site to be declared a Superfund site. They—we had a process that basically—

and I used in my testimony the word "forced," and we were forced. I didn't use the word "blackmail," but——

Mr. SHIMKUS. I've used extortion before. You've heard me——

Mr. NOBIS. Well, I don't want to use that, but we were forced into it. Was it successful? Did they get the settlement done? Yes, they did. But what happened was 149 companies that had nothing to do with the hazardous waste in that site were forced to pay a settlement. My company paid $43,000. Forty-three-thousand dollars, that out of the gratis of my heart, I had to give the EPA. And unfortunately, that money went to the lawyers, because the site was already cleaned. The parties that were involved in polluting that site had already agreed to clean it up. It was already done. And then late in the process, then the diminimus went through. And, basically, due to a time problem in their statute of limitations, within a very short period of time, a matter of just a short couple of months, forced us into the settlement.

We were basically told that if we did not settle with the amounts they gave us, then they—we would all be hauled into Federal court and that our cost would be way beyond anything we could ever imagine. And what do you do? And since we did not have a time to really deal with the decision properly, many of us were forced to settle and begrudgingly. And the EPA told us that, well, you can settle. We're not saying you did anything wrong, but we want this done.

So, was it successful? Yes. They point to Quincy as being a success story. For the small business and those of us in Quincy, we had to be involved. It was a disaster and very difficult for our companies.

Mr. SHIMKUS. Thank you. Mr. Johnson, have you ever operated a small business?

Mr. JOHNSON. No, but my father is a small businessman. I've worked with him.

Mr. SHIMKUS. Okay, thank you. And, of course, you are in a legal professional?

Mr. JOHNSON. Yes.

Mr. SHIMKUS. So, you understand burden of proof and you understand evidence, whether—I'm not a lawyer—primary evidence or circumstantial evidence. Would you feel it's right to penalize a business, which there's no evidence to suggest that they're responsible for polluting a site?

Mr. JOHNSON. I know that in my State, we are very careful before we name any small parties as parties in a Superfund cleanup case. We examine the facts. We look at the types of material that may have been sent to the site.

Mr. SHIMKUS. Okay, but we're now addressing the—obviously the—I did that myself, sorry—the Federal Government and our Federal legislation. Would you think it was right, fair, and just to hold small businesses, like Mr. Nobis, who has recycled everything and there's no burden of proof through documentation that would lend anyone to believe that his company was responsible for the major industrial waste that was placed in that municipal landfill?

Mr. JOHNSON. We, too, in the Attorney General's offices throughout the country, support an exemption from liability for small businesses.

Mr. SHIMKUS. Could you help us—since the EPA is very reticent to try to define that, do you think you all would help us define small business?

Mr. JOHNSON. I think we would be happy to sit down with the committee and give you our comments on what is appropriate. Our concerns, as we stated in the testimony, is that the status of the parties should not necessarily be the sole criteria. For instance, if a small business sent very toxic materials to a site, where large quantities——

Mr. SHIMKUS. We're not addressing those—yeah, and, of course, newer legislation, you put your markers down.

Mr. JOHNSON. Right.

Mr. SHIMKUS. And I don't think anyone wants to not hold anybody responsible for polluting to pay for the cleanup of the site. The question that we're debating is: what about those parties, who have not polluted, and why should those businesses be forced into bankruptcy through this process? And so, if you could help with legislation—let me go on with this line of questioning.

Although there were significant problems facing—actually, you made a statement in your written documentation presented that, although there were no significant problems facing the Federal—there were significant problems facing the Federal implementation of CERCLA during the 1980's, the current statute is now getting the job done as intended. This would suggest that the State prosecutors believe that the liability scheme is fair—you just testified against that for small business—not harming innocent parties, not causing unncessary litigation, and not delaying cleanup, and not inhibiting redevelopment. Is this the position of the Attorney General—is this the position of the Attorney's General, that they have—I need to turn the page—no recommendations for reform?

Mr. JOHNSON. We do have recommendations for reform and we've addressed some of the things that we support in our written testimony and we've, also, attached our resolutions on the types of reforms that we think are appropriate. We think that fundamentally, the core liability provisions of CERCLA are sound and should be supported. We, also, agree with you, Congressman, that there should be some changes, with respect to certain aspects of that. We believe that a small business exemption is appropriate under—with the proper safeguards to make sure that it isn't abused. The same thing we feel with respect to municipal solid waste disposal.

We have to be, though, very careful when we change language of the statute, because too many lawyers will address language changes and use—and try to use them in a process that inevitably delays the cleanups and raises transaction costs, rather than decreases them. And so, we think that we should continue to rely on many of the administrative reforms that have been reached in CERCLA. There are certain aspects, of course, that we'd be happy to work with the committee and make codified changes in the statute, as well, where there are—is really a need for that. But, we have to be very careful in that process.

Mr. SHIMKUS. You were passed and all the members of the panel were passed a piece styled, "Superfund is an unjust litigation nightmare." I'd ask for you to look at that and I ask that this be placed in the record. Without objection, so ordered.

[The information follows:]

SUPERFUND IS AN UNJUST LITIGATION NIGHTMARE

"Most mayors will tell you that the major impediment in securing private capital for the clean up and redevelopment of brownfields is Superfund's liability regime. We believe that . . . [i]t is time to free innocent parties, both public and private entities, from Superfund's unfair liability strictures. Parties that had no part in causing the contamination at individual sites should no longer be held liable under federal law . . . It is time to create more certainty for the current owners of contaminated properties—the hundred of thousands of sites in every place in America that are likely to be brownfields at some time in the future—by providing them certainty in their cleanup costs and liability exposure."

—The Honorable Jim Marshall in testimony before the United States Senate Environment and Public Works Committee, May 25, 1999

"We have been living under a federal statute and its strict liability regime—although well-intended and largely aimed at more contaminated properties posing greater threats to the public—that has dramatically slowed progress by all parties in coming to terms with lesser contaminated properties, sites we generally describe as brownfields . . . It has produced a legacy of inaction by property owners, be they innocent or responsible parties, which we now measure in terms of thousands of properties and millions of acres . . . Rhetoric and political advantage will not cleanup one brownfield, but bipartisan legislative action will . . . "[F]inality" must be provided to prompt current owners to move forward and cleanup contaminated properties . . . The price of keeping EPA over-empowered in this area is simply too high."

—The Honorable Jim Marshall in testimony before the United States Senate Environment and Public Works Committee, May 25, 1999

"There is no question that voluntary cleanup programs and brownfields redevelopment are currently hindered by the pervasive fear of federal liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980. Many potential developers of brownfields sites have been deterred because even if a state is completely satisfied that the site has been properly addressed, and even if the site is not on the NPL, there is the potential for EPA to take action against the cooperating party under the CERCLA liability scheme . . . In considering how to restore brownfields sites to productive use, please remember the importance of state voluntary cleanup programs in contributing to the nation's hazardous waste cleanup goals."

—Tom Curtis, Director of the Natural Resources Group, National Governor's Association, in testimony before the Senate Committee on Environment and Public Works, May 25, 1999

"I am here to tell you that, in actuality, the true Brownfields market has not kept pace with expectations. Why? We have been asking our clients just that. Our clients' responses are fairly unanimous. They fear that EPA will "second guess" Brownfield cleanups, and require costly site rework at a later dat to reach a different site cleanup standard so they "hold onto" lightly contaminated parcels instead of turning them over to beneficial reuse. Moreover, there remains potential down-stream liability associated with that reuse which further retards the process. These concerns result in owners of such properties not undertaking redevelopment efforts at viable Brownfields sites. While EPA has indicated a willingness to enter into, on a case-by-case basis, prospective purchaser agreements at Brownfields sites, the process to enter into those agreements is quite time consuming and there is no certainty in the end that EPA will agree to a prospective purchaser agreement.

"H.R. 2580's provisions in Section 3 provide the finality in Brownfields decisions are truly needed if this market, and the actual cleanups, are to accelerate . . . This provision is very important to spurring increased voluntary cleanup actions at Brownfields sites across the country and reducing possible risks to nearby populations that are currently not addressed, expressly because of the fear of federal liability."

"The permit waiver for on-site response actions that is contained in H.R. 2580 would remove the barriers to actual on-site cleanup and significantly increase the pace of Brownfields cleanups."

—The Cleanup Contractors, The Environmental Business Action Coalition in testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999.

"H.R. 2580 succinctly mandates that U.S. EPA must receive a Governor' concurrence prior to listing a facility on the National Priorities List. We support this provision as it is clear, unambiguous and satisfies our goal of clarifying the role of the federal Superfund program in the future."

"Both the National Governors' Association and ASTSWMO oppose provisions which allow the U.S. EPA to review and approve existing, established State voluntary cleanup programs. "

"It is our belief that we can no longer afford to foster the illusion that State authorized cleanups may somehow not be adequate to satisfy federal requirements. The potential for U.S. EPA overfile and for third party lawsuits under CERCLA is beginning to cause many owners of potential Brownfields sites to simply "mothball" the properties"

"H.R. 2580 satisfies the goal of clarifying which governmental entity is an should be responsible for deciding when a cleanup is complete and when a party is released from liability."

—The National Governors Association and the Association of State and Territorial Waste Management Officials in testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999.

"It has been shown that Superfund's liability regime unfairly threatens innocent parties and too often drives private sector investors from brownfields to more pristine locations. And, we recognize that this Act helps fuel a development cycle that imposes increasing burdens on all of us."

—The Honorable Marc Morial, Mayor of New Orleans, The Honorable Michael Turner, Mayor of Dayton, The Honorable Jim Marshall, Mayor of Macon, testimony before the Subcommittee on Water and the Environment, May 12, 1999

"Another provision that is important to the nation's Governors concerns the requirement for a Governor to request the listing of a site before a state's site may be added to the NPL . . . Because states are currently overseeing most cleanups, listing a site on the NPL when the state is prepared to apply its own programs and authorities is not only wasteful of federal resources, it is very often counterproductive, resulting in increased delays and greater costs. The Governors fear a case where there will be "two masters" of the cleanup process . . . To avoid this we advocate that Governors should be given the statutory right to concur with the listing of any new NPL sites in their states."

—Tom Curtis, Director of the Natural Resources Group, National Governor's Association, in testimony before the Senate Committee on Environment and Public Works, May 25, 1999

"One common incentive provided by these programs is liability relief. Typically, the state will provide some form of liability relief once it has approved a cleanup. In Ohio, relief comes in the form of a "No Further Action" letter from the state EPA. Unfortunately, there is no guarantee that the federal EPA will not assert authority at a future date and require additional cleanup. Without the certainty of knowing that they are protected from federal as well as state liability, property owners and developers are very reluctant to undertake development of a site which is or might be contaminated. Let me illustrate with an example. I recently had a contract as listing agent to sell a large warehouse property. The property was adjacent to a government-owned landfill. There were concerns about contamination on the property due to migration of heavy metals from the landfill. If we only had to comply with Ohio law, the government entities that owned the landfill would have removed the contamination, and the property would have been sold in a reasonable time. However, because of uncertainty over federal liability, the lender and the purchaser were reluctant to go forward. As a result, it took five years to close the deal, and only after we found a new buyer and a new lender willing to face the risk of future liability."

—National Association of Realtors, May 12, 1999

"The Superfund liability scheme has clearly exacerbated the difficulty of bringing brownfields back to productive use. Moreover, that liability scheme itself is responsible for the creation of many brownfields. This system makes the owners of contaminated properties liable for millions of dollars in cleanup costs even if they had nothing to do with contaminating the site and they purchased the property decades after the contamination occurred. It exposes landowners not only to Superfund actions by EPA, but also to lawsuits decades in the future by as-yet unanticipated parties who incur costs to clean up the property. Concerned about this "trailing" liability, owners of the properties that may be contaminated hold these properties back from the market. This practice has been referred to as "mothballing," bringing to mind the useless hulks of rusting ships set aside by the U.S. Navy after World War II. When properties which carry the stigma of con-

tamination become available for sale, most developers avoid them out of concern for exposure to endless uncertainty and undue financial liability."

—Barry J. Trilling, National Association of Industrial and Office Properties, testimony before the Subcommittee on Water Resources and Environment, May 12, 1999

"The example of states like Pennsylvania, Michigan, Indiana, and others with voluntary cleanup programs support this view. In Pennsylvania, for example, NAIOP actively participated in the legislative process that resulted in Act 2, the Land Recycling and Environmental Remediation Standards Act. Under that statute, parties may choose to clean up contaminated properties to one or more of three different levels, after which they receive a release from liability under state environmental laws. The remediation standards of Act 2 apply both to voluntary cleanups and mandatory remedial actions under the state's version of Superfund. The Pennsylvania statute has been adopted as model legislation by the American Legislative Exchange Council, an organization represented by legislators from all 50 states. Under Pennsylvania's program, in effect since July, 1995, 267 sites have already been cleaned up and nearly 500 sites are in the process of remediation. State voluntary remediation and revitalization efforts, such as Pennsylvania's, are significant steps forward, but these state programs do not protect our members from liabilities arising under the federal Superfund statute.

—Barry J. Trilling, National Association of Industrial and Office Properties, testimony before the Subcommittee on Water Resources and Environment, May 12, 1999

"We know that Superfund's liability regime too often drives private sector investors from brownfields to more pristine locations. We know these rules punish innocent parties, fueling a development cycle that is unsustainable. We know that current law must be reformed to undo the bias toward new land resources over recycling land that is already urbanized or developed. Mitigating the effects of this nearly twenty-year Superfund policy will require actions on several fronts.

"We have learned that liability under Superfund is their dominant concern. Despite progress in securing "comfort letters" at many sites, lender liability reforms and growing confidence in state program efforts, there is real anxiety, and we would wish otherwise, among bankers and other lenders on these issues. The specter of Superfund liability severely limits their ability to increase the flow of private capital into these projects."

"We also strongly support liability reforms contained in H.R. 1300 and H.R. 2580 to address the many circumstances whereby cities and other local governments have acquired brownfield properties in the past. Under these provisions, cities and other public agencies are rightly afforded innocent party relief in the performance of local government functions."

"We hope that the legislation that is adopted by this Committee, as provided in H.R. 2580, will encourage states to use these funds to place more priority on efforts to bolster state programs in support of brownfield cleanups."

"Without this certainty on state authority, we can't hope ever to provide the necessary assurances sought by private investors in brownfield sites, let alone secure final decisions on the hundreds of thousands of brownfields sites we are seeking to clean up and redevelop. Mr. Chairman, we also want to indicate our interest in seeing provisions that would help accomplish more cooperation and integration of applicable federal laws and standards. One of the areas that H.R. 1300 does not address is the applicability of RCRA and LUST specifically at brownfield sites. Mayors have been very consistent in urging more attention in federal policies to a "one-stop" brownfields regulatory program at the state level, where states, which are vested with delegated authority, can provide more coordinated and integrated programs. Such an approach would respond to the realities of the contaminants and types of problems that localities encounter at these sites."

"I would note that H.R. 2580 provides authority for RCRA waivers to allow states to integrate this law's permit requirements with cleanups of brownfields. I understand that this provision does not diminish or alter RCRA requirements, but is intended to give states some flexibility in delivering a more responsive and coordinated regulatory program in addressing brownfields. This or some variant of this provision would be very helpful to those of us at the local level who often find ourselves confronting increased complexity at specific sites as we work to return them to productive use."

—The Honorable Paul Helmke, Mayor of Fort Wayne, IN, on behalf of the U.S. Conference of Mayors, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

"Legal authority for qualified states to play the primary role in liability clarification is critical to the effective redevelopment of local brownfield sites. A state lead will increase local flexibility and provide confidence to developers, lenders, prospective purchasers and other parties that brownfield sites can be revitalized without the specter of Superfund liability or the involvement of federal enforcement personnel. Parties developing brownfields want to know that the state can provide the last word on liability, and that there will be only one "policeman," barring exceptional circumstances."

"Therefore, in delegating brownfields authority for non-NPL caliber sites to the states, NALGEP proposes that: *EPA should provide that it will not plan or anticipate further action at any site unless, at a particular site, there is: (1) an imminent and substantial threat to public health or environment; and (2) either the state response is not adequate or the state requests U.S. EPA assistance."*

—Donald J. Stypula, Manager, Environmental Affairs, testimony before the Subcommittee on Finance and Hazardous Materials, August 4, 1999

"...We all know it doesn't work—the Superfund has been a disaster. All the money goes to lawyers and none of the money goes to clean up the problem it was designed to cleanup."

—Clinton speech to business leaders at the White House, February 11, 1993

"I'd like to use that Superfund to clean up pollution and not just pay the lawyers."

—President Clinton, State of the Union Address, Feb. 17, 1993

"On a site by site basis, it is clear that liability negotiations consume a lot of time and delay completion of the site."

—EPA Inspector General in testimony before House Subcommittee on Government Reform and Oversight, May 1996

" For nonfederal sites, the time required to complete cleanups increased from 2.4 years in 1986 to 10.6 years in 1996...EPA officials also said that the effort to find the parties...and to reach cleanup settlements with them can increase cleanup times."

—Government Accounting Office Report, Superfund, Times to Complete the Assessment and Cleanup of Hazardous Waste Sites, March 1997.

"Superfund has been a bonanza for lawyers and consultants...After over a decade of delay, cleanup is only now beginning at the McColl site in Fullerton...cleanup was continually put off as various defendants wrangled in court over how much they would pay".

—James M. Strock, California Secretary for Environmental Protection, 1994.

"Hastings...has already spent roughly $1.1 million under Superfund, yet the cleanup is far from completed. More that 90 percent of the money has been spent on consultants and legal fees."

—Governor Ben Nelson, Nebraska Journal March 1, 1996.

"[Superfund] has failed the efficiency test: of the $13 billion spend by the governments and companies, one-fourth has gone to what are euphemistically known as "transaction costs"—fees to lawyers and consultants, many of them former Federal officials who spun through Washington's revolving door to trade their Superfund expertise for private gain."

—New York Times Editorial, February 7, 1994

"[Superfund] is generating intolerable injustices and needs to be fixed...Many of these cases are grotesquely unfair, and all invite furious litigation as small companies, big ones, banks, mortgages holders, local governments and insurers all go after each other...That is why a high proportion of the money spent so far has gone not into clean-ups but into lawyer's fees..."

—Washington Post Editorial September 2, 1993

"[Superfund] has created a legal swamp, enriching lawyers while accomplishing precious little cleanup."

—Seattle Times Editorial Board, February 23, 1995

"Just about anyone who ever has been involved with a site can be held liable. That encourages the parties to sue each other endlessly to determine who pays."

—Chicago Tribune Editorial, February 14, 1994

"...Superfund is absurdly expensive, hideously complex, and sometimes patently unfair. As a result, it invites litigation the way dung attracts flies: not by seeking but just by being".

—USA Today Editorial, February 2, 1994

"Far too much money is being spent on lawyers and not nearly enough on cleanup. Our primary concern is that tens of thousands of abandoned properties in

urban areas lie contaminated and unproductive because developers and local businesses fear getting pulled into Superfund's far reaching liability system. Congress must act this year to fundamentally reform the failed liability system . . . Without these changes these properties will lie dormant and critical economic revitalization opportunities will be lost for cities nationwide."

—Letter from Robert Ingram, President of the National Conference of Black Mayors to Speaker Gingrich, October 1995

"Eliminate retroactive and strict liability prior to January 1, 1987 to prohibit liability for conduct that was not negligent, illegal or in violation of regulations or permits at the time."

—Recommendation of 1995 White House Conference on Small Business

". . . [A]ny meaningful reform of the liability scheme must include elimination of retroactive liability for waste disposal prior to January 1, 1987."

—Acting Chief Counsel for Advocacy, U.S. Small Business Administration, Letter to Leon Panetta, Director, Office of Management and Budget, January 25, 1994.

"The current Superfund liability scheme of strict, joint and several and retroactive liability is grossly unfair. We are convinced that this must be rectified in the reauthorization of Superfund. In reality, the current system is not a "polluter pay" system but instead a "deep pocket pay" system. The scheme imposes significant impediments to redevelop contaminated sites and only serves to dry up transaction costs at the expense of getting cleanups completed."

—Charles McIntosh, Office of the Governor, State of Michigan in testimony before the House Commerce Committee, June 22, 1995.

"The ABA position holds that CERCLA needs substantial revision as Congress revisits this year. As presently written, interpreted, and enforced, it results in massive. wasteful, and unproductive litigation. In many instances, it has also resulted in the imposition of liability grossly disproportionate to the conduct involved, perverting rather than implementing the polluters should pay principle. In many situations, it has not been cost-effective, nor have the social benefits been equal to the costs imposed. Finally, in the over fourteen years since its enactment, relatively few sites have been cleaned up . . .

Government should generally avoid passing laws which provide for the imposition of retroactive liability: that legislation which creates a new obligation, imposes a new duty, or attaches a new disability for past activities. Retroactive criminal legislation is barred by our Constitution. Retroactive civil legislation is contrary to the common law, and unknown in the civil law. It is unfair and presents an additional major risk to business decisions, because present activities which are legal may have uncertain future consequences due to after the fact enactments of unanticipated legal schemes. This added risk tends to discourage new investments."

—Statement of the American Bar Association presented to the House Commerce Committee June 22, 1995.

"While massive, time-consuming litigation may perhaps provide short-term pecuniary benefits to some in the legal profession, the American Bar Association and the attorneys it represents have no desire to stand by idly and profit from other people's misery."

—May 21, 1997 letter from Robert D. Evans, Director of Governmental Affairs, American Bar Association to Rep. Sherwood Boehlert

"A vote for the Markey Amendment is a vote against Superfund reform and in favor of the current, flawed Superfund Program . . . Many innocent small-business owners are unjustly trapped in the Superfund litigation nightmare even though they followed the law and legally disposed of their wastes . . . No small business can afford to stay in business when the average cleanup costs are $30 million . . . [T]he Markey amendment would prevent any possibility of Superfund reform for Fiscal Year 1997 . . . Supporters of the amendment are forgetting about the small businesses and municipalities who are stuck in Superfund litigation . . . This is a key vote for small businesses."

"Adoption of the Markey amendment would condemn the Superfund program to continue as a wasteful and failed environmental program—something this country neither wants, nor can afford . . . A vote for this amendment is a vote for the status quo, and against the interest of small business and other innocent parties who have been caught in the Superfund litigation lottery. After 15 years, it's time for a real change that will get small business and other innocent parties completely

out of Superfund. Hazardous waste sites can—and will—be cleaned up faster under the GOP reform plan."

—Statement of Jack Farris, President of the National Federation of Independent Businesses, the nation's largest small-business advocacy group in a statement dated June 25, 1996.

"While it is no doubt convenient for the Government to assign liability to all parties that have contributed to a Superfund site irrespective of whether they were in compliance with existing laws, doing so violates common standards of fairness while doing nothing to deter future undesirable behavior. In some cases, parties held liable were not only in compliance with laws existing at the time of their action, but were in fact following the State government's explicit directive to deposit the waste at the site."

—from the text of the Treasury Department proposal on Superfund, released on August 23, 1993

"As you will recall, this has been a matter which the Oversight Subcommittee when I was the chairman of it, complained on many occasions. We had a number of hearings about the inadequacies of the administration and about the basic failures and the structural failures which were built into Superfund law which defied even the best of administrations. I believe that these are matters which have to be corrected because it is intolerable that we would spend so much money on litigation, so little money on cleanup. So much time has been dissipated and wasted, and so little accomplishment generally can be observed in what we have done."

—Oral Statement of the Honorable John Dingell, Ranking Member, Commerce Committee, during a hearing of the Commerce, Transportation and Hazardous Materials Subcommittee, June 22, 1995

"It is easy to criticize the current liability scheme and the way that it has been administered, and there has certainly been no shortage of people who have been willing to do so. I agree with many of those criticisms. We spend far too much money on litigation and not enough on cleanups . . . there is no question though, that the liability scheme is unfair, litigious and a policy disaster".

—Opening Statement, Chairman Al Swift, Hearing before the Transportation and Hazardous Materials Subcommittee, February 19, 1994.

"[W]e believe legislative changes are necessary so Superfund can better protect human health and the environment and operate in a more cost-efficient manner. Each of us has heard concerns from our constituents that the pace of cleanup is too slow; that more money is being spent on litigation than on cleanup activities; that citizens are not properly involved in cleanup decisions; and that program costs are unnecessarily high."

—Letter from Senators Robert Byrd and John Rockefeller to Senator John Chafee, Chairman Senate Environment and Public Works Committee, dated June 25, 1997.

"A system that results in 50% of the costs going to lawyers—although I am a lawyer—consultants, and transactional costs is a system that begs for, we believe reform, fundamental reform, so that more of the money goes to site remediation."

—Statement of Michael Finnegan, Counsel to the Governor, State of New York, before the Subcommittee on Finance and Hazardous Materials, March 7, 1997.

"One site in particular has escaped the effectiveness of CERCLA simply because there are 18 or more PRPs and CERCLA clearly provides the right to litigate. The litigation is not aimed at the regulatory agencies but instead at the PRPs themselves.

With over 20 million dollars spent on characterizing Fields Brook at least half has been devoted to suing non-participating PRPs by participating PRPs; PRPs against other PRPs to determine who put how much into the Brook; Who's material was more toxic and should they pay more than less toxic polluters: litigation against insurance companies to pay for the disposed materials of PRPs they insured and on and on."

—Statement of Leonard E. Eames, Owner Operator Fish City Marina, Ashtabula, Ohio before a Hearing of the Subcommittee on Finance and Hazardous Materials, February 14, 1997.

"The Council is cognizant of the negative effect [Superfund] has had upon the reuse and redevelopment of real estate in Ohio. CERCLA's liability scheme, coupled with the staggering cost of conducting and environmental cleanup in accordance with Superfund program requirements and ill-defined cleanup standards has resulted in a widespread reluctance to use or acquire "so-called" contaminated property. Manufacturers are reluctant to expand operations into existing commercial and industrial properties, developers are reluctant to acquire existing com-

mercial and industrial properties for redevelopment, lenders are reluctant to loan on such properties and even public or non-profit entities shun such properties . . .

The Ohio legislation establishes a liability scheme which exempts those who neither caused nor contributed in any material respect to the release of hazardous substances from liability for the costs of investigation and cleanup."

—Statement of James D. Donohue, Ohio Steel Industry Advisory Council, before a Hearing of the Subcommittee on Finance and Hazardous Materials, February 14, 1997.

". . . Superfund is unduly harsh on small businesses. Under this liability scheme, any contributor to a site is potentially responsible for the entire cost of a site, even if the volume of waste they contributed to the site was minimal. Under retroactive liability, small businesses can be held liable for clean-ups that resulted from alleged waste management activities occurring years or even decades ago. It need not be demonstrated that a small business was negligent or at fault to establish liability.

Like many of my fellow dealers in Ohio and across the nation, I sent my wastes to recycling facilities. The solvents in question were stored in compliance with all applicable regulations in effect at the time, not mixed with other chemicals, and were transported by licensed haulers to licensed facilities which were designed to recycle a resource for reuse . . .

My story is just one of many businesses that have been unjustifiably burdened by an unfair system. I hope my statement will give you and your colleagues a clearer picture of the devastation wreaked on my dealership and America's small businesses community by Superfund . . ."

—Statement of Richard Smith, President, Bob Daniels Buick Co., Columbus, Ohio, before a Hearing of the Subcommittee on Finance and Hazardous Materials, February 14, 1997.

"The uncertainties, disagreements, and litigation produced by these aspects of joint and several liability have imposed delay, profound resentment, and high transaction costs on the basic process of achieving cleanups . . . [t]he basic mechanism for funding Superfund cleanups is fundamentally unfair and extremely inefficient. This problem cannot be solved by EPA's administrative reforms . . ."

—Statement of Michael W. Stienberg, on behalf of the Superfund Settlements Project in a Hearing before the Subcommittee on Water Resources and Environment, April 10, 1997.

"Superfund's liability provisions make brownfields more difficult to redevelop, in part, because of the unwillingness of lenders, developers, and property owners to invest in a redevelopment project that could leave them liable for cleanup costs."

—United States General Accounting Office Report to Congressional Requesters, RCED-96-125, Barriers to Brownfield Redevelopment, June 1996, Page 2.

"Perhaps the greatest barrier to industrial site reuse, however, is the 1980 Comprehensive Environmental, Response, Compensation, and Liability Act--commonly known as Superfund."

—"Restoring Contaminated Industrial Sites" by Charles Bartsch and Richard Munson, Issues in Science and Technology, Spring 1994 Issue.

"Superfund laws actually reduce the reuse, supply of, and demand for brownfield properties"

—Unlocking the Brownfields: Overcoming Superfund Barriers to Redevelopment, by Ross Macfarlane, Jennifer Belk and J. Alan Clark, a Report Done By the Law Firm of Preston Gates & Ellis, Seattle, Washington.

"The Superfund liability system needs to be reformed to reduce the burden on small businesses and to ensure that more money goes to clean-up not lawyers . . ."

—Statement of Carol Browner, Administrator, U.S. EPA, before of hearing of the Subcommittee on Commerce, Trade, and Hazardous Materials on March 16, 1995.

"We are all frustrated by the number of lawyers who are now involved in Superfund. We want the lawyers out."

—Statement of Carol Browner, Administrator, U.S. EPA, before of hearing of the Subcommittee on Commerce, Trade, and Hazardous Materials on March 16, 1995.

". . . We are paying a high price in terms of administrative and cleanup costs incurred by EPA, and a high price in terms of the transaction and cleanup costs incurred by companies and State and local governments potentially liable for contamination. We are paying a high price in terms of the basic fairness—or unfairness—of the program. Finally, we are paying a high price in terms of the anxiety and frustration of local communities concerned about delays in cleaning up contaminated sites . . . Additional time is spent negotiating and litigating over the re-

sponsibility for, and the cost and extent of cleanup. These delays, even if sometimes explainable, can add significantly to the total costs of cleanup."

—*Statement of Carol Browner, Administrator, U.S. EPA, before of hearing of the Subcommittee on Transportation and Hazardous Materials on May 13, 1993.*

"One of the most significant delays that occurs in the Superfund process is the allocation of liability among responsible parties."

—*Statement of Carol Browner, Administrator, U.S. EPA, before of hearing of the Subcommittee on Transportation and Hazardous Materials on May 13, 1993.*

"I think we all agree that the transaction cost portion is one due very serious evaluation and consideration. Again, I do not think we could have predicted 12 years ago that the result of the law would be that responsible parties suing responsible parties—insurance companies, I mean, the level of legal actions that would take place. We need to do something to address it."

—*Statement of Carol Browner, Administrator, U.S. EPA, before of hearing of the Subcommittee on Transportation and Hazardous Materials on May 13, 1993.*

"...[A] system which puts a premium on assessing liability invites legal warfare, a result which is fundamentally at odds with the goals of the statute...[I]t appears as if many, if not most, of the 20,000 PRP's named so far are not the midnight dumpers Congress has in mind in 1980. Instead they are thousands of small- and medium-sized businesses, municipalities, individuals, hospitals, and others who never broke any laws, who sent their waste where they were told—often to government-permitted facilities—and who did not and do not fit the popular definition of irresponsible polluters...arly, the Superfund status quo is unacceptable. We cannot tolerate a program which generates so few cleanups, a program which encourages the responsible Agency, EPA to concoct all manner of public relations schemes to inflate its accomplishment, and a program which is disappointing to thousands of citizens who live near Superfund sites."

—*Extension of Remarks of Congressman Mike Synar, October 9, 1992.*

"When examining the few sites that have been cleaned up, the costs associated with such cleanups, coupled with the staggering amount of money that has gone directly to lawyers' coffers, its easy to see that the fault and liability system currently in Superfund is flawed. Congress may have envisioned a system that would only catch the few, large, intentional or irresponsible polluters, however, the reality has been very different. There have been over 100,000 different potentially responsible parties (PRPs) identified at Superfund sites...The effect of the current liability system is permeating all segments of the small business community. No issue in this very complex public policy debate will have a more direct impact on the present and future economic viability of many small businesses...There isn't one segment whether it be a retail store, a professional service business, or a construction business that has not been touched."

—*Statement for the Record by National Federation of Independent Business before the Senate Subcommittee on Superfund, Waste Control, & Risk Assessment on March 5, 1997.*

"...EPA, under the current liability provisions, is now going after hundreds of small service stations in my district who thought that they were doing the right thing...This despite the fact they had no knowledge of nor control over the facility's actions...In fact, the EPA has taken unusual steps to 'verify' which services stations sent used oil to the Peak Oil site and how much they sent. The de minimis parties involved in the Peak Oil site were identified by a truck driver who worked for Peak Oil from 1955 until 1965 hauling used oil from various locations throughout Florida...With EPA officials in a car, they drove around Florida and he pointed to all the businesses from which he claimed to remember picking up oil...Nevertheless, Yarborough Tire Service has had to hire a lawyer to challenge the EPA 'evidence'."

—*Congressman Mark Foley in testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"[S]ound science must have a seat at the table. In determining the appropriate remediation option, science must play a role in distinguishing realistic scenarios under which public health and safety would be at risk. Remediating a site under outlandish assumptions not only creates fear within the community, but ties up additional resources and prolongs the final clean-up."

—*Congressman John E. Peterson in testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"Little did the community know then, that EPA's decision to declare the plant a Superfund site was not the beginning, but the end of efforts to clean up the plant. It was as if EPA had signed the death warrant for the entire commu-

nity . . . And they wait to this very day. While in the middle of town there sits the plant—almost 1 million square feed of prime industrial real estate . . . Empty of jobs, empty of taxes for the local schools, and empty of hope. Adding insult to injury, local economic development officials tell me that they have had to refuse several offers to resume industrial production at the site . . . And all of this because the Superfund program—while admittedly well intentioned—has became an almost impenetrable morass of red tape, liability litigation and expense . . . No community should have to suffer through what has happened to us."

—*Congressman Phil English in testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"Each year since I have been elected to Congress, I have visited each site on what I call my annual Superfund tour. I am accompanied by employees of the EPA Superfund Region 2 division, and I am joined in many cases at each site by local elected officials, town administrators, and concerned members of the community. At each site, the EPA site manager provides a status update on the site to me and community representatives and, unfortunately, the updates do not seem to vary much from year to year . . . In the 17 year history of the program, only one of my 13 sites has been listed in the "Construction Completed" category and *none* have been deleted . . ."

—*Congressman Rodney Frelinghuysen testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"In New Jersey alone, 57 school districts have been assessed for liability under Superfund . . . In one case in New Jersey, involving the Gloucester Environmental Management Services Landfill (GEMS), 53 school boards were assessed $15,000 each, not including additional money associated with legal costs. As a result of the tangled Superfund liability web, these precious dollars in a school's budget were diverted away from educating children and into the Superfund coffers."

—*Congressman Rodney Frelinghuysen in testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"In drafting this statement, I came upon the Environmental Protection Agency's Web Site. Curious, I decided to see if it mentioned Operating Industries Incorporated (OII), a Superfund site in my district that has been a red tape, bureaucratic nightmare for ten years. Imagine my surprise to not only see it mentioned, but to find it listed under the heading "Superfund Success Stories".

As you can see [EPA] lauds the Agency's settlement with the responsible parties, the agency's quick action in formulating a plan for the construction of two cleanup facilities, and the Agency's close working relationship with the surrounding community.

I don't know where they EPA got its information, but it did not talk to me, or the city manager or council members of Monterey Park, where OII is located, or to the residents of the city, who live with this toxic eyesore day in and day out . . . [T]he EPA continues to drag its feet and throw up every obstacle possible to prevent Monterey Park from moving forward with this project . . . I for one, fail to see how preventing a community from cleaning up and developing its land can be considered productive. I fail to see how denying the community's request time and time again, and preventing it from turning a blight into a benefit, can be considered community cooperation.

I can't emphasize enough how frustrating it has been to deal with such bureaucratic arrogance. The city of Monterey Park has bent over backwards in its attempt to work with the EPA to achieve the release of this land, which is actually a prime candidate for the much-touted brownfield program. As a matter of fact, several local developers have expressed interest in the land once minor cleanup is completed. But instead of working with the community, the EPA has fought it at every turn."

—*Congressman Matthew G. Martinez in testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"[T]he Superfund program has become a tool to punish companies and individuals, many of whose actions were not negligent, illegal or in violation of any regulations at the time, rather than focusing on cleaning up the nation's worst toxic waste sites—and the biggest losers have been the American public."

—*Congressman Chris John in testimony before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.*

"Liability reform comes closer to a real concept of "polluter pays" by seeking to hold liable those parties which owned and controlled sites and parties which violated disposal laws, rather than pursuing everyone connect to the site. The goal is to secure who is truly responsible for the pollution and hold them accountable

while reducing the number of parties at sites to a relatively small number, each with clear liability."

—Superfund Reform 105th Congress Goals for Progress presented in testimony by Congressman Robert Condit before the Subcommittee on Finance and Hazardous Materials on September 4, 1997.

"[B]usinesses paid a premium fee for a private company to manage their waste. The management company violated the law, not the small business owners. Yet the small businesses apparently are being forced to pay for sins they did not commit. They made a good faith contract and the Superfund law as applied violates it. Congress must fix these glaring injustices."

—Statement of Congress Tim Roemer before a hearing of the Commerce, Transportation and Hazardous Materials Subcommittee, October 18, 1995.

"I have already spent over $30,000 in my defense. I don't understand, why I should be liable for activities that took place before I bought the business? Why should the landlord be held liable for what he had no control over? Why should businessmen like myself who have revitalized shops in poor neighborhoods be penalized for the good we are trying to do?...[T]he salinity of the underground water in that area is so high that since the time of Genesis we have already known that we cannot ever use it...Ladies and gentleman, this old man is in jeopardy just because of the Superfund. It has strict retroactive liability, it sets unrealistic and unwarranted cleanup standards, and it allows for costly private lawsuits against innocent, hard-working people like myself. Please fix this broken law."

—Statement of Martin Yee, White Spur Cleaners before the Commerce, Transportation, and Hazardous Materials Subcommittee June 22, 1995.

"No bank will finance my growth because retroactive liability has destroyed my property value, which small businesses use as a source of growth capitol...There is little doubt left that retroactive liability is unfair...Still, there are some left in government who maintain that retroactive liability is needed...It is as though any means are justified in pursuit of an end..."

—Statement of Richard Leavitt, President and Owner, Chelsea Clock Company, before the Commerce, Transportation, and Hazardous Materials Subcommittee, June 22, 1995.

"Arrowhead Refinery Superfund site is a classic example of the best intentions becoming the worst nightmare...The company went out of business some time in the late 1960's...From what I understand there were not many records left over from Arrowhead so the federal and state agencies looking into the site interviewed a former driver, now up in years, as to where and when he went to pick up waste oil...The federal agency in Chicago and Pollution Control Agency in Minnesota were both involved...They both asked for the same documentation. We weren't sure who was controlling the process. Because I had been active in politics I would get calls from various litigants complaining or, in some cases, almost crying wondering what was going to happen...I could go on and on about what transpired during the eight years of litigation, hearings and depositions. The point is that there is no reason for something like this to cause eight years of stress on people that have been good citizens and good business people...This Act reversed our whole tradition of innocent until proven guilty to you're guilty prove otherwise"

—Statement of Kelvin Hersted, President/Treasurer, United Truck Body, before the Commerce, Transportation, and Hazardous Materials Subcommittee, March 16, 1995.

"I am a fourth party defendant in the Keystone Superfund lawsuit. I have been sued by my friends and neighbors. Why did they do this? Upon the advice of attorneys bringing others into the suit, this was the only way they could lessen the amount of their settlements...I am being sued for $76, 253.71. That is a lot of money to me, more than I am eager to pay myself a year. That does not include my ever increasing legal fees. This legal action has angered, depressed and confused me. After paying thousands of dollars in insurance premiums, my company will not defend me or assist me without cost...I obeyed State, local, and Federal regulations. Being forced to defend myself is a travesty of justice. Being forced to pay this settlement would be devastating to my business. Has anyone considered the effect on my employees and their families. Has anyone considered the effect on our community?...What is the Superfund law accomplishing? The attorneys are making a fortune, small businesses are unfairly burdened, and the contamination still isn't cleaned up."

—Statement of Barbara Williams, Owner, Sunnyray Restaurant before the Committee on Environment and Public Works, April 23, 1996.

"One component of CERCLA that exacerbates this problem of inordinately high litigation transaction costs is the statute's imposition of retroactive liability coupled with absolutely no time limit on how far back in history a party's conduct will be subject to scrutiny. As a result, it is common for potentially responsible parties who may have had some relationship to the property at issue, even those whose relationship to the property ended during the last century . . . UGI and other companies mired in costly claims over liability at ancient sites where their activities ceased many years ago are expending a substantial amount of time, dollars and resources litigating over documents from the 19th Century gas light era. With the clean up costs as enormous as they are, companies if permitted will go back as far in time as they are allowed in order to drag in one more potentially responsible party . . . Indeed, UGI has retained an entirely new kind of Superfund-spawned specialist, known as "insurance archaeologist" who attempts to identify and evaluate the import of ancient insurance documents. Thus, one more company, this time an insurance company, is drawn into the retroactive liability morass of the swamp and any claim against the insurance company will likely involve additional litigation."

—Statement for the Hearing Record, Richard Bunn, UGI Utilities, Subcommittee on Water Resources and Environment, June 15, 1995.

"Now, almost 15 years later, the matter is about to be fully and finally settled. In the interim, EPA spent approximately $1,300,000 investigating the site. Additionally, our company spent almost $500,000 in attorney's fees and consulting fees over the period. And for what? The actual cleanup of the site, which EPA ordered and oversaw, cost approximately $38,000 . . . It took over 15 years and cost our company nearly $2 million in professional fees, lost profits, and environmental studies, all for the sake of a $38,000, 2-day cleanup, which resulted in three truckloads of nonhazardous dirt being trucked to Oklahoma."

—Statement of Michael Mallen, Southern Foundary Supply Company, Subcommittee on Water Resources and Environment, June 15, 1995.

"Construction contractors are being held liable for cleanup costs at landfills for construction debris disposed of there as long as thirty years ago. The contractors did nothing illegal or irresponsible in disposing the wastes and it is questionable if the wastes could be found hazardous even by today's strict standards."

—Statement for the Record of Stephen E. Sandherr, Associated General Contractors, before the Subcommittee on Commerce, Trade and Hazardous Materials, June 22, 1995.

"We were told that unless we had documentation from the 1960's to prove that the drums were triple rinsed, the fact that they were empty did not matter . . . We were told by Mr. Caplan that if we were not part of the PRP group that settled with EPA, we were subject to paying triple damages if the EPA or the official PRP group came after us for reimbursement . . .

In talking to some of the many lawyers that were at the meeting, we were told that we better join, as the EPA basically had unlimited power to do whatever they wanted even if we were innocent of any wrongdoing. At the time we were so intimidated that we paid the $25,000 to stay in the paper loop so that we could keep abreast of what was to transpire . . . It looks as though Stamas would end out between $175,000 to $450,000 if we are coerced into going along with what the EPA expects.

Gentlemen, in all fairness, how can a small company like Stamas be held responsible for actions taken 30 years ago that were at the time legal, particularly when this action is by another company . . . The requirement to triple wash an empty drum and to be responsible for the life of that drum was not required by any regulation at the time . . . To pay out the kind of money the EPA expects, we might as well close our doors and lay off the 75 employees that we currently employ."

—Statement of J.L. "Jim" Williams, Controller, Stamas Yacht, Inc., before the Subcommittee on Commerce, Trade and Hazardous Materials, June 22, 1995.

"In 1979, Robert Cox, Sr. then president of the tiny Gilbert-Spruance Company in Philadelphia, Pennsylvania, testified as Congress considered passing the initial Superfund law. He told the Senate Environment and Public Works Committee that he did not want his legacy to be bankruptcy for his son, Bob Cox, Jr. due to the open-ended nature of the Superfund liability system . . .

Bob Cox, Jr., was forced to declare bankruptcy a decade later due to protracted Kafka-like liability litigation under Superfund and similar state statutes. Many NPCA members have been caught up in the web of Superfund litigation and have experienced great frustration and expense in attempting to find workable and equitable solutions to the cases in which they have become involved.

In 1992, NPCA conducted a survey of its members and found that, of the $600 million extended by the industry on Superfund-related matters, only $200 million went to cleanups while $400 million was consumed in transaction costs"

—Statement of Richard Bliss, on Behalf of National Paint and Coatings Association, before the Subcommittee on Commerce, Trade and Hazardous Materials, June 22, 1995.

"...Similac, a substitute for breast milk, in fact, had copper content that was required by FDA that far exceeded the copper content that was the basis for the liability in our waste...we got two major circuits in this country to admit that...in Superfund, everything in the universe is a hazardous substance including federally approved drinking water...[F]acts are irrelevant, because if everything in the universe is a hazardous substance, we don't have to concern ourselves with the facts as to what it is...[C]ausation was not a part of the statute. That is the present state of the law that everyone thinks is too expensive and too slow, and yet is a plaintiff's lawyers dream; you have nothing to prove."

—Statement of Lawrence A. Salibra, Alcan Aluminum Co., before the Subcommittee on Commerce, Trade and Hazardous Materials, June 22, 1995.

"Too many of us have had the unpleasant experience of dealing with federal regulators who impose arbitrary and unreasonable requirements upon property owners. Too many of us have had the unpleasant experience of not being able to resolve these issues after years of involvement. Too many of us have seen small business owners be pushed out of business after having their life savings depleted due to a system that produces little benefit for the public.

In my district, for example, I have been working with several auto dealers who have been sued by the U.S. Environmental Protection Agency for having deposited oil at a Purity Oil Sales disposal site in Fresno, California between 1930-1970's. Since the oil company's records were burned in a fire sometime in the late 1960's, the only evidence that the EPA has on these auto dealers is the vague recollection of a Purity Oil Sales driver that "thinks" he picked up oil from auto dealers. We are now six years into the process. 190 defendants have been sued and spent over $200,000 has been spent for attorneys fees, yet not one ounce of contaminated soil has been cleaned up."

—Statement of Congressman Gary Condit before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, May 8, 1996.

"We think that after spending $8 million our property is in far worse environmental condition than it was before the remedy was begun, and it's still going to take a lot of money to correct all the mistakes that have been made.

These problems can be addressed by proper management, supervision, and controls, utilizing competent contractors and requiring EPA to be responsive to property owners and the local community.

An appropriate remedy could have been selected for our property and could have been completed in a far more cost-effective manner...Believe us when we say that after 13 years, 13 years of aggravation, anger, tears, and frustration that no one else deserves to suffer this fate."

—Statement of Hans and Helena Tielman, Meyersville, New Jersey, before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, May 8, 1996.

"...We utilized other facilities to aid us in our recycling efforts. Most of these locations have since been closed and are now Superfund sites. Because of this Marisol is labeled a 'polluter.' To have helped pioneer the recycling industry and be labeled a polluter is an insult...

I've personally watched the current Superfund system literally waste millions, if not billions of dollars. The amount of money spent for non-cleanup expenses is a national disgrace.

I believe Superfund is a major reason many businesses have left or have not expanded in the United States, and especially in New Jersey.

This has amounted to lost jobs, and you don't put a man or woman out of work. You put his or her whole family out of work.

It has become difficult to plan and budget effectively. Administrative and allocation costs related to Superfund are extremely unpredictable. The unanticipated and untimely imposition of these expenses defy and frustrate managerial control...

My small company has already paid over $310,000 in defense and administrative costs...not toward cleanup...

Superfund liability provisions are woefully lacking in fairness, logic, and reason . . ."

—Statement of James Nerger, Marisol, Inc, before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, May 8, 1996.

"We believe EPA has let all the federal government agencies off the hook . . . In other words, only the non-federal agencies were ordered to spend millions of dollars on the cleanup, while federal agencies did nothing."

—Letter from the Colorado School of Mines to Congressman Dan Schaeffer dated June 6, 1997.

"Because of Superfund, my small business has spent over $1 million due to contamination caused by others. What makes it even worse is the fact that the vast majority of the contamination was caused by agencies of the Federal Government during World War II when they owned and operated the property.

How would you describe a law that allows one branch of the Federal Government, EPA, to pursue me to clean contamination caused by another branch of the Federal Government, the Department of War . . .

. . . EPA stated at a public meeting that site workers, children playing at the park next door and neighbors living across the street were not at risk from the soils or the air from the Liberty site.

However, EPA went on to say that there was a risk to the hypothetical trespasser. That trespasser was assumed to be a teenage boy who would enter on the property twice a week, 2 hours per visit, 52 weeks a year for 9 consecutive years, each time coming in contact and ingesting certain soils.

Based on this scenario, the trespasser would have a hypothetical 3 in 10,000 increased risk of getting one type of cancer.

Ironically, these soils were behind locked, fenced areas that covered less than half of 1 percent of the site with signs saying, "High voltage. Keep out."

Yet, when EPA made their determination about risk, they assumed that the teenage trespasser would be in contact with the soils from these isolated high spots containing the highest concentrations every time they walked on the site . . .

Because of all the expenses I have been forced to incur, I have been unable to maintain the mortgage payments . . . One million dollars is a lot of money. However, it is not a true measure of what owning the site and being caught in the web of Superfund liability has cost me.

It is impossible to measure the toll that it has taken on me, my family and my small business. It has sapped me and my small business of capital, energy, and entrepreneurial spirit. It has taken me from my family and children . . ."

—Jeffrey Rosmarin, RGE, Inc. before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, May 8, 1996.

"In April 1992, EPA sent us a letter stating that we were a potentially responsible party, PRP and they wanted a lot of information that would have taken a year to answer completely.

But they threatened a $25,000 a day fine if we didn't give it to them . . . We asked them, in July 1992, what they had against us, and the answer was that they had a couple of statements from former garbage men that worked out at that dump who said that we had used other contractors to bring trash out to that dump . . .

We did an extensive investigation of all of our employees who were still around to ask, who happened to still be alive, including my mother who has since deceased.

None of the people that we talked to that had any --or truck drivers had any knowledge of that situation . . . I think they spent about a half a million dollars with litigation before they even started cleaning the thing up . . . [the primary PRPs] wanted $26,000 from us as a downpayment to get the ball rolling . . . That's what makes this Superfund law such a nightmare, and "nightmare" is a word that we've all used.

We are charged with something that our grandfather allegedly did that was legal. It's even worse than being fined by a legitimate act allegedly done by your grandfather or my great-grandfather, for that matter . . .

[T]hanks to Congress, we face a tremendous legal cost and fines based on allegations that we did something legal that is illegal.

This is unfair, un-American, and we request that you consider rescinding this outrageous injustice."

—Statement of Steve Dixon, Beckett Bronze Co., before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, May 8, 1996.

"I can tell you as a town manager that the site-specific, retroactive liability system has made it virtually impossible for local governments to fulfill their four major responsibilities at Superfund sites which are (1) eliminating the risk in a timely manner; (2) protecting the local economy and tax base; (3) returning polluted, non-productive land to productive, taxable status when that is practical; and (4) controlling costs at those sites. The current Superfund law, in particular its liability system, significantly impedes rather than facilitates the attainment of these goals."

—John Weichsel, Town Manager, City of Southington Connecticut, before the Subcommittee on Water Resources and Environment, October 30, 1997.

"...I am mired in litigation at the Berks Superfund Site in Douglassville, Pennsylvania...The Berks site operated as an oil and solvent recycling facility from the 1930's until 1985. Delaware Oldsmobile is just one of twenty dealerships that was identified as a contributor by the testimony of a former truck driver for a company that had transported used oil to the Berks site...Significantly, the driver was employed for only two and a half years, and there are no supporting receipts or other documentation to substantiate his claims. Yet, with no other fact-finding on EPA's part and no documentary records of evidence, EPA used the driver's recollections to determine, through extrapolation, the amount of oil that each dealership sent to the Berks recycling facility for all years in question.

As a small businessman who complied with all federal, state and local regulations regarding used oil, I am utterly amazed at the legal entanglements I have endured, and I am even more frustrated by the exorbitant liability that I am being forced to assume".

—William Luke, Delaware Olds, Inc., Wilmington, Delaware before the Subcommittee on Water Resources and Environment, October 29, 1997.

Mr. SHIMKUS. And these are quotes from everybody, talking about—I think there's—you know, and you can look at that at your leisure. But, it suggests another opinion; that although I think we're accepting the fact that there are problems, I think there's maybe a little bit more problems than—than a lot of people are willing to admit.

I know I am beating a dead horse on the limited liability provision for small business, but the reason why I'm doing that is I saw it historically portrayed a couple of years ago on a 60 Minutes episode. People promised to have reform, from the—from the administration on down the line. Three years later, no reforms. That story is being replayed out in my district. And if we don't have any reforms, that seems to always going to be replayed out 3 years from now and we're going to be back at it. And it's the small businesses and mom and pop operations that have—there's no connection to the hazardous material that—by this failed, unfair law, especially with provisions for small business.

With that, my time has expired and I yield to the ranking member, Mr. Towns, for 5 minutes.

Mr. TOWNS. Thank you, very much. If a State or Federal law is both relevant and appropriate under the circumstances of a lease, it would seem to be common sense to apply that requirement, particularly if it would avoid disputes with the States over whether such a State standard is per se legally applicable. Mr. Johnson, what is the position of the States and please give us a reason for your views?

Mr. JOHNSON. We are very concerned about the rejection of relevant and appropriate standards by 1300 and 2580. Our feeling is that it, in fact, is a common sense conclusion; that if a standard is relevant and appropriate, it should be applied at a site. Why should it matter whether the landfill, for instance, stopped accepting waste in 1984 and 1988, when it—when it comes to determining how that landfill should be fixed. However, many standards

will not be legally applicable, if the landfill stopped accepting waste in, let's say, 1984 or whereas they will be applicable after that date. But the standard, nevertheless, is important for protecting the public. It is relevant and appropriate under the circumstances and we think it should be applied at the site.

Keeping relevant and appropriate standards in the statute will avoid fights about whether regulations, in fact, are applicable; avoid excessive rulemaking by States that would be compelled to have to completely repromulgate all of its rules to apply to Superfund cleanups, and that places an extraordinary burden on all the States throughout the country. Relevant and appropriate standards usually represent the best engineering judgment about what should be utilized in the remedy selection process. And because they are not mandatory under the statute, the EPA and the States still have the ability to choose among the various standards and pick that which is best for the circumstance.

And it seems to us to be a very good way to proceed in picking an appropriate remedy. It avoids excessive risk assessments. It avoids having to demonstrate case after case after case that somehow, and it's a best engineering judgment, to put an impermeable cap on a landfill. Instead, the States can rely on the relevant and appropriate standards to require those types of protective remedies.

Mr. TOWNS. All right, thank you. Ms. Williams, from the community standpoint, the same question.

Ms. WILLIAMS. Well, from a key community standpoint, RARs are the first line of defense against the Federal agency that may not understand local ordinances or State ordinances that were enacted. Let me give you an example. We're recently working at the Del Amo/Montrose site, where they picked up what was essentially pure DDT and had to go into the neighborhood and pick it up with bulldozers. And the local Air Board put a standard for air emissions that they had to meet, and if they didn't meet that, they had to shut the cleanup down and re-water the site. Now, if that standard had not been adhered to and applied by the local Air Board, the Federal agency—actually, the contractor doing the work would have just been able to pretty much, you know, have billowing DDT latent dust all over the neighborhood. So, that just gives you one example.

Another example I can give you, in California, is with drinking water standards. California has more stringent drinking water standards. California has a Porter/Cologne Water Quality Act, which was passed almost a century ago, to protect ground water from contamination, and no other States have programs like that, as well. And so the Water Board actually has a special resolution that they passed 4 years ago, I think, to force Superfund sites and Federal agencies, such as DOE and DOH, comply with groundwater standards, which are very important. Because, in many instances, at very complicated cleanups, where we may not have technologies yet to actually destroy the contaminants, you end up with a cap. And part of the requirements that the Water Board imposes on those caps is that they put in monitoring systems, to make sure that the groundwater is not becoming contaminated with the cap.

So—I mean, I can go on at great length. But, these relevant and appropriate regulations are very, very important for the protection of public health, as well as the environment.

Mr. TOWNS. Right. Thank you, very much. Let me have 1 minute additional here. I want to just sort of raise a question with Mr. Jeffers. Why do you support and seek legislative ratification on the numbers in EPA's municipal settlement policy?

Mr. JEFFERS. Well, I think we, as a muncipal government, feel that they are fair, equitable, and conservatively estimable and they're workable and we supported those ideals for several years now. And we think we can live with them and they work for us.

Mr. TOWNS. Okay, thank you. Let me thank all of you for your testimony. Thank you. Yield back.

Mr. SHIMKUS. The gentleman yields back his time. Next, we have the gentleman from Michigan, Mr. Stupak, you are recognized for 5 minutes.

Mr. STUPAK. Thanks, Mr. Chairman. Let me apologize, again, for bouncing back and forth between O&I and here. I was just once again looking at your testimony, Mr. Nobis, on Quincy, Illinois, and hopefully we have some good news we can share with you.

Every member on this side, at least on the Democratic side here, has supported legislation to exempt from liability small businesses and residential home owners, who only send municipal solid waste or trash to a local landfill, much like you had in your Quincy experience here. And we have supported exempting you from liability for municipal solid waste over the past 5 years. In the earlier panel, we had H.R. 2485, my bill, which would eliminate the liability; but, unfortunately, the leadership of the House didn't take any action on it. And we're going to bring it up again and hopefully, as this legislation moves, we can do something with it to give you that exemption you're looking for. And, quite frankly, you're being held hostage to those have a much broader and more controversial Superfund legislative agendas. And that's why we developed 2485, because the little individuals that we're trying to help out were always getting caught in the larger issues on Superfund.

So, would you and NFIB—I guess you're representing NFIB—would you support moving a bill separately to relieve you and your friends in Quincy, who are sent their trash to the normal municipal solid waste? Would you guys be willing to, at NFIB, support our legislation 2485?

Mr. NOBIS. I think the thing for small business—and the Superfund is a very complicated thing, and we found that out and tried to deal with it in our community. For small business, I think, small business will definitely be supportive of any bill that would get small business out. To me, it makes a lot of sense. We have been dealing with this problem for at least 6 years. There have been promises to get small business out. Yes, we do feel hostage. We have needed to be out of this problem for a long time.

Had—I think it was 5 years ago, we saw a 60 Minutes piece, where the problem was dealt with in Gettysburg and that then, they said, well, you know, they're working on the problem. And had that been done, my problem in Quincy wouldn't have happened. So, we are being held hostage. We think—we really want to be out of this. We see the necessity for small business to be out of it. We

would be supportive of any bill that would get small business out of this. It makes sense to us, though, that there's a bill that can just deal with small business, definitely, that would be the quickest way. It's been real frustrating, where both sides—and we've heard it many times, yes, the Democrats are for getting small business out, the Republicans are for it; but, yet, we're still in.

Mr. STUPAK. Right.

Mr. NOBIS. To me, I'm very simple. I'm just a printer. I get right to the point. If you all believe that we need to be out, let's get a bill that just gets us out. You can leave us alone. We'll leave you alone. As a matter of fact, I think we even save you money. It will cost you less money to track after us and then you can put that money back and clean up the landfills.

Mr. STUPAK. Use your organization, then, to encourage your leadership to allow my bill to go. Because, 2485, you mention Gettysburg. That's Representative Goodling. He was co-sponsor with me and we had it to get you out. We just need a little help from the leadership of the House of Representatives to move the bill. So, thank you for your input on that.

Mr. Jeffers, H.R. 1300 provides in Section 305 a full exemption for any generator or transporter of municipal solid waste, including large commercial companies like Waste Management or BFI, who sent municipal solid waste to a landfill prior to enactment. But, you support a different resolution of the municipal liability issue; is that correct?

Mr. JEFFERS. That's correct.

Mr. STUPAK. Could you just take a moment to explain that?

Mr. JEFFERS. Well, again, my groups feel that the EPA policy, which we were very supportive and commented on in detail when it was being developed and, ultimately, developed and processed, again, deals with a fair, equitable, and workable manner, which keeps Superfund going. I think all of us want to have the assurance that these environmental parcels that need attention are equitably and quickly addressed from a community standpoint. We need to make sure that there's a chance for them to be redeveloped back into community use and that, therefore, the EPA policy, as stated, we think, allows that to happen and it treats us, as municipal governments and local government, in a manner that we can live with and proceed forward with.

Mr. STUPAK. Thank you. My time has expired.

Mr. SHIMKUS. Gentleman yield back?

Mr. STUPAK. Well, my time expired. I had one more question.

Mr. SHIMKUS. Go ahead.

Mr. STUPAK. Okay, thank you. Mr. Johnson, if I could ask you this, what affect will the current owner liability provision in Section 302 have on current—let me try again—what affect will the current owner liability provisions in Section 302 have on the current owner category on current law?

Mr. JOHNSON. We are very concerned, because we think that the revisions that are proposed in H.R. 1300 will make it very difficult to hold current owners liable. It makes——

It makes a number of changes in the law that will make the law very difficult to apply for many years. First of all, it allows certain owners who purchase even with knowledge of contamination even

at a reduced price to avoid liability under many circumstances. And in fact that is inconsistent with the common-law duty to maintain property so that it isn't a nuisance or a hazard to others. And we find it a bit odd that that type of exemption would appear in Superfund at this point, particularly given the consensus over a long period of time, several hundred years, that property owners have an obligation to protect the public from conditions that occur, that exist on their properties.

Second, the statute changes the standard of care from due care to appropriate care. This will invite a new round of litigation on what is appropriate versus what is due. And we feel that the current statutory language provides an appropriate protection for truly innocent owners, and it does not need to be changed at this point. This is a problem that we don't think is serious. We don't think it is a problem in need of a legislative fix. We think the current statute adequately provides protection to truly innocent owners and doesn't need to be changed.

Mr. OXLEY. The gentleman's time has expired.

Mr. STUPAK. Thank you, Mr. Chairman, for the courtesy.

Mr. OXLEY. The gentleman from New York, Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman.

First I would like to ask, Mr. Chairman, unanimous consent to insert a statement I have into the record.

Mr. OXLEY. Without objection.

Mr. ENGEL. Thank you, Mr. Chairman.

This legislation troubles me, for a number of reasons, and let me give a little bit of an analogy. Years ago when I was on the Education and Labor Committee, we held hearings on OSHA, which is safety in the workplace. And the majority at that time—the majority was trying to point out all the problems with OSHA, and so their proposal was to simply eliminate OSHA. Instead of fixing it, simply eliminate it. It was an excuse to eliminate a program that I think has been very, very good. And I called it throwing out the baby with the bath water.

And I'm afraid the same thing is happening here. Yes, there are problems with Superfund. Yes, there are changes that need to be made. Yes, we don't want small business to be hurt. It is not in anyone's interest to hurt small business. And I think we ought to take care of that. But what this legislation does in my estimation is it overreaches, and it uses as an excuse to roll back the clock in terms of many, many gains that we have made.

I think we need a Brownfields-only bill. Mr. Towns has such a bill in H.R. 1750, and I support that bill, and I am a sponsor of that bill, I believe.

But what H.R. 1300 does in my estimation is it nullifies the reforms already instituted, and cleaning up of contaminated sites in my estimation if this were to pass would stall because of the new liability defense defenses giving polluters exemption.

Now we want to not hurt people who are not guilty, but on the other hand we don't want to let off the hook the polluters who are guilty. And that is why I believe that a number of State officials, including the organization Mr. Johnson is representing, the National Association of Attorneys General, they have stated that the core liability provisions of Superfund are an essential part of a suc-

cessful cleanup program. Let me just say what they say. According to the State officials, the Superfund liability provides strong incentives for early cleanup settlements, promotes improved management of hazardous waste and pollution prevention, and promotes voluntary cleanup.

So I would like to ask Mr. Johnson, since he is from New York, and so am I, and he represents this Association of Attorneys General, what effect will the mandatory allocation scheme and all the significant liability exemptions contained in H.R. 1300 have on the current Superfund program?

Mr. JOHNSON. We are particularly concerned about the allocation scheme. As you have said, Congressman, the Association's resolution has said that we would like to retain the core liability provisions with some minor changes to take care of some of the problems that have cropped up in the statute. But it is important to keep the core elements of liability in the statute.

The requirement that there be an allocation at every site, every NPL site, we think is not a good idea at all. What the result of this we think is is that the allocation process will change the emphasis that currently exists in the law from obtaining settlements, where the issues are decided and the case is over and people's liability is determined, to a process where an allocation is just the first step in that process of resolving the case.

Mandatory allocation we think under this statute will become a trial. It will not result necessarily in settlements. When allocations are made mandatory, parties are more likely to await its results rather than make an effort to truly settle the case and end it. Why not wait and see what happens as a result of the allocation before coming forward with a settlement proposal?

Mandatory allocation we think will just inevitably lead to trial-like allocations rather than a reduction in transaction costs in settlements. And this is particularly pertinent here because PRP's ordered to clean up a site will get reimbursed by the fund, and thus removing any incentive that they currently have to settle.

Under current law, EPA can provide mixed funding for PRP's who agree to settle their liability. However, if they know that they don't have to make a settlement in order to be reimbursed for any excess costs, PRP's are not going to be settling. That means that the fund is going to have to pay for cleanups. There is going to be a lot more orders. Cleanups will be delayed. And the whole process of resolving cases by settlement and getting cleanups to move forward quickly will be delayed.

Mr. OXLEY. The gentleman's time has expired.

Mr. ENGEL. May I ask just ask one more question, Mr. Chairman?

Mr. OXLEY. Without objection.

Mr. ENGEL. Thank you. I don't want to put words in your mouth, Mr. Johnson, so correct me if I am wrong, you are saying in essence that an allocation is in effect a trial, and you are saying that H.R. 1300 on the Superfund program would trigger another decade of litigation, escalate private transaction costs, create delays in cleanup, and shift huge costs back to the Federal Government and the States. Is that not a fact?

Mr. JOHNSON. I think——

Mr. ENGEL. That is what I believe. I want to know if you believe that.

Mr. JOHNSON. I think you have taken the words from our written testimony and summarized them succinctly. We think that that is a problem.

Mr. ENGEL. Well——

Mr. JOHNSON. Sometimes allocation can work. But to make it mandatory in every situation is a bad idea. We need flexibility in order to decide what will work on a case-by-case basis.

Mr. ENGEL. You just mentioned your testimony, and on page 21 you said that the section 305(e) in particular—and again I don't want to put words in your mouth; correct me if I am wrong—would add an additional limitation on liability that would directly affect every State by establishing a 10-percent cap on recoverable oversight costs. Can you please just tell us your concerns with this provision?

Mr. JOHNSON. Yes. States need to provide oversight to cleanups. The public is always concerned about the quality of a cleanup that goes on at a Superfund site, and if private parties that are cleaning up a site do not have oversight, the public is especially concerned, because they don't know if the cleanup is being done properly.

Under H.R. 1300, section 305 puts a cap on the oversight costs of a State 10 percent. Now sometimes that will be all right, but in other circumstances it will not be, and this type of cap will prevent States from providing the type of oversight and ensuring the type of public confidence in cleanups that the public demands, appropriately so.

In particular, we are concerned about putting a cap on State oversights, oversight costs. We could end up with fraudulent cleanups or shoddy cleanups, and that's not appropriate. States do not gold-plate their oversight. We don't have enough personnel to do that type of thing. We do what is necessary and what it costs, it costs. But those are costs necessary to protect the public. And artificially putting a 10-percent cap on our costs we don't think is correct.

Mr. OXLEY. The gentleman's time has expired.

Mr. ENGEL. Thank you, Mr. Chairman, for indulging me.

Mr. OXLEY. Mr. Jackson, we have worked with the Governors, the State cleanup agencies, the cleanup contractors, engineers, the Commission on Risk Assessment and Risk Management. They have all supported changes to ensure that remedy selection is protective and modernized. I would like to outline the brief but important remedy selection pieces of H.R. 2580 and ask how these pieces will help cleanups.

First, H.R. 2580 modifies the provision requiring treatment for treatment's sake to consider practicality, future land use, and risks to the community and workers' health. Can you comment with the field experience of the cleanup contractors on this matter?

Mr. JACKSON. Yes, I would tend to agree with that position. I think it is important to look at not just doing treatment for treatment's sake. I think it is important to look at the use of the land, and I think it is very important to incorporate risk assessment in identifying not only the cleanup goal but also the method.

Mr. OXLEY. Isn't it a fact that EPA in the past has supported changes in future land use as espoused in this legislation?

Mr. JACKSON. I believe in some cases yes.

Mr. OXLEY. Well, that was in testimony earlier today from Mr. Fields that appeared to be the case.

Second, H.R. 2580 requires compliance with drinking water standards at reasonable points of compliance and removes the needless bureaucratic relevant and appropriate standards. Can you comment on the need for these changes?

Mr. JACKSON. The key word there is point of compliance. Many times I have seen a drinking water standard used inappropriately that is not relative to the point of compliance, namely, when the water is being consumed by the public. So I think the general intention of what you just said is correct.

Mr. OXLEY. Finally, H.R. 2580 requires use of sound and objective risk assessment practices. Can you comment on that based on your experience?

Mr. JACKSON. I would agree with that wholeheartedly. It is something that not only I have had experience with in the United States, but have also been involved with on projects overseas. It is a concept that is based on sound science.

Mr. OXLEY. And finally, Mr. Jackson, can you tell me how the RAC liability provisions would spur Brownfields redevelopment? And how do you respond to the arguments of Mr. Fields and Mr. Johnson?

Mr. JACKSON. One example comes to mind that is very obvious from my industry is that by modifying appropriately the RAC—the response action contractors—liability—you will see a more speedy process as far as proposing, adopting, and implementing a remedial action on a given site. Many times those sites are Brownfields sites. So I would see it as a positive thing.

Mr. OXLEY. Mr. Johnson and Mr. Jeffers, I want to ask you about the Allied Signal case and enforcement policy. Isn't it true that an enforcement policy is an exercise of discretion, and courts will always have the discretion to review whether a settlement is equitable? In Allied Signal, on the facts before the courts, they found the municipal settlement policy not fair under the circumstances. How can codification of a settlement policy remove this uncertainty, and how can Congress codify a policy where the design of the court is to provide fairness on specific facts?

Let me start with Mr. Johnson, and then go to Mr. Jeffers.

Mr. JOHNSON. I think we have to be careful before we draw any general conclusions about that decision. I have read the decision, although the State was not I don't believe a party in that particular case. However, there were some unusual facts in that case that are I think unlikely to be replicated at other Superfund sites.

In particular there was evidence in the case that the town had required that large amounts of hazardous waste actually be deposited at that landfill. And so I don't think it is really representative of the problems that are faced at municipal sites, at least at the vast number of the municipal sites where there hasn't been a resolution of liability.

Mr. OXLEY. Mr. Jeffers.

Mr. JEFFERS. Mr. Chair, again we rely on the EPA policy numbers, and we think that those numbers are fair. In fact, we had originally started off with a lower number, but agreed to settle on a higher number when the policy was being circulated for comment. In fact, in the Fultz Landfill case in Cambridge, Ohio, the Federal court did affirm the EPA numbers as fair and equitable, and again as a decision the benefited both municipalities and industrial generators in that case. Codification of the EPA policy numbers will use again a fair and equitable number that will drastically reduce transaction costs over the long run, and we think keep the program alive, which again I think all parties want these sites quickly and cleanly resolved.

Mr. OXLEY. And would legislation like 1300 or similar deal with the issue that you have raised and deal with the problem?

Mr. JEFFERS. Whatever bill is the mechanism or vehicle to get there, we think as long as it contains the EPA municipal policy numbers, it is a vehicle that we can work with, and again it is fair and equitable.

Mr. OXLEY. Thank you. The Chair notes there is a series of votes on the floor, and will take this opportunity to thank all of you on the panel for an excellent presentation.

I ask unanimous consent to keep the hearing record open for 60 days for members to insert statements, questions, and additional material for the record.

Without objection, it is so ordered, and this subcommittee is adjourned.

[Whereupon, at 1:13 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

October 12, 1999

The Honorable John Dingell
Committee on Commerce
United States House of Representatives
Washington, DC 20515

Dear Representative Dingell:

I am writing in response to your request to clarify budget issues that have arisen with regard to H.R. 2580, to be considered by the House Commerce Committee tomorrow, and H.R. 1300, as reported by the House Transportation and Infrastructure Committee. Both H.R. 2580 and H.R. 1300 contain a number of provisions that would exempt certain parties from Superfund liability or otherwise shift costs from responsible parties at Superfund sites to the Superfund Trust Fund. To pay for these provisions, both bills include direct spending: H.R. 2580 provides $250 million per year for fiscal years 2000 through 2004, and H.R. 1300 provides $300 million per year for fiscal years 2000 through 2004 and $200 million per year for fiscal years 2005 through 2007. Neither bill reinstates the Superfund taxes, although the current version of H.R. 1300 contains a sense of the Committee statement that the Superfund taxes should be reinstated.

OMB's preliminary review of H.R. 2580 and H.R. 1300 suggests that either bill would impose costs on the Superfund Trust Fund in excess of the level of direct spending included in the bill by a significant margin. The bills do not appear to specify the budgetary treatment of such excess costs. If they were funded out of discretionary appropriations, a portion of the existing Superfund budget would be needed to assume costs previously paid by responsible parties.

Since both H.R. 2580 and H.R. 1300 would increase direct spending (by $250 million per year and $300 million per year, respectively), they are subject to the pay-as-you-go (PAYGO) requirement of the Omnibus Budget Reconciliation Act of 1990. Neither bill contains provisions to offset the increased direct spending, so if either is enacted its net costs could contribute to a sequester of mandatory programs.

We look forward to working with Congress to reinstate the Superfund taxes and enact narrowly targeted Superfund legislation that builds upon the success of Superfund administrative reforms, without putting an undue burden on the taxpayer and the budget.

Sincerely,

Jacob J. Lew
Director

Association of Metropolitan Water Agencies
1717 K Street, NW, Suite 403
Washington, D.C. 20036

American Water Works Association
1401 New York Avenue, NW, Suite 640
Washington, D.C. 20005

October 8, 1999

The Honorable John D. Dingell
Ranking Member
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Dingell:

The Association of Metropolitan Water Agencies (AMWA) and the American Water Works Association (AWWA) write today regarding H.R. 1300 and H.R. 2580, reauthorizing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

AMWA is a non-profit organization comprised of the nation's largest drinking water providers. Member agencies are in every region of the country, and are represented within the association by their commissioners, directors and general managers. Together, AMWA members serve over 120 million people with clean, safe drinking water.

AWWA is the world's largest and oldest scientific and educational association representing drinking water supply professionals. The association's 56,000 members are comprised of administrators, utility operators, professional engineers, contractors, manufacturers, scientists, professors and health professionals. The association's membership includes over 4,200 utilities that provide over 80 percent of the nation's drinking. Since its founding in 1881, AWWA and its members have been dedicated to providing safe drinking water.

AMWA and AWWA commend the cosponsors of H.R. 2580 and H.R. 1300 for their interest in returning brownfield sites to beneficial uses. Many water suppliers serve urban areas where brownfields are common. As members of these urban communities, our members are strongly supportive of your efforts to revitalize brownfields. Yet we believe it can be done without significantly amending CERCLA Section 121. We support common sense reform of CERCLA, but any proposal must recognize the practical and intrinsic value of drinking water and the burdens of liability and treatment that could be borne by consumers and water suppliers.

Nearly half the country relies on ground water as a primary source of drinking water. About 100 million of these consumers are served by community water systems using ground water for all or most of their water supply. The remainder rely on private wells. Meanwhile, at more than 85 percent of Superfund sites, ground water contamination is a problem, according the U.S. Environmental Protection Agency (EPA). The value of this country's ground water resources for both the economic and social well-being of the American public cannot be overstated.

CERCLA primarily addresses contaminated water and says little about uncontaminated water. To protect future ground water supplies, Congress should correct this oversight. AMWA and AWWA urge the committee to include language directing, at a minimum, that uncontaminated ground water be protected.

Relevant and Appropriate Requirements

Eliminated in H.R. 1300 and H.R. 2580 is the authority for federal and state government to rely on relevant and appropriate requirements (RARs) for clean up efforts. This ambiguous-sounding phrase is a key tool in protecting human health and ensuring that consumers are not forced to pay for treatment of water contaminated by hazardous waste.

While the Safe Drinking Water Act may provide a legally applicable requirement for setting a clean up goal for regulated contaminants, there may be no such guidance to govern the clean up of unregulated contaminants. For instance, methyl tertiary butyl ether (MTBE) and perchlorate contaminate a number of aquifers in southern California. These two contaminants are not regulated at this time, yet the California State Water Quality Board might determine that its Resolution 92-49, which sets clean up goals at background concentrations or alternative levels, is a RAR.

Another type of RAR might be a State drinking water maximum contaminant level. Some states, including California, have tougher drinking water standards than U.S. EPA. Without RARs, only the Federal standards would apply, leaving water suppliers with the financial burden of further treating the water to satisfy the State drinking water regulations.

Other Ground Water Clean Up Standards

We are opposed to H.R. 2580's elimination of all Clean Water Act regulations as governing standards. And we further object to the bill's devaluation of permanent remediation solutions by striking the word "maximum" from CERCLA Section 121(b)(1), in which the President is directed to select remedial actions that utilize permanent "solutions to the *maximum* extent practicable." (Emphasis added.) The association believes it is extremely important that there be a continuation of the current policy's general preference for treatment and permanence.

Likewise, we cannot support H.R. 1300's prohibition on "any requirement for a reduction in concentrations of contaminants below background levels," and to language in the bill directing that applicable standards may only be employed if the standards are "consistently applied to response actions in the State". The latter could be interpreted to preclude use of any standard unless it is often used.

These are flexible and reasonable clean up guidelines that should remain available to federal and state authorities as tools to protect sources of drinking water and public health. Without them, the association foresee major gaps in drinking water protection.

AMWA and AWWA also encourage the committee to retain drinking water maximum contaminant level goals (MCLGs) as remediation standards that are repealed in both bills.

Institutional Controls

AMWA and AWWA commend the sponsors of H.R. 1300 for directing that "[T]he President may use institutional controls as a supplement to, but not as a substitute for, other response measures at a facility, except in extraordinary circumstances." This provision recognizes the value of ground water as a potential drinking water source and promotes a long-term view of clean up efforts.

Current and Future Uses of Drinking Water

AMWA and AWWA commend the sponsors of H.R. 1300 for ensuring that ground water's current or future use be evaluated closely before remediation decisions are made. The determination method established by H.R. 1300 recognizes the importance of comprehensive State ground water protection programs, and where no such program exists, the bill is careful to presume that ground water is drinking water unless specifically rebutted. We particularly commend H.R. 1300's sponsors for including local water suppliers in the anticipated use determination.

However, H.R. 1300 seems to diminish the current EPA policy of restoring contaminated water to its current or potential beneficial use. The bill replaces this goal with a directive to the President to consider "the current and reasonably anticipated uses of water" in selecting a remedy. We urge the committee to remain consistent with EPA's policy and retain the emphasis on "beneficial use."

Ground Water Extraction and Liability

The associations urge the subcommittee to preclude liability against water utilities that inadvertently cause a contaminated plume to change its movement when the utility extracts water from the aquifer for drinking water purposes. In satisfying its public mission to provide drinking water for a community, a water utility must continue to draw water from the aquifer. However, in the process of extracting ground water from one portion of the aquifer, a plume could be caused to change direction. This is especially true in unconfined aquifers, where different parts of the aquifer are interconnected. Allowing liability to attach to a water supplier in such a context penalizes the community it serves by pulling the utility into unnecessary litigation and expensive response costs.

Utility Trenches, Brownfields and Liability

Administrative and legislative efforts have been initiated to address the need to reuse properties that have been contaminated in the past and are now potential sites for productive use. These efforts include provisions to plan the use of brownfield areas and efforts to protect purchasers of brownfields from Superfund liability related to their use of the land. For many of these brownfield sites, redevelopment will require new or modified utilities, such as water, sewage, electricity, and natural gas. These services will require the construction of "utility trenches" to connect the site to the offsite grid. It is possible that these trenches could create a route for some remaining hazardous substances to move off the brownfield site. Given the broad scope of CERCLA liability and the many novel ways in which liability has been interpreted, we are concerned that providing the essential utilities to brownfield sites will result in exposure to CERCLA liability. This would be an unfortunate consequence for rate-payers and can limit the reuse potential of many properties.

Conclusion

Once again, thank you for your efforts to revitalize the nation's brownfields. We would be pleased to work with you toward this end, and we would support you in maintaining the ground water and health protections in current law.

Please contact Michael Arceneaux at AMWA (202-331-2820) or Al Warburton at AWWA (202-628-8303), if you have any questions for us.

Sincerely,

Diane VanDe Hei
Executive Director
Association of Metropolitan Water Agencies

Jack Sullivan
Deputy Executive Director
American Water Works Association

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ELIOT SPITZER
Attorney General

(212) 416-8050

October 12, 1999

HAND DELIVERED

Honorable Tom Bliley
Chairman, Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Bliley:

I wish to express deep concerns about certain provisions in H.R. 2580, the Land Recycling Act of 1999, which is scheduled for mark-up by the Committee on Commerce on Wednesday, October 13, 1999. As the Attorney General of New York, I am committed to ensuring that the people of my State get the clean and healthy environment they deserve. The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), is an essential tool we use to insure that cleanups are performed by responsible parties, remedial actions fully protect our citizens, our natural resources are restored when damaged, and state taxpayers are not burdened with the costs of cleanup. We work closely with our State Department of Environmental Conservation to that end.

We have had extensive experience with CERCLA and are well aware of the areas of the statute that require reform, yet central provisions of H.R. 2580 give us great concern. As reported from the Subcommittee on Finance and Hazardous Materials, H.R. 2580 will undermine our efforts to protect the environment and natural resources of New York, and will jeopardize the ability of the State to fund the hundreds of cleanups still required in New York.

Provisions of H.R. 2580 that raise serious problems for the people of New York include the following:

- The many new liability exemptions will shift hundreds of millions of dollars in costs from responsible parties to state and federal taxpayers. States will be compelled to bear at least 10%, and sometimes up to 100%, of the liability shares of all those parties entitled to the proposed exemptions. New York cannot afford this transfer of liability and costs.

- A current owner which knew before purchase that the property was contaminated will escape all liability, even if the owner paid a reduced price for the land because of the contamination. All the owner has to do is to let the government onto the property and get out of the way while the government spends taxpayer money to enhance the owner's property. States do not obtain a "windfall lien" that returns to the taxpayers some of the windfall the owner obtains.

- The elimination of "relevant and appropriate" standards will significantly diminish the protectiveness of cleanups and substantially increase transaction costs. In New York, for instance, "applicable" landfill closure requirements vary depending on the date a landfill last received waste. Rather than requiring the most appropriate closure measures that best reflect the type of wastes present and the dump's location, the standards that the amended statute would require will depend upon the date waste was last sent there. Regulations that reflect the best engineering judgment will be ignored because they are not "applicable." Even adherence to New York regulations requiring secondary containment measures often no longer will be required.

- The bill will force New York to assume the cost of the cleanup of numerous sites and public drinking water wells contaminated by dry cleaners and others, no matter how irresponsible the party or its ability to pay for cleanup. The bill sets a mandatory cleanup level that is 2,000 times less stringent than typical cleanup levels for dry cleaning solvents and exempts dry cleaners, owners of dry cleaner sites, and suppliers of dry cleaning materials and equipment from liability for cleanups that reduce contamination any lower than that level. While the bill excludes ground and surface water actually being used for drinking water from this lesser environmental standard, the exclusion never will be triggered because water contaminated with that level of solvents cannot be used as drinking water. Exemptions from liability must never be accomplished by reducing environmental protection.

- Cosmetic manufacturers that dispose of substantial quantities of waste containing a variety of hazardous substances and other commercial, institutional and industrial facilities that dispose of solvents in large quantities could escape liability because their wastes are "essentially the same" as waste materials normally generated by households, *i.e.*, cosmetics and solvents. Liability exemptions for households and other small generators of municipal solid waste should not extend to large generators and industrial manufacturers.

- A company that disposed of 110 gallons of a spent solvent, such as trichloroethylene, could contaminate 10 billion gallons of drinking water to levels twice the drinking water

standard for the solvent, and escape liability under the de micromis exemption provisions. The exemption for truly de micromis generators must be narrowly and fairly targeted.

- The mandatory process for allocating liability among responsible parties is not binding, so few PRPs would settle before an allocation is completed, thereby delaying cleanups and substantially increasing costs. Parties that want to settle will be drawn into the increased wrangling over their allocated share. As reported, H.R. 2580 also grants PRPs the right to appeal administratively, and judicial review of, EPA decisions declining to enter into settlements with any person claiming de minimis, small business, or "inability to pay" status, further removing any incentive to settle and creating a new, double-layered bureaucratic process guaranteed to increase costs for everyone.

- The bill caps oversight costs that a state may recover at 10% of the cost of a response action, even when the PRP's prior activities have been inadequate, shoddy, or even fraudulent. Oversight is needed to protect the public. Without oversight, public confidence in cleanups conducted by private parties will be severely undermined.

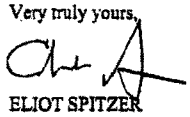
I have previously written the Committee about the impact of the natural resource damage amendment which the Subcommittee rejected in markup. A copy of my letter is attached. I again urge the defeat of this and any similar amendments, which would deprive our citizens of the full restoration of damaged resources, such as the Hudson River, and allow polluters to escape their responsibilities.

The issues facing the Committee in Superfund reauthorization are important and far reaching, and the statutory language is complex. Important changes sought by states, including clarification of the federal waiver of sovereign immunity and a state's potential liability as the sovereign owner for contamination of, for instance, streambeds, have not been addressed. Rather than go into further detail here, I ask that you refer to the more detailed analysis attached.

Our office and the State's Department of Environmental Conservation have obtained cleanups at over 800 hazardous waste sites in New York. Responsible parties have contributed more than $2.35 billion toward site remediation and two-thirds of sites are being cleaned by the private parties responsible for their creation. Most states have had similar results. On the federal level, some $10 billion of public money has been saved because 70% of all remedial actions at federal Superfund sites are being performed by responsible parties. A major reason for this success is that cleanup liability under CERCLA is now clearly understood by responsible parties and government. The wholesale changes proposed in H.R. 2580 will undo all this understanding by creating numerous new categories of exemptions and altering the remedy selection requirements, all of which will lead to long and costly litigation.

I ask for your help in preventing these unnecessary and harmful amendments to the Superfund law.

Very truly yours,



ELIOT SPITZER
Attorney General

cc: Hon. John D. Dingell
Hon. Eliot L. Engel
Hon. Vito Fossella
Hon. Rick Lazio
Hon. Edolphus Towns
All other members of the Commerce Committee

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ELIOT SPITZER
Attorney General

(212) 416-8050

September 28, 1999

VIA TELEFAX

Honorable Michael G. Oxley
Chairman, Subcommittee on Finance
and Hazardous Materials
Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Oxley:

I am deeply concerned about an amendment likely to be considered in the course of the mark-up of H.R. 2580, the Land Recycling Act of 1999, scheduled for the Subcommittee on Finance and Hazardous Materials this Wednesday afternoon, September 29, 1999. The proposed provision, which I understand will be offered by Representative W. J. Tauzin, would amend the natural resource damage provisions, section 107(f)(1), of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), to the detriment of my state and the environment. I urge you to oppose this amendment.

As the Attorney General of New York, I represent the public trustee for natural resources in New York. The natural resource damages provisions of CERCLA are central to the trustee's exercise of his responsibility to protect New York's great natural resources from deterioration and injury caused by the release of hazardous substances, and over the years we have successfully utilized CERCLA to obtain the restoration of numerous sites damaged by releases of hazardous substances. While we have had long experience with CERCLA and are well aware of the areas of the statute that require reform, we are confident that amendment of the natural resource damage provisions – particularly by that amendment which we understand will be offered on Wednesday – is unnecessary and will be counter-productive.

Instead of promoting fairness, encouraging cleanups and restoration of natural resources, and reducing transaction costs, the amendment perversely will delay restoration of injured resources, exacerbate damages caused by releases, and lead to additional complications in the already

complicated CERCLA cleanup process. For instance, the amendment will bar restorations whenever any response action, including "natural recovery," has been conducted at a site even when that action was not intended to address the injuries suffered by the resources. Thus, because cleanups do not repopulate trout streams, replant forests, or help breed endangered species, polluters will evade their current obligations to restore the environment after their releases damage or even destroy that environment.

Similarly, the amendment limits recoveries designed to make the public whole after destruction of natural resources and to encourage prompt restorations. Trustees may recover the costs of "providing substantially equivalent uses" of a resource only when no reasonably available substitute resource is available to provide such uses, and the amendment explicitly bars recoveries based on "non-use" values of a resource. This means that pristine resources that currently are not being used by the public but are preserved for future generations will remain unrestored. Depleted populations of endangered species, which have no "use" but are highly valued for their existence as a species, will remain decimated. Even popular fishing holes and rivers, parks, and groundwater will not be restored because alternative sites or water sources almost always are available. Indeed, the proposed amendment would establish a system where these resources could be fouled, one by one, without liability for natural resource damages until no viable alternative is left.

Moreover, responsible parties will have no incentive whatsoever to restore damaged resources early. By limiting recovery to the costs of restoration of current uses, the amendment rewards delay by reducing the damages that may be collected by a trustee as the environment slowly restores itself naturally. The longer one waits to restore lost uses, the less the cost, and the longer one waits, the more pre-existing uses are forgotten. I suggest this is hardly the type of incentive Congress would want to provide polluters.

There are other problems with the proposed amendment. It uses terms, such as "to the extent necessary," "substantially equivalent uses," "substitute resources," "not reasonably available," and others that will complicate the assessment of damages and encourage litigation. Because the current statute and case law already bar trustees from recovering damages suffered by private individuals, the amendment's imprecise language will only create litigation while protecting no one. Proponents of the amendment will only use these and other portions of an amended statute to avoid or further delay their obligation to restore damaged resources such as the Hudson River.

In my state, great rivers such as the Hudson and St. Lawrence, drinking water aquifers, lakes, streams, and estuaries have suffered grievous damage from the release of hazardous substances such as PCBs, mercury, and chemical solvents. While cleanup efforts have begun to remove the chemicals in many cases, should this amendment be enacted, the public will not be compensated for

the residual and often the interim damages. I urge you to defeat this effort to cripple the natural resource provisions of CERCLA.

Very truly yours,

ELIOT SPITZER
Attorney General

cc: Hon. Tom Bliley, Chairman, Committee on Commerce
Hon. John D. Dingell
Hon. Edolphus Towns
All members of the Commerce Committee

STATEMENT ON H.R. 2580, THE LAND RECYCLING ACT OF 1999 AS REPORTED BY THE SUBCOMMITTEE ON FINANCE AND HAZARDOUS SUBSTANCES, AND BEFORE THE HOUSE COMMITTEE ON COMMERCE FOR MARK-UP

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK

H.R. 2580 will make significant changes to the current Superfund statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"). While certain of these modifications to CERCLA are worthwhile, many of the proposed amendments will be counterproductive. Rather than promoting environmental cleanup and fairness and reducing transaction costs, these changes will shift costs to the states, multiply transaction costs, increase litigation, and leave our children a legacy of unremedied environmental hazards. We and the National Association of Attorneys General have addressed many of the legislative problems in testimony by Gordon J. Johnson, a New York Assistant Attorney General, before the Committee on Commerce on September 22, 1999, regarding H.R. 1300 and section 9 of H.R. 2580, and respectfully refer the Committee members to that testimony. The present version of the H.R. 2580 now before the Committee for markup repaired a small number of the problems addressed in that testimony, but at the same time created new and heightened existing deficiencies in the version of H.R. 2580 reported out of the Subcommittee.

I. LIABILITY AMENDMENTS

The core liability provisions of CERCLA, and analogous liability laws which have been enacted by the majority of the states, are an essential part of a successful cleanup program. They provide strong incentives for early cleanup settlements, and promote pollution prevention, improved management of hazardous wastes, and voluntary cleanups incident to property transfer and redevelopment. Unfortunately, H.R. 2580 would make substantial and problematic changes to those core provisions. These changes will trigger another decade of litigation, with the attendant drain of government resources, escalation of private transaction costs, and delays in cleanup.

A. EXEMPTIONS AND LIMITATIONS TO LIABILITY

H.R. 2580 would implement a huge federal cost shift from private parties to the states. H.R. 2580, as reported, although an amalgam of provisions in prior versions of H.R. 2580 and H.R. 1300, lacks the amendment of the current cost-share formula which was contained in H.R. 1300, as introduced. Under H.R. 1300, the state share for all remedial costs, including operation and maintenance, would have been 10%, and the Fund alone would bear the cost of assuming the

newly exempt parties' shares of liability. This change also would have resulted in swifter cleanups by eliminating any tendency to shift cleanup costs to the states which, under current law, are responsible for 100% of operation and maintenance costs. Because of this huge shift of costs to New York and all other states, the current version of H.R. 2580 is wholly unacceptable.

1. **Owners/Operators**

Sections 104 and 105 of H.R. 2580, as reported, would make substantial modifications to the scope of defenses available to current owners under § 107 of CERCLA, in effect broadening the ways in which current owners can escape any responsibility for contamination of their properties. For example, under H.R. 2580, as reported, a current owner which knew before purchase that the property was contaminated will escape all liability, even if the owner paid a reduced price for the land because of the contamination. All the owner has to do is to let the government onto the property and get out of the way while the government spends taxpayer money to enhance the owner's property. This effect is contrary to one of the important tenets of the CERCLA liability scheme. CERCLA's provision for current owners is modeled after common law tort liability rules that seek to address the social cost of hazardous waste contamination by controlling the behavior of landowners and other relevant actors. Indeed, landowners have long had a duty under common law to maintain their properties free of nuisances, such as chemical contamination, and upon learning of a nuisance are required to abate it even when they did not create the nuisance themselves. *See, e.g.*, *RESTATEMENT (SECOND) OF TORTS* §§351 *et seq.* and §§822 *et seq.*; *State of New York v. Shore Realty*, 759 F.2d 1032, 1050-52 (2d Cir. 1985).

Only the United States gets the "windfall" lien to recover costs under § 105 of H.R. 2580. As a result, an owner or operator could receive the protection against state enforcement and enhancement of its property's value at no cost, but the state would not get the lien's benefit allowing recovery of unrecovered response costs when the property is sold. The states, which play a role virtually identical to EPA's, also should be entitled to such liens.

2. **Governmental Entities**

We support the changes to the long-standing "Innocent Governmental Entities" exception to liability under new §107(r), § 106 of H.R. 2580, as reported, although it fails to address current abuses where, for example, states are subject to counterclaims based on sovereign interests in groundwater, stream and river beds and banks.

3. **Small Businesses Exemption**

Section 107 of CERCLA would be amended by § 303 of H.R. 2580, as reported, to include a new subsection (o), limiting liability at NPL sites for small businesses which are generators or transporters. We oppose the proposed exemption since the exemption is based on the status of the potentially responsible party ("PRP"), it applies no matter what volume of waste

was disposed, and it applies unless the company's hazardous substances contribute significantly to the costs of the response action. The exemption would eliminate many PRPs from liability, and the states do not have the resources to absorb these shares. Introducing a new standard into CERCLA litigation, *i.e.*, whether the company contributed significantly, would undermine the critically important strict liability provisions of existing law, increase litigation and all its attendant transaction costs, and undermine recovery of the public funds at CERCLA sites.

4. MSW Exemption

Section 107 of CERCLA would be amended by § 303 to include a new subsection (p), providing a liability exemption for generators and transporters of municipal solid waste ("MSW") and municipal sewage sludge ("sludge") at NPL sites, unless, in the case only of transporters, the transporter's wastes contribute significantly to the costs of the response action and the transporter is in the business of transporting waste. Even such transporters, which disposed of waste that significantly contributed to the cost, are provided further protection, as the liability at an NPL site for *all* MSW generators and transporters who are not exempt would be capped at ten percent.

While we support reasonable limitations on liability for disposal of municipal solid waste, unfortunately the limitations provided under the proposed § 107(p) are much too broad. A substantial portion of PRPs would be relieved of liability if these changes were adopted because the exemption applies to not just households, but a wide, almost all-inclusive group of business, commercial, institutional and industrial sources. For instance, at a number of hazardous waste sites, cosmetic manufacturers have disposed of sometimes substantial quantities of their waste containing a variety of hazardous substances, *e.g.*, acetone. Under H.R. 2580, as reported, such PRPs would escape liability because their wastes, at least arguably, are "essentially the same" as waste materials normally generated by households, *i.e.*, cosmetics thrown away by households. Or, as another example, at municipal-owned co-disposal facilities, it is common to have a large volume of MSW and then a small volume of waste from commercial and industrial sources which is highly toxic. Many commercial, institutional and industrial facilities have used solvents in large quantities, and those wastes were often disposed in landfills over the years. PRPs could argue that their solvents are "essentially the same as" solvents used in households and, therefore, exempt. Finally, the exemption applies regardless of the volume of the MSW waste as long as the waste is essentially the same as household waste.

While we support liability reforms for small MSW generators, such broad-based exemptions, which would apply to major waste handling companies, go too far.

5. Municipal Owners/Operators

We support the provisions that recognize the burden on local governments and place a limit on what they will pay at NPL sites. However, it must be noted that to the extent that the other exemptions are applicable, and the exempt and limited liability parties avoid sharing in the

costs of cleaning up these toxic waste sites, that burden will fall on the states which cost-share 10% of remedial costs and 100% of operational and maintenance costs with the Fund. Moreover, it is not clear that the proposed funding for the federal share will be adequate to pay for cleanups because of its assumption of the costs of the new liability exemptions.

6. **"De micromis" parties.**

Section 303 of H.R. 2580, as reported, adds a proposed § 107(r) which would exempt from liability "de micromis" parties that sent less than 110 gallons or 200 pounds of material containing hazardous substances to a NPL site. We support an exemption for truly de micromis parties, such as Elk Clubs, pizza parlors, and Girl Scout troops, that sent minimal amounts of low-concentration and low-toxicity mixtures to a site. However, depending on site-specific circumstances and the type of hazardous substances involved, 200 pounds of solid material or 110 gallons of liquid (which is more mobile than a solid material and will usually have a weight of approximately 880 pounds – four times the weight exemption for solid materials) can constitute a substantial contribution to a release. For instance, 110 gallons of a spent solvent, such as trichloroethylene, could contaminate 10 billion gallons of drinking water to levels twice the drinking water standard for the solvent. We believe exempting such a party statutorily and presumptively would be unfair and inappropriate, and would lead to extensive litigation by parties near the specified weight or gallonage. While the provision does allow the President to deny the exemption when the material disposed of at the site contributes significantly to the costs of response, this introduction of a new standard into CERCLA litigation, *i.e.*, whether the company contributed significantly, would undermine the critically important strict liability provisions of existing law and likely lead to more litigation, not less.

7. **Recyclers**

Under the new § 128 added by §306 of H.R. 2580, there is no liability at any site for a person who arranges for the recycling of recyclable material. "Recyclable material" is defined to include (1) paper, plastic, glass, textiles, rubber, metal, lead-acid, nickel-cadmium and spent batteries, as well as minor amounts of material incident to or adhering to such scrap. Special rules are then provided for transactions involving these different kinds of recyclable materials. Section 306 of the bill is encaptioned a "clarification of liability." It is not a clarification, but is rather a substantive change in the law.

While we agree that recycling activities should be encouraged, we are nevertheless troubled by this exemption because it is too broad. For instance, the exemption is particularly inappropriate as it applies to spent lead-acid batteries. Such batteries contain large quantities of lead, an especially toxic substance. Much of the lead in these batteries is in the form of lead oxide and lead sulfate, compounds that are relatively mobile and bioavailable in the environment. Moreover, the sulfuric acid in these batteries (which has a pH approaching 0) greatly enhances the solubility and mobility of these metals.

The secondary lead smelter industry has repeatedly argued that the RCRA regulations – under either federal or state authority – do not apply to spent batteries. These batteries, the industry argues, are raw material; they are not discarded, and thus not solid wastes and not subject to regulation under RCRA. *See United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993). The lead components of spent lead-acid batteries would also fall within the definition of "scrap metal." The limitations on the exemption for scrap metal are significantly less stringent than the limitations on the exemption for spent batteries. As the exemptions are currently drafted, a person recycling the lead from spent lead-acid batteries could take advantage of the less stringent limitation for scrap metal. At a minimum, these problems need to be addressed.

8. Oversight Costs

Section 303 of H.R. 2580 would add a new Section 107(v) which would be an additional limitation of liability directly affecting every state: a cap on recoverable oversight costs incurred by any government at 10% of the costs of the response action. This cap is unfair, for the cost of appropriate oversight often does not bear a direct relationship to the cost of the response action. The implementation of response actions requires close monitoring, particularly when the PRP has a history of non-compliance or when the PRP is less experienced. Oversight is needed to protect the public, and without oversight public confidence in cleanups conducted by private parties will be severely undermined. There should not be an artificial limitation on oversight costs based on cost percentages.

Quite simply, state governments in particular do not have the personnel and other resources needed to inflate or perform unnecessary oversight. This provision will only encourage further litigation on oversight, and might well result in some states foregoing needed oversight. The result could well be fraudulent or shoddy cleanups. This provision should be stricken.

B. ALLOCATION

We support reasonable statutory changes that encourage early settlements with de minimis and de micromis parties that sent minimal quantities of waste to a site. However, H.R. 2580 would create a mandatory process for allocating liability among responsible parties at any NPL site, except some "chain of title sites," where the costs are estimated to exceed $2 million (likely most sites) and there is no consent decree or administrative order by September 29, 1999. While liability allocation can be worthwhile in some cases, the decision to conduct such an allocation, and the timing and procedure for allocation, should be left to agency discretion and should not be prescribed by statute. Historically, most allocations have been done by responsible party groups themselves, not by government agencies. Moreover, recent experience with administrative allocations conducted by EPA and by state agencies has demonstrated the need for flexibility. The governments should be allowed to structure allocation procedures to fit the particular facts of each case.

1. **Delay of Cleanups**

By creating a mandatory process for allocating liability among responsible parties, H.R. 2580 will likely delay cleanups and substantially increase costs. Under current law, the governments are empowered to clean up first and protect the public, then allocate responsibility and costs. H.R. 2580 requires the President to "ensure that a fair and equitable allocation of liability is undertaken at an appropriate time," language which is likely to lead to litigation when EPA fails to proceed on a timetable desired by a PRP. Thus, the bill may well require that liability disputes be resolved first, while cleanups wait until later. This "argue first, clean up later" approach turns the purpose of CERCLA on its head. In addition, the provisions are unfair to those who have settled and to the governments with which they settled, since the mandatory provisions could result in settling parties being forced to participate in the allocation demanded by those who refused to settle.

Adding even further to the litigation burden is the proposed administrative appeal procedure established by § 305(b). This provision added by amendment during the Subcommittee markup, allows a PRP to appeal any EPA decision declining to enter into settlements predicated on the party's asserted status as a de minimis party or a claim that the party cannot pay its fair share of costs.

We expect that PRPs will decline to perform cleanups and opt to wait for an allocation because the government's ability to impose joint and several liability on major PRPs is effectively eliminated by a mandatory allocation process.

2. **Inappropriate Liability Determinations**

The provisions allow the allocator to make determinations of liability. It is inappropriate for someone who is not a judicial or adjudicatory officer to make legal determinations as to which parties are liable under the statute. This provision is particularly troublesome because, under the bill, the responsible parties participate in the selection of the allocator. Moreover, the many changes in the liability provisions will require a whole new set of rulings on who qualifies for which exemption, limitation, and clarification, and it would be a private party allocator making these determinations in the first instance.

Further, the bill expressly provides that an allocation will apply to subsequent removal or remedial actions "unless the allocator determines" that the allocation should only address a limited number of response actions, even if additional information on parties' activities, conditions at the site, the identity of toxic substances, or additional costs caused by a particular PRP's waste becomes available after the initial allocation. In effect, the allocator becomes a judge in a setting lacking the procedural and appellate protections afforded parties in a courtroom.

Allocation of the share of liability for each PRP at sites with multiple PRPs is possible because, and only because, the issue of who is liable has been settled through the past twenty years of litigation. Because H.R. 2580 significantly alters the liability sections, it will be difficult if not impossible to sort out shares of liability when the many questions about liability itself remain open. An allocator cannot assign shares to "liable" parties before it is determined who is "liable."

The provisions on allocation also bind the hands of the states to long and involved allocation procedures without giving the state any influence or control over the effect of offers or settlements. For instance, only the United States can reject the allocator's report. Also, de micromis and exempt PRPs, and PRPs which have a limited ability to pay their fair share likely would be trapped in a complicated and time-consuming allocation.

3. Inappropriate Evidentiary Provisions

The bill should provide that the report may not be used by any party in a legal proceeding. This will eliminate likely efforts by PRPs (or the governments) to introduce the report into evidence and obtain court approval for the specific allocation. If an allocation report becomes a document that might be used in a legal proceeding when the allocation does not result in a settlement, the parties will turn the allocation into the very trial that allocation is supposed to avoid, together with a trial's attendant costs and delays.

In sum, while we support the use of allocation in appropriate cases, we oppose the prescriptive approach of H.R. 2580, as reported. Especially when read with the liability changes, H.R. 2580's allocation process will substantially increase all parties' costs, bind smaller PRPs to a mandatory, unmanageable process, and delay both cleanups and costs recovery efforts.

II. REMEDY SELECTION

Remedy selection in a Superfund statute should contain certain minimum requirements. Remedial actions should attain, at a minimum, applicable state and federal standards. Cost-effectiveness should continue to be a factor considered among other factors. While consideration of future land uses is proper when selecting remedial actions, land use should not be the controlling factor, and when remedial decisions are less stringent because they are based on future land use, there must be appropriate, enforceable institutional controls.

We are concerned about the changes H.R. 2580 would bring in remedy selection.

A. ANTICIPATED USE OF LAND, WATER, AND OTHER RESOURCES AND THE PREFERENCE FOR PERMANENT CLEANUPS AND TREATMENT

We support the consideration of future land use in selecting remedial actions, provided that future land use is not the controlling factor. We are concerned about the downgrading of

cleanups from those accommodating all reasonably likely land uses, which is required under the current NCP, to an apparent emphasis on cleanups which accommodate existing uses. At sites where the existing use has been commercial and industrial but the municipality and nearby residents might want to convert the site to residential and recreational uses, the PRP might be let off the hook with a relatively cheap cleanup that thwarts future community objectives because the change in use had not been planned or received any approvals. Many other sites may be in their last years of industrial or commercial use, as indicated by clear trends in the region or the neighborhood, and to limit cleanups to a vestigial use is dangerous to public health or regressive for community development, or both.

Thus, language in § 108, which conditions the remedial options in light of the "nature and timing of reasonably anticipated uses of land, water, and other resources," may prevent sufficiently protective or appropriate cleanups. By not cleaning property for any uses other than those currently existing, there will be no other uses in the future. Indeed, brownfields redevelopment often depends upon a departure from current and anticipated uses; under the proposed language, such redevelopment may be thwarted.

In particular, groundwater is protected only for its "reasonably anticipated uses," and there is no provision for protecting groundwater that has not yet been contaminated but is not used, or has not yet been planned to be used, for drinking water or otherwise. Such provisions fail to sufficiently protect future groundwater supplies. We prefer the EPA's current requirement that contaminated groundwater be restored to beneficial uses whenever practicable, and that uncontaminated groundwater be protected.

The removal of the word"maximum" in the penultimate sentence of § 121(b)(1) of the current statute is also problematic. By this amendment, the bill is downgrading the current preference for permanent remedies and treatment of hazardous substances. We do not want to reencounter the problems of the 1980's and 1990's twenty years hence. These changes to the remedy selection process, especially in light of the failure to prevent the indiscriminate use of institutional controls and the absence of enforcement requirements when such controls are applied, should be rejected.

B. REMEDY SELECTION CRITERIA

Section 108 amends§ 121(d)(2)(A) of CERCLA to remove the mandate that remedies meet "relevant and appropriate requirements." Relevant and appropriate requirements remain an important threshold criterion in remedy selection, particularly with regard to state drinking water standards, solid and hazardous waste laws, landfill remediation, radioactive waste remediation, and mining reclamation standards, and should therefore be retained. For instance, most landfill closure requirements are not "legally applicable" to land disposal sites unless the site received waste after a date in the 1980's. Soil cleanup levels, and even requirements for secondary confinement, almost always will be "relevant and appropriate requirements" in New York, not "applicable" requirements. Nevertheless, these requirements establish important remedial

requirements and represent the best engineering judgment on protecting the public and the environment from releases of toxic substances after inappropriate land disposal. Eliminating "relevant and appropriate" standards from those which a cleanup presumptively must meet will severely complicate the remedy selection process, delay cleanups, and increase litigation costs as regulators are compelled to justify remedy decisions over and over again in each case that otherwise would be based on such standards.

H.R. 2580, as amended, will force New York to assume the cost of the cleanup of numerous sites and public drinking water wells contaminated by dry cleaners and others, no matter how irresponsible the party or its ability to pay for cleanup. In an amendment to H.R. 2580 adopted by the Subcommittee, the bill sets a mandatory cleanup level that is 2,000 times less stringent than typical cleanup levels for dry cleaning solvents and exempts dry cleaners, owners of dry cleaner sites, and suppliers of dry cleaning materials and equipment from liability for cleanups that reduce contamination any lower than that level. While the bill excludes ground and surface water actually being used for drinking water from this lesser environmental standard, the exclusion never will be triggered because water contaminated with that level of solvents cannot and thus is not "actually used" as drinking water.

Exemptions from liability must never be accomplished by reducing environmental protection. Most dry cleaners would be covered by a responsible small business exemption. This amendment of CERCLA is particularly inappropriate.

III. H.R. 2580'S FAILURES TO ADDRESS STATE NEEDS

H.R. 2580 fails to amend CERCLA in ways long sought by New York and other states. For instance, as detailed in our written testimony given September 22, 1999, before the Committee, forty-one Attorneys General reiterated the need for clarification of the federal waiver of sovereign immunity in a letter to the Senate Armed Services Committee, dated July 26, 1999. We strongly urge the adoption of language that is contained in the DeGette/Norwood bill, H.R. 617, as it represents the compromise reached between states and federal agencies in 1994, and would clarify the waiver without disrupting the status quo with regard to the issue of dual regulation at NPL sites. We also urge that § 506 include additional language to clarify that states do not impair their independent enforcement authority by entering into site-wide interagency agreements that combine state law requirements with CERCLA requirements. Proposed language for such a provision is contained in § 5 of H.R. 617, and is necessary to preclude any arguments that might be made by federal agencies based on the decision *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265 (E.D. Wash. 1993).

H.R. 2580 also fails to provide liability relief for states where, as noted above, parties assert state liability in counterclaims predicated on the states' sovereign ownership of streambeds, rivers, and other natural resources that those parties contaminated. This oversight needs to be corrected.

I also strongly recommend that Congress establish independent oversight of removals at federal facilities and strengthen protections for states and communities when federal facilities undertake transfer of contaminated federal properties prior to completion of cleanup activities. In my state, Superfund activities at Brookhaven National Laboratory on Long Island have elicited considerable local distrust and apprehension. State oversight of Department of Energy cleanup activities would be valuable in diminishing community concerns, and insuring that cleanups at federal facilities are conducted properly

KEN SALAZAR
Attorney General

BARBARA MCDONNELL
Chief Deputy Attorney General

MICHAEL E. MCLACHLAN
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 5th Floor
Denver, Colorado 80203
Phone (303) 866-4500
FAX (303) 866-5691

November 5, 1999

Honorable Thomas J. Bliley, Jr.
Chairman, Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Honorable John D. Dingell
Ranking Member, Committee on Commerce
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20515

Honorable Bud Shuster
Chairman, Committee on Transportation and Infrastructure
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515

Honorable James Oberstar
Ranking Member, Committee on Transportation and Infrastructure
U.S. House of Representatives
2365 Rayburn House Office Building
Washington, D.C. 20515

Honorable Richard Gephardt
Minority Leader
United States House of Representatives
The Capitol, H-204
Washington, D.C. 20515-6502

Honorable J. Dennis Hastert
Speaker
United States House of Representatives
The Capitol, H-232
Washington, D.C. 20515-6501

RE: H.R. 2580, Land Recycling Act of 1999, and H.R. 1300, Recycle America's Land Act of 1999

Dear Sirs:

I write to express concerns that I have with provisions of H.R. 2580 and H.R. 1300 as passed by the House Commerce Committee and Transportation and Infrastructure Committee respectively. As the Attorney General of Colorado and one of Colorado's designated natural resource trustees, I have direct responsibilities for implementing the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). It is important that the citizens of Colorado have a common-sense, fair statute which ensures that our communities are protected from adverse effects associated with toxic dumps, our injured natural resources are restored, and that the primary burden of cleanup is placed on those responsible for creating the threats in the first place. We need to accomplish these goals with maximum efficiency, and with minimum transaction costs. Unfortunately, I believe that

many provisions in the current bills would undermine these goals. I highlight only some of the most troubling provisions below:

Liability

Mandatory Allocation

Although we recognize that the imposition of joint and several liability can in certain instances result in inequities, mandatory allocation will create more problems than it solves. It will, in fact, ensure high transaction costs as parties, including small businesses and other minor contributors, as well as parties who have already resolved their liability, are forced to participate in "quasi-trials" of liability; and it prioritizes allocation over cleanup. Under these provisions, the current practice of reaching early settlements which provide for investigations and response actions by responsible parties is unlikely to occur. Rather, these parties will await completion of the allocation – thereby potentially exacerbating contamination problems and driving up costs.

Based on the experience of Colorado CERCLA attorneys, the simplest and most effective solution for the problem of allocation would be merely to provide ample orphan share funding for EPA to use at appropriate sites based on their "waste-in analysis" or some other responsible formula or policy. The establishment of more process requirements frustrates the goal of rapid cleanup and minimization of transaction costs.

With generous orphan share funding and flexible procedures, settlements could be rapidly reached under current law. I believe the mandatory allocation provisions are therefore ill-advised.

Liability Exemptions and Limitations

The second major component of the liability title is a series of exemptions and limitations. Many of these exemptions are ill-advised. For example:

1.) Purchasers of land who are aware of contamination, and therefore pay a reduced purchase price, should be held responsible for controlling threats resulting from such contamination. This is consistent with the conventional law of nuisance. Taxpayers should not pay to enhance private property where owners were aware of risks.

2.) Dry cleaners should be held accountable for their management and disposal practices, not the taxpayers.

3.) Both H.R. 2580 and H.R. 1300 create broad exemptions for generators and transporters of municipal waste. There is widespread consensus that many smaller municipal waste generators, such as the pizza parlors, Elks Clubs and Girl Scouts – cases we have all read about – deserve some liability protection. However, these bills go far beyond a reasonable fix to this relatively limited problem, and would exempt substantial

commercial and industrial generators and transporters of municipal waste. Furthermore, municipal waste is so broadly defined as arguably to include large manufacturers and other industrial facilities whose waste can be described as "essentially the same" as household waste, *e.g.*, cosmetics, solvents and herbicides.

Each bill allows for exceptions to this exemption category; however, the burden placed on the agency to establish that the exception applies would result in extensive and extremely difficult litigation. And even if such an exception could be established, the liability of these parties would be capped at a total of 10 percent for all municipal waste disposers regardless of their contribution of waste at the site.

These provisions remove the very strong incentives, currently in the law, for arrangers and transporters to ensure that disposal sites are responsibly located and managed. Without such incentives we can anticipate a new generation of superfund sites. The exemption for municipal waste generators and transporters must be significantly narrowed.

4.) Disposers of 110 gallons of highly toxic liquid waste should not necessarily be considered "de micromis" contributors; the extent of their liability should be considered on a case-by-case basis. This is a problem with both bills.

5.) Liability exemptions for recyclers must be very carefully drafted as "sham recycling" sites have been some of the worst identified by EPA and states. The language employed in both bills is ill-suited to prevent abuses of this exemption.

6.) Congress should not preempt states' ability to pass laws regarding the liability of response action contractors. Both bills contain unnecessary and inappropriate special treatment for such contractors.

7.) Responsible parties should reimburse EPA and states for the full costs of response activities. Limiting liability to an arbitrary 10 percent of a response action merely frustrates the ability of the oversight agency to perform its function in a manner it deems appropriate for protecting public health and environment, and provides a disincentive for agencies to agree to less expensive remedies. This provision should be stricken from both bills.

These are a few of the problematic exemptions created by these bills. These and others are more thoroughly discussed in the Testimony of Gordon Johnson, Assistant Attorney General on behalf of the Attorney General of New York and the National Association of Attorneys General, presented to the Subcommittee on Finance and Hazardous Materials in September. Although other exemptions and limitations established by the bill are reasonable and good policy (for example, bona fide purchasers, charities, inheritors), the exemptions discussed above and additional exemptions discussed more fully in Mr. Johnson's testimony unfairly shift cleanup costs from the polluters to federal and state taxpayers.

The current bills provide for the superfund to assume virtually all of these costs. If EPA's projected costs for these exemptions are correct, states' 10 percent cost share under H.R. 2580 or H.R. 1300 could result in an extra $ 40 to 50 million per year. Further, it is not clear that these costs include operation and maintenance, which under H.R. 2580, would remain solely states' responsibility. States cannot afford to shoulder these expenditures. In addition, the new exemptions will result in extensive litigation and transaction costs as parties resist liability based on the new, untested provisions.

Remedy Selection

Our communities need rapid and thorough responses to enable beneficial uses and "recycling" of contaminated lands or "brownfields." The "preference for treatment" and "permanent solutions" should not be further eroded as proposed in the two House bills; nor should protection of surface and groundwater, an issue of critical importance in the arid West. Uncontaminated groundwater must be protected unless it is completely impracticable to do so.

I am particularly concerned with the provision which would do away with "relevant and appropriate requirements." In many instances, relevant and appropriate requirements govern allowable contaminant concentrations and suitable approaches for effecting cleanups. The use of relevant and appropriate requirements will often abrogate the need to conduct costly and controversial risk assessments, or the need to negotiate each and every aspect of a cleanup activity to be taken. In addition, elimination of relevant and appropriate standards would result in increased acrimony and transaction costs as parties argue over whether a standard is applicable.

Under current law, states and EPA may disagree whether a standard is applicable, but can move forward with cleanup because they agree the standard is relevant and appropriate. Arguments over the applicability of state (or federal) standards are particularly inappropriate because they generally have more to do with jurisdictional issues than protectiveness. For example, standards that define the density and diversity of vegetation on a cap overlying a mine waste pile make sense regardless of whether the pile was created pursuant to a reclamation permit; standards defining the safe level of a contaminant in groundwater should be used regardless of whether a given cleanup meets all jurisdictional prerequisites of the law establishing such a level. If it does not make sense to utilize a standard at a given site, under the current law EPA or the state has the option of disregarding the standard as not being relevant and appropriate.

Modification of the cleanup criteria as proposed in the two bills passed through their respective committees is not necessary, and will result in higher transaction costs, delayed cleanup actions, and probably less protective remedies.

Sovereign Immunity

Colorado along with virtually every other state in this country, has long worked for a clarification of the waiver of sovereign immunity in CERCLA. The language adopted by the Commerce Committee is well designed to address the problems with the provision currently in the law, has been approved by states' attorney general's offices across the country, and

was essentially drafted in cooperation with administration representatives during the reauthorization debate of 1994. In fact, almost identical language was included in the administration-supported bill, H.R. 3800. As 41 attorneys general stated in their letter of July 26, 1999 (attached to the testimony of Assistant Attorney General Gordon Johnson), this provision is absolutely necessary to enable states to hold federal agencies accountable under environmental laws to the same extent as private parties. I therefore applaud the Commerce Committee for inserting this language in its bill.

I was disappointed, however, to see that the provision ensuring that states would not jeopardize their independent enforcement authorities when agreeing to integrate those authorities with CERCLA was dropped. This provision, which is part of H.R. 617 co-sponsored by Ms. DeGette and Mr. Norwood, has long been urged by states to deal with any misunderstandings that could arise out of the Heart of America decision, and it should be adopted to ensure the orderly progression of cleanups, and to preserve state authorities to the same extent as such authorities would be exercised at private sites.

Natural Resource Damages

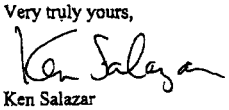
We commend the Commerce Committee for rejecting the amendment which was designed to limit trustees' ability to recover natural resource damages. We believe that the provision proposed would not only weaken current law, but would also lead to extensive litigation and uncertainty.

Conclusion

The Superfund program has probably been the most controversial of all environmental programs that have been instituted in the past 20 years. It has confronted a monumental task, and has not always met the challenge. With nearly 20 years experience, however, I believe a more targeted, consensus-driven reform effort is appropriate. Congress should not make changes that are not necessary to address widely acknowledged problems. Redevelopment of brownfields is an example of such a problem; the clarification of sovereign immunity is another. It is unfortunate that these problems remain unresolved as Congress continues to struggle with controversial issues that do not lend themselves to consensus. I urge you to proceed with legislation that would remove impediments to redevelopment of tainted property, provide resources for such redevelopment, reinstitute appropriate taxes on industries to replenish the Superfund, and require federal agencies to comply with the law to the same extent as private parties.

Thank you for consideration of my views on these important issues.

Very truly yours,



Ken Salazar

cc: Diana DeGette
Joel Hefley
Scott McInnis
Mark Udall
Bob Schaffer
Tom Tancredo

California Environmental Protection Agency

Air Resources Board • Department of Pesticide Regulation • Department of Toxic Substances Control
Integrated Waste Management Board • Office of Environmental Health Hazard Assessment
State Water Resources Control Board • Regional Water Quality Control Boards

m H. Hinkox
ry for
nmental
tion

October 12, 1999

Honorable Thomas J. Billey, Jr.
Chairman, House Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Bliley:

I write to express concerns about H.R. 2580 (Greenwood),The Land Recycling Act of 1999, which is scheduled to be marked up in your committee. This bill would make substantive changes to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, or federal Superfund). The changes to CERCLA proposed in H.R. 2580 would directly impact California's cleanup program and should be carefully considered.

California, through its State Superfund Program, ensures the cleanup of contaminated sites that are not listed on the National Priorities List (NPL) and, therefore, not being addressed under the federal Superfund Program. However, California's State Superfund statutes incorporate many provisions of CERCLA, including provisions that define who is a liable party as well as those that govern the cleanup process. Under California law, cleanups under the State Superfund must be performed in a manner that is consistent with federal law. The State Superfund Program also relies heavily upon causes of action available under CERCLA to recover its costs and to encourage liable parties to take cleanup action. Many of the proposed amendments in H.R. 2580 would impact pending cleanup actions in California and affect California's ability to carry out its State Superfund Program.

California has the following specific concerns with the provisions of H.R. 2580:

1. <u>Liability Exemptions</u>
   H.R. 2580 would create liability exemptions for small business, de micromis, and municipal solid waste and sewage sludge generators and transporters, and for owners and operators of municipal solid waste facilities.

   H.R. 2580's liability exemptions are overly broad, not clearly defined, and would undoubtedly foster new litigation. While the exemptions would not

555 Capitol Mall • Suite 525 • Sacramento, California 95814 • (916) 445-3846 • Fax: (916) 445-6401
Printed on Recycled Paper

impact sites being addressed solely by the State, they would have cost implications for States. Any limitation on the costs of cleanups borne by responsible parties would ultimately shift the cleanup cost burden to the federal Superfund and the States, through their 10% cost share obligation, and, if the federal Superfund is not adequate to pay for cleanups, to the States alone.

2. Recyclable Materials
Under H.R. 2580, there would be no liability assigned to generators or transporters of recyclable materials (including scrap paper, plastic, glass, textiles, rubber, or metal and spent lead-acid, nickel-cadmium and other spent batteries).

This exemption would limit the ability of the State to recover its costs under state law or CERCLA against exempt parties. While recycling activities should be encouraged, this exemption is overly broad and would exempt items such as spent lead-acid batteries, which contain large quantities of lead, an especially toxic substance, and sulfuric acid, which greatly enhances the solubility and mobility of hazardous substances. Historically, sites managing recyclable materials have resulted in some of the States' most significant environmental contamination. In many cases, the owner or operator of these sites is insolvent or defunct, leaving only the generators and transporters to fund the cleanup of the site. This exemption would inappropriately shift the burden of paying for the cleanup of this type of site to the State.

3. Prospective Purchaser Exemption
H.R. 2580 would create an exemption from liability for prospective purchasers of contaminated property in order to encourage purchase and development of brownfield properties. It would provide the federal government with a lien on the property for any unrecovered cleanup costs that resulted in an increase in the fair market value of the site. The windfall profit lien would not benefit States, leaving States' costs unrecovered.

4. Liability Allocation
H.R. 2580 would create a mandatory process for allocating liability among responsible parties at most sites listed on the NPL.

The creation of a mandatory, prescriptive process for allocating liability may delay cleanups, increase costs and result in new litigation at NPL sites.

5. Remedy Selection
H.R. 2580 would amend the remedy selection provisions. Current law requires that, to the "maximum extent practicable," preference be given to remedial actions that involve treatment and the permanent reduction in the volume, toxicity or mobility of hazardous substances. H.R. 2580 would modify this by imposing the preference only to the "extent practicable" considering the nature and timing of reasonably anticipated uses of land, water and other resources.

These changes weaken the preference for treatment and permanence by focusing on current uses rather than possible future uses of a site. The amendments also protect only the reasonably anticipated uses of groundwater and make no provision for protecting unused groundwater that has not yet been contaminated. California's State Superfund Program would be constrained by these changes, limiting California's ability to protect its resources for future, yet unplanned uses.

6. State Relevant and Appropriate Standards
H.R. 2580 would eliminate the requirement that the level or standard of control for a selected remedial action achieve state standards that are relevant and appropriate. Remedies would only be required to achieve a level or standard of control that attains legally applicable state standards. In addition, H.R. 2580 would eliminate the requirement that remedies require a level or standard of control that at least attains water quality criteria established under the Clean Water Act. Instead, remedies would only be required to attain Maximum Contaminant Level Goals established under the Safe Drinking Water Act.

Relevant and appropriate state standards that may not be "legally applicable" to a site are still important threshold criterion in remedy selection. In addition, H.R. 2580 would provide less protection to groundwater and surface water that is used for purposes other than human consumption.

7. Risk Assessments
H.R. 2580 would add principles to be followed when conducting risk assessments to CERCLA.

The need for these provisions is not clear, but are not likely to alter risk assessments conducted by the United States or the States. These changes could, however, become fodder for additional litigation.

8. Governmental Oversight Costs
H.R. 2580 would place a cap on oversight costs incurred by any government that could be recovered under CERCLA. The cap would be set at 10% of the cost of the response action.

H.R. 2580's cap is arbitrary and unfair. The cost of appropriate governmental oversight often does not bear a direct relationship to the cost of the response action.

9. Cleanup Level for Perchloroethylene
H.R. 2580 would set a maximum cleanup level for perchloroethylene, a dry cleaning solvent. The level would be set at the soil screening level for that solvent determined using a Soil Screening Guidance Document adopted by the United States Environmental Protection Agency.

The establishment of a special remediation level for a single contaminant, for use in cleanups by a particular industry, is inappropriate. The cleanup level could not be protective of public health and the environment at all sites where perchloroethylene may be found because it does not take into consideration the variety of site-specific factors, including the presence of other contaminants, that can influence the development of a cleanup level.

Although there may have been problems in the federal implementation of CERCLA in the past, the current statute is now accomplishing the goals for which it was enacted. Contaminated sites are being cleaned up by responsible parties. A major reason for this success is that cleanup liability under CERCLA is now understood by responsible parties and government. The meaning of terms and the liability and remedy selection provisions have been the subject of contentious litigation. The litigation caused delays in cleanups and increased transaction costs. Now that the key provisions of CERCLA have been clarified and the state and federal programs have matured, we are not experiencing the same problems of the past. While there may indeed be room for improvements to the provisions of CERCLA, I believe that Congress should avoid the changes proposed in H.R. 2580. These changes will only reignite courtroom battles over the meaning, scope and implications of CERCLA.

I ask that, rather than moving ahead with a bill that contains numerous provisions that would result in less protective cleanups and impose significant costs upon States, you delay action to allow for the development of changes to CERCLA that will promote

brownfields cleanup and redevelopment while at the same time ensuring the protection of public health and the environment. Thank you for your consideration.

Sincerely,

Winston Hickox

Winston H. Hickox
Agency Secretary

cc: Honorable John Dingell
Ranking Member, House Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

Honorable Henry Waxman
U.S. House of Representatives
Washington, D.C. 20515

Honorable Anna Eshoo
U.S. House of Representatives
Washington, D.C. 20515

Honorable Lois Capps
U.S. House of Representatives
Washington, D.C. 20515

Honorable Christopher Cox
U.S. House of Representatives
Washington, D.C. 20515

Honorable Brian Bilbray
U.S. House of Representatives
Washington, D.C. 20515

Honorable James Rogan
U.S. House of Representatives
Washington, D.C. 20515

Children's Health Environmental Coalition

CHEC is for Children and Other Living Things

Nancy Gould Chuda
Founder/President

James Chuda
Co-Founder/Environmental Architect

Olivia Newton-John
National Spokesperson and Goodwill Ambassador

Elizabeth Hauge Sword
Executive Director

Board of Directors

Ann D. Cornell
Director
Wallace Genetic Foundation

Jay Feldman
Co-Founder and Executive Director
Beyond Pesticides/NCAMP

Betty Ann Gaynor
National Publicist
Health-Related Public Relations

Nancy Greenspan
Energy Conservation Consultant

Tessa Hill
President
Kids for Saving Earth

Joe Henry
Lyricist, Poet and Author

Harvey Karp, MD
Assistant Professor of Pediatrics
UCLA School of Medicine

Philip J. Landrigan, MD, MSc
Professor of Pediatrics and Community Medicine
Mount Sinai School of Medicine

Carrie Cook Platt
Media Consultant

Kelly Preston
Mother, Wife and Actress

John Wargo, PhD
Director, Center for Children's Environmental Health
Yale University

1 November 1999

United States House of Representatives
Washington, DC 20515

Dear Representative,

The Children's Health Environmental Coalition (CHEC) is an organization working to educate citizens about environmental toxins, how they effect children's health, and how to eliminate children's exposure to man-made toxic substances. On behalf of the thousands of members of CHEC, we are writing this letter to urge you to oppose H.R. 1300 and H.R. 2580. Both bills would weaken cleanup standards at the nation's worst hazardous waste sites. For the wellbeing of current and future generations of Americans, we should retain strong protections at such sites, particularly with respect to contaminated groundwater and drinking water.

Toxic chemicals, commonly found at Superfund sites include, lead, benzene, mercury, and arsenic. Lead can cause brain damage, often resulting in a decline of IQ scores, kidney damage, hearing problems and impair normal growth. Benzene can cause cancer and severe anemia. Long-term exposure to mercury can cause permanent damage to the brain and kidneys. Arsenic is a known carcinogen that increases the risk of lung, kidney, liver, and skin cancers. Strong protections are particularly important for children, whose developing bodies are often more susceptible than adults to these chemical exposures.

Unfortunately, both bills would eliminate the requirement that EPA use all "relevant and appropriate requirements" (RARs) when developing remedies under Superfund. These RARs may include state environmental standards (such as State Clean Water Act standards and State drinking water quality standards) that are more protective than federal law. The dangers of Superfund site contaminants are well documented. Since states choose to give their citizens more protection than federal law, EPA should be required to ensure such standards are applied during Superfund cleanups. Therefore, we object to H.R. 1300 and H.R. 2580's elimination of RARs at Superfund sites.

CHEC also opposes H.R. 1300 changing the standard that EPA would use to clean up contaminated water. Current law provides that EPA return water to its "beneficial use" whenever "practicable". However, H.R. 1300 would weaken this standard by requiring that

P.O. Box 1540, Princeton, New Jersey 08542 (609) 252-1915 · fax (609) 252-1536
P.O. Box 846, Malibu, California 90265 (310) 589-2233 · fax (310) 589-5856
chec@checnet.org www.checnet.org

EPA only remediate water based on its "reasonably anticipated use." The lessons of Woburn, MA, Tom's River, NJ, and other contaminated sites demonstrate the importance of ensuring thorough, highly protective cleanups for ground and surface water.

H.R. 1300's risk assessment provisions fail to ensure that vulnerable populations are protected from the potentially harmful effects of contamination. Specifically, they do not emphasize the unique protections required for children and pregnant women. If Congress chooses to modify Superfund's remedy title, it should do so by increasing protections rather than using language that may actually weaken protection provided under current law.

CHEC objects to provisions of H.R. 2580 that would even further weaken cleanup standards. For example, H.R. 2580's elimination of Superfund's preference for permanently treating hazardous waste would increase the use of contaminate based remedies at Superfund sites. H.R. 2580 would also, eliminate EPA's required use of the Clean Water Act regulations as the standard governing cleanups, further eroding current protections. CHEC also believes that H.R. 2580's weakening of cleanup standards for solvents is antithetical to strong protections for public health. This provision could make cleanups more than 2,200 times less protective at Superfund sites around the nation.

CHEC urges you to oppose H.R. 1300, H.R. 2580, and any other such effort that would weaken cleanup standards at Superfund sites.

Sincerely,

Elizabeth H Sword

Elizabeth Hauge Sword
Executive Director

CLEAN WATER ACTION

October 26, 1999

Dear Representative:

We remain concerned that the House has taken up Superfund reauthorization using provisions from H.R. 1300 and H.R. 2580. Both bills would weaken cleanup standards, slow down cleanups, roll back the polluter pays principle, and increase litigation. Both bills ignore the interests of one in four Americans who live within four miles of a Superfund site by diminishing the Superfund program's ability to expeditiously and thoroughly cleanup sites.

These bills would weaken cleanup standards by eliminating EPA's requirement that it use "reasonable and appropriate requirements" like state water quality standards as cleanup standards. They would also replace Superfund's current cleanup standard, which requires groundwater to returned to its beneficial use, with a weaker standard that only requires cleanups take into account water's "reasonably anticipated uses."

The bills roll back the principle of polluter pays and will increase litigation, fraud and abuses of the judicial system, and delay and increase the cost of cleanups. Stubborn polluters who have refused to clean up sites are rewarded, while those who have settled with EPA are punished. Settlements between small parties are vulnerable to legal challenges from large polluters.

H.R. 1300 and H.R. 2580 are not just brownfields bills. We agree that brownfields are an issue that warrant legislative action, but they should not provide political cover for weakening ions of public health protection and increasing polluters' profits at the expense of the taxpayer. EPA administrative reforms over the last several years have increased the number of Potentially Responsible Parties (PRP)-led cleanups, the overall pace of cleanups, and fairness towards small parties caught up in Superfund liability. These bills are a step backwards from this progress.

We urge you to vote "No" on H.R. 1300 and H.R. 2580 and support the principle of polluter pays and strong cleanup standards for contaminated sites which protect the health of children and other vulnerable members of our society.

Clean Water Action is a national citizens' organization working for clean, safe and affordable water, prevention of health-threatening pollution, creation of environmentally-safe jobs and businesses and empowerment of people to make democracy work. Clean Water Action is active in more than 25 states with 700,000 members in 250 Congressional Districts.

Sincerely,

David Zwick

David Zwick, Clean Water Action President

NATIONAL OFFICE
4455 Connecticut Avenue, N.W. ■ Suite A300 ■ Washington, DC 20008-2328
(202) 895-0420 ■ FAX (202) 895-0438 ■ E-Mail: CleanWater@essential.org

Recycled Paper

CAMPAIGN FOR SAFE AND AFFORDABLE DRINKING WATER
4455 Connecticut Ave. NW; Suite A-300; Washington DC 20008
202-895-0420

November 1, 1999

Dear Representative,

The Campaign for Safe and Affordable Drinking Water (CSADW) is an alliance of more than 300 environmental, public health and consumer organizations working together for safe and affordable drinking water; we, the undersigned organizations represent the Campaign's Steering Committee. We are writing this letter to voice our opposition to both H.R. 1300 and H.R. 2580, because they would weaken protections that currently ensure groundwater and drinking water are free of contamination from Superfund sites.

Given that 85% of all Superfund sites have contaminated groundwater and that an increasing number of Americans rely on groundwater for drinking water (at least 50% and growing,) weakening protections for drinking water and groundwater is contrary to sound policy to protect public health.

Both H.R. 1300 and H.R. 2580 eliminate the requirement that EPA use all "relevant and appropriate requirements" (RARs) when developing remedies under Superfund. Such RARs may include state and federal Clean Water Act standards and State drinking water quality standards. Some states provide more protective standards than those under the federal Safe Drinking Water Act. Local and county ordinances and resolutions that seek to protect public health may also constitute RARs. Citizens deserve the protections afforded by their state and local public health laws. Therefore, the RARs should be retained under Superfund's remedy title.

In addition to the obvious adverse implication for public health, eliminating the RARs may also increase costs for consumers who drink water from public water systems. If only federal Safe Drinking Water Act standards apply, then water suppliers will be forced to treat the water to satisfy state drinking water quality standards. This places an unnecessary burden on utilities and will increase rates for consumers. The CSADW believes that polluters, not consumers, should pay to treat contaminated water.

The CSADW is also opposed to other provisions of H.R. 1300, including the requirement that EPA cleanup water based on its "reasonably anticipated use." This represents a weakening of current law, under which EPA is required to return water to its "beneficial use" whenever "practicable."

H.R. 1300's risk assessment provisions will relax cleanup standards, rather than striving to ensure that public health is protected from the potentially harmful effects of contamination. Of particular concern are the effects on those in society who are most vulnerable to the adverse health effects caused by some contaminants, such as pregnant women, children and the elderly. For example, H.R. 1300's requirement that risk assessments and characterizations shall be based on analysis of "the weight of scientific evidence that supports conclusions about a problem's potential risk to human health," fails to highlight the unique protections that children, pregnant women, and the elderly need. Finally, we object to H.R. 1300 restriction on "any requirement for a reduction in concentrations of contaminants below background levels." This could seriously weaken cleanup standards in areas that are already heavily contaminated due to human activities. Allowing contamination to remain in place due to such circumstances could

force future generations to cleanup hazardous waste sites that present a continued threat. We should not foreclose on future options for development or risk unforeseen adverse consequences caused by contamination left on-site.

The CSADW also objects to other provisions of H.R. 2580. In particular, we object to H.R. 2580's:

- elimination of all Clean Water Act regulations as standards governing cleanups;
- elimination of Superfund's preference for permanently treating hazardous waste, and
- dramatic weakening of cleanup standards for cleaning solvents, which are particularly likely to leach into groundwater.

Because their provisions threaten current and future sources of drinking water, and pose unnecessary risk to consumers, the Campaign for Safe and Affordable Drinking Water urges you to oppose both H.R. 1300 and H.R. 2580.

Sincerely,

David Zwick, President
Clean Water Action

Erik Olson
Senior Attorney, Natural Resources Defense Council

Diana Neidle, Public Policy Associate
Consumer Federation of America

Robert K. Musil, PhD, Executive Director
Physicians for Social Responsibility

Velma Smith, Senior Policy Associate
Friends of the Earth

Grant Cope
U.S. PIRG

Terje Anderson
National Association of People With AIDS

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS
October 4, 1999

The Honorable MICHAEL G. OXLEY, *Chairman*
Subcommittee on Finance and Hazardous Materials
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

DEAR MR. CHAIRMAN: We would like to supplement for the record the testimony given by Assistant Attorney General Lois Schiffer at the August 4, 1999 hearing before the Finance and Hazardous Materials Subcommittee of the House Commerce Committee on the bills introduced on brownfields issues by Congressmen Towns and Dingell (H.R. 1750), Congressman Greenwood (H.R. 2580), and Congressman Boehlert (H.R. 1300). In particular, we would like to respond to certain concerns raised by Congresswoman Wilson about the State's role and authority at Superfund sites.

At the hearing, Congresswoman Wilson asked whether a State is authorized to intervene and override EPA remedy decisions that the State finds were inadequate. She stated that she understood our testimony to be that EPA should be able to do so for State decisions, and asked whether States should be given similar authority to override Federal decisions that States believed failed to protect public health and the environment.[1]

In fact, under the present Superfund law, states do have substantial authority to influence and shape EPA's remedy selections. Section 121(f) specifically provides that "The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State." Such involvement includes the following:

First, EPA must solicit State comments on its proposed plan for remedial action and respond to a State's comments. CERCLA § 121(f)(1)(G). Second, EPA must provide a State with notice of its negotiations with potentially responsible parties (PRPs); the opportunity to participate in the negotiations; and the opportunity to be a party to any settlement between EPA and the PRPs. CERCLA § 121(0(1)(F). Consequently, the State has the opportunity to be actively involved in PRP negotiations and settlements.

Third, CERCLA Section 121(f) recognizes the importance of substantial state involvement in remedy selection. Where EPA orders a PRP to undertake a cleanup, if EPA proposes a remedy that does not meet all legally applicable or relevant and appropriate State requirements, it must provide the State with an opportunity to concur or not concur in the remedy selection. If the State disagrees with the remedy chosen, it has a *right* to intervene in the CERCLA Section 106 action. CERCLA § 121(f)(2)(B). If the State is able to persuade a court that its judgment is correct, the remedy must be modified accordingly. *Id.* If a court does not agree with the State, the State may still modify the remedy if it pays, or assures the payment of, the cost difference to attain the State's preferred remedy. *Id.*

In another example of the State's role in remedy decisions, if a State believes there is a problem with a remedy at a site where EPA must use Fund monies to do the cleanup, the State can choose not to contribute the 10% of site costs (including all future maintenance) it is obligated to pay under the statute. Such action would have the effect of blocking EPA from undertaking a Fund-financed cleanup at the site. CERCLA § 104(c)(3).

States have used many of the authorities described above. Each time EPA proposes a remedy, it solicits and considers State comments. Also, we have handled countless settlements in which individual States and EPA are co-plaintiffs supporting an agreed remedy.

We are also sending a copy of this reply directly to Congresswoman Wilson to respond to her questions raised at the hearing.

Sincerely,

JON P. JENNINGS, *Acting Assistant Attorney General*

cc: The Honorable Edolphus Towns, Ranking Minority Member
The Honorable Heather Wilson

---

[1] In her remarks, AAG Schiffer indicated her belief that any amended Superfund law should retain EPA's authority to protect public health and the environment from the threat of an imminent and substantial endangerment, even at sites cleaned up under State authorities. Of course, if a site is satisfactorily cleaned up under State authorities, there should not be an imminent and substantial endangerment.