



## *The Committee on Energy and Commerce*

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### **Memorandum**

February 13, 2013

To: Members, Subcommittee on Environment and the Economy

From: Committee Staff

Subject: Hearing on the Role of the States in Protecting the Environment

On Friday, February 15, 2013, at 9:30 a.m. the Subcommittee on Environment and the Economy will hold an oversight hearing in 2123 Rayburn House Office Building entitled “The Role of the States in Protecting the Environment Under Current Law.” Witnesses will be by invitation only and are listed below. There will be one panel featuring state and local government officials. Individual witnesses will represent the Environmental Council of the States, the Association of State Drinking Water Administrators, the Association of State and Territorial Solid Waste Management Officials, the Ground Water Protection Council, the Interstate Oil and Gas Compact Commission, the National Caucus of Environmental Legislators, and the National League of Cities. Each witness will also speak from his or her State or local government experience.

#### **I. Witnesses**

*Environmental Council of States*  
Teresa Marks, Director  
Arkansas Department of Environmental  
Quality

*Association of State Drinking Water Administrators*  
Sarah Pillsbury, Administrator  
Drinking Water and Groundwater Bureau  
New Hampshire Dept. of Environmental Services

*Association of State and Territorial Solid  
Waste Management Organizations*  
Jeffery Steers  
Director, Land Protection and Revitalization  
Division  
Virginia Department of Environmental Quality

*Ground Water Protection Council*  
Matthew J. Lepore  
Director  
Colorado Oil & Gas Conservation Commission

*Interstate Oil and Gas Compact Commission*  
Harold R. Fitch, Supervisor of Mineral Wells  
and Chief  
Office of Oil, Gas, and Minerals  
Michigan Department of Environmental  
Quality

*National Caucus of Environmental Legislators*  
The Honorable Pricey Harrison  
North Carolina House of Representatives

*National League of Cities*  
The Honorable Michael A. Sesma  
Council Vice President  
City of Gaithersburg, Maryland

## **II. Background**

Before Congress enacted most of today's environmental laws, States, local entities, and courts were engaged in environmental protection. These efforts trace historic State and local public health and resource conservation laws as well as the common law of nuisance.<sup>1</sup>

Over the last several decades as the Committee on Energy and Commerce has focused much of its attention and legislative activity on environment and public health protections, State environmental regulators have emerged, not only as managers of State-initiated environmental safeguards, but also as managers of State programs to implement Federal laws and standards. State officials contribute technical data, experience, and local expertise in implementation of those Federal standards.

This hearing will give subcommittee Members the opportunity to better understand the capabilities and activities of State officials in protecting the environment and public health under several of the Federal laws in the subcommittee's jurisdiction, and under related State laws.

## **III. Statutes, State Action, and Issues for Consideration**

Among the natural resource and human health protection issues in which States are currently active are drinking water, solid waste management, hazardous waste clean-up, brownfield remediation, and oil and gas production.

### ***Drinking Water***

The Safe Drinking Water Act (SDWA)<sup>2</sup> is the primary Federal law for protecting public water supplies from harmful contaminants. SDWA contains:

- requirements for the creation of contaminant control standards as well as treatment techniques for public water supplies of drinking water;
- stipulations regarding the control of underground injection of wastes;
- provisions for funding State Revolving Loan Funds (SRFs) to help drinking water systems comply with the mandates in SDWA;
- response authorities for imminent hazards and preventative measures for vandalism and terrorism; and,
- controls on lead in plumbing fixtures, lead-lined tanks, and coolers in schools.

Originally enacted in 1974, SDWA established the current Federal-State arrangement by which States may be delegated primary implementation and enforcement authority for their drinking water programs.<sup>3</sup> The U.S. Environmental Protection Agency (EPA) administers SDWA, but States, with EPA approval, may obtain primary enforcement authority on behalf of

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<sup>1</sup> See e.g. Jonathan Adler, *The Fable of Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. 93 (2004).

[http://law.case.edu/faculty/adler\\_jonathan/publications/FablesFedReg.pdf](http://law.case.edu/faculty/adler_jonathan/publications/FablesFedReg.pdf)

<sup>2</sup> 42 U.S.C. 300f *et seq.*

<sup>3</sup> <http://www.crs.gov/pages/Reports.aspx?PRODCODE=RL31243&Source=search>

the Federal government to implement certain parts of SDWA. Currently, 49 States have authority to enforce regulations of public drinking water systems for treatment techniques and contaminants.<sup>4</sup> For underground injection control programs, 33 States have primary enforcement authority. EPA shares these responsibilities with seven other States and EPA has primary enforcement authority for the remaining ten States.<sup>5</sup>

### ***Solid Waste Disposal Act or Resource Conservation and Recovery Act (RCRA)***

The Solid Waste Disposal Act or Resource Conservation and Recovery Act (RCRA)<sup>6</sup> provides a framework for the regulation of solid and hazardous wastes and corrective action. From generation to disposal, Subtitle C of RCRA grants EPA broad authority to regulate wastes the agency has determined to be hazardous (“listed” hazardous waste) or wastes that have hazardous characteristics. EPA has primary responsibility for implementing the hazardous waste program. However, under RCRA section 3006, States may implement their own hazardous waste management programs (including the treatment, storage and disposal permitting program) if EPA determines the State’s hazardous waste management program is at least as stringent as the Federal one. Currently, 48 States and the District of Columbia are authorized by EPA to operate their own hazardous waste programs.<sup>7</sup>

RCRA Subtitle D applies to solid wastes that are non-hazardous or specifically exempted from regulation as a hazardous waste. EPA has limited authority to set minimum requirements for certain types of solid waste disposal under Subtitle D. Under Subtitle D, State and local governments are the primary planning, regulating, and implementing entities for the management of non-hazardous solid waste, such as household garbage and non-hazardous industrial solid waste.<sup>8</sup>

Subtitle I of RCRA addresses the cleanup of petroleum and other regulated substances that have leaked from underground storage tanks (USTs). All 50 States have comprehensive UST leak prevention, release detection, and cleanup regulations.<sup>9</sup> As of February 2012, 38 States, the District of Columbia, and Puerto Rico are all approved to operate their programs on behalf of EPA.<sup>10</sup>

### ***Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)/Brownfields***

CERCLA<sup>11</sup>, also referred to as “Superfund,” authorizes cleanup of contaminated sites in the United States and establishes a broad liability scheme that holds potentially responsible parties (PRPs) financially responsible for the costs of cleanup. PRPs can include past and current owners and operators of contaminated facilities and generators, transporters and

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<sup>4</sup> [http://www.epa.gov/ogwdw/sdwa/pdfs/fs\\_30ann\\_sdwa\\_web.pdf](http://www.epa.gov/ogwdw/sdwa/pdfs/fs_30ann_sdwa_web.pdf)

<sup>5</sup> <http://water.epa.gov/type/groundwater/uic/Primacy.cfm#who>

<sup>6</sup> 42 U.S.C. 6901 *et seq.*

<sup>7</sup> <http://www.epa.gov/osw/laws-regs/state/stats/authall.pdf>

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<http://yosemite.epa.gov/r10/owcm.nsf/7468f0692f73df9a88256500005d62e8/d73eb5eb795edd8c8825675a006285e3?OpenDocument>

<sup>9</sup> <http://www.epa.gov/oust/fsstates.htm>

<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. 9601 *et seq.*

arrangers of hazardous waste. While EPA administers CERCLA, 25 States have a memorandum of agreement with EPA to run State voluntary cleanup programs.<sup>12</sup> The majority of States operate a brownfields program to support the cleanup of abandoned or more lightly contaminated sites or "brownfields" properties to encourage their redevelopment.<sup>13</sup> Subsequent amendments to CERCLA also authorized EPA to administer a separate brownfields grant program with congressionally appropriated funds.<sup>14</sup>

**Hydraulic fracturing** is a technique developed initially to stimulate oil production from wells in declining oil reservoirs, but is now widely used to initiate oil and gas production in geologic formations that were previously not economically accessible. This process now is used in more than 90 percent of new oil and gas wells.<sup>15</sup> Hydraulic fracturing occurs after a well is drilled and involves injecting mixtures of water, sand (or other propping agent), and specialized chemicals under enough pressure to fracture the formations holding the oil or gas. The sand or other proppant holds the fractures open to allow the oil or gas to flow freely out of the formation and into a production well. Its application, along with horizontal drilling, for production of natural gas (methane) from tight gas sands, unconventional shale formations, and coal beds, has increased estimates of recoverable U.S. natural gas reserves in recent years.

Historically, States rather than the EPA have regulated the underground injection of fluids for hydraulic fracturing of oil or gas production wells. In 1997, however, a U.S. Court of Appeals ruled that fracturing for coal bed methane production in Alabama constituted underground injection and would be subject to regulation under the SDWA.<sup>16</sup> Later, the Energy Policy Act of 2005 revised the SDWA term "underground injection" to exclude "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities."<sup>17</sup>

### **Information about the associations represented at the hearing**

Witnesses will testify at the February 15 hearing on behalf of the following associations of State and local government officials.

The *Environmental Council of the States (ECOS)* is the association of State and territorial environmental agency leaders. ECOS serves as a liaison between Federal and State agencies; promotes the role of the States in environmental management; provides for the exchange of ideas, views, and experiences among States and with others; and fosters cooperation and coordination in environmental management.<sup>18</sup>

The *Association of State Drinking Water Administrators (ASDWA)* supports States in their efforts to achieve safe drinking water; collects information and makes it accessible to State

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<sup>12</sup> [http://www.epa.gov/brownfields/state\\_tribal/moa\\_mou.htm](http://www.epa.gov/brownfields/state_tribal/moa_mou.htm) .

<sup>13</sup> [http://www.epa.gov/brownfields/state\\_tribal/state\\_map.htm](http://www.epa.gov/brownfields/state_tribal/state_map.htm) .

<sup>14</sup> <http://www.crs.gov/pages/Reports.aspx?PRODCODE=R41039&Source=search> .

<sup>15</sup> <http://www.crs.gov/pages/Reports.aspx?PRODCODE=R42677&Source=search>

<sup>16</sup> *Legal Environmental Assistance Foundation, Inc. v. U.S. Environmental Protection Agency*, 118 F.3d 1467 (11th Cir. 1997) ("LEAF I").

<sup>17</sup> Section 322 of the Energy Policy Act of 2005 (Public Law 109-58, now Section 1421(d)(1)(B)(ii) of the Safe Drinking Water Act).

<sup>18</sup> <http://ecos.org/section/aboutecos> .

program administrators to help them fulfill their duties; encourages the exchange of information and expertise among State drinking water programs; and promotes certain drinking water program requirements at the State and Federal levels.<sup>19</sup>

The *Association of State and Territorial Solid Waste Management Organizations (ASTSWMO)* supplies information and services to State solid waste management officials, works with EPA to ensure that its members are current on developments related to their programs, and helps coordinate the work of State regulators with that of their Federal counterparts.<sup>20</sup>

The *Ground Water Protection Council (GWPC)* is comprised of State officials who regulate underground injection control, source water, ground water, and oil and gas development and production. GWPC conducts research and promotes the use of best management practices and model State-based legislation for effective groundwater protection.<sup>21</sup>

The *Interstate Oil and Gas Compact Commission (IOGCC)* describes itself as a “multi-State government agency that serves as a representative of its member-States on development and production of our nation’s oil and natural gas resources, while also protecting health, safety and the environment.” IOGCC helps States, industry, and the environmental community share information.<sup>22</sup>

The *National Caucus of Environmental Legislators* helps environmentally progressive legislators coordinate their activities with respect to national legislative organizations, and to share ideas on environmental issues.<sup>23</sup>

The *National League of Cities* works in partnership with the 49 State municipal leagues, and serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents.<sup>24</sup>

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*If you have any questions, please contact David McCarthy, Jerry Couri, or Tina Richards with the Committee Majority staff at (202) 225-2927.*

<sup>19</sup> <http://asdwa.org/index.cfm?fuseaction=Page.ViewPage&PageID=471>

<sup>20</sup> [http://astswmo.org/Pages/Who\\_We\\_Are/Overview\\_History.htm](http://astswmo.org/Pages/Who_We_Are/Overview_History.htm)

<sup>21</sup> <http://www.gwpc.org/about-us/gwpc-history>

<sup>22</sup> *Id.*

<sup>23</sup> [http://www.ncel.net/base.cgim?template=about\\_us](http://www.ncel.net/base.cgim?template=about_us)

<sup>24</sup> <http://www.nlc.org/about-nlc>