

ARTICLE

THE GROWTH OF ENVIRONMENTAL ISSUES IN GOVERNMENT CONTRACTING*

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INTRODUCTION

Risk of exposure to environmental cleanup and other liabilities is a growing concern of private companies that do business with the Federal Government. Government contractors are subject to requirements and potential liabilities imposed by myriad comprehensive environmental laws and regulations that numerous agencies at the federal, state, and local levels implement and enforce.¹ The legal obligation of government contractors to comply with environmental laws is well-established.² Environmental issues, however, have taken on greater importance for contractors as the Federal Government struggles to manage the mounting costs associated with cleaning up environmental contamination at the nation's military installations and nuclear weapons complexes.³ Increasingly, contractors who operate

1. For example, at the federal level, the primary environmental laws affecting government contractors include: the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2671 (1988 & Supp. V 1993); the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993); the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f to 300j-26 (1988); the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992); the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

Many of the federal environmental statutes also have state counterparts that contain pollution control requirements at least as stringent and, possibly, more stringent, than federal law.

2. See *infra* Part I.A-C (establishing basis for contractor liability through discussion of federal and state environmental laws).

3. See, e.g., Terry Atlas, *U.S.: Billions More Needed to Clean Up Arms Plants*, CHI. TRIB., July 4, 1990, at 4 (reporting Department of Energy projection that cleanup of nuclear weapons facilities will cost \$30 billion over five-year period); *Cleanup of Non-DOE Federal Sites Could Cost Taxpayers Billions*, NUCLEAR WASTE NEWS, July 15, 1993, available in LEXIS, Envirn Library, Allnws File (relaying conclusions of congressional report that identified radioactive contamination of nuclear waste at federal facilities as environmental liabilities); *DOD Cleanup Costs Scrutinized*, ENGINEERING NEWS-REC., May 31, 1993, at 5, available in LEXIS, Envirn Library, Allnws File (reporting that environmental cleanup costs for 15 of DOD's largest contractors was estimated

at these federal military facilities are being targeted to pay for both the cleanup and resulting damages.⁴

The most significant factor with respect to government contractor liability, however, is the U.S. Environmental Protection Agency's (EPA) recent focus on contractors as enforcement targets. The EPA, the primary federal agency responsible for implementing and enforcing the nation's environmental laws, adopted a new policy in 1988 to "pursue the full range of [EPA] enforcement authorities against contractor operators of government-owned facilities in appropriate circumstances."⁵ In addition, government contractors face increasingly comprehensive and stringent regulatory requirements of federal, state, and local environmental laws,⁶ and the explosive growth in the last decade of environmental liabilities imposed by federal and state courts.⁷

The concerns of government contractors regarding environmental issues thus are well-founded. Government contractors face environmental liabilities in contexts covering the full range of possible contracts and arrangements between contractors and the government, including: (1) the contractor that operates a government-owned facility (GOCO—government-owned/contractor-operated); (2) the contractor that leases or occupies space at a federal facility and typically performs services for the government; (3) the contractor that

at \$2.1 billion over next several years); *Federal Facility Cleanup Costs Cannot Be Estimated*, *Congress Told*, NUCLEAR WASTE NEWS, Sept. 23, 1993, available in LEXIS, Envirn Library, Allnws File (reporting that cleanup for DOE and DOD sites alone could reach \$500 billion); Michael Satchell, *Uncle Sam's Toxic Folly*, U.S. NEWS & WORLD REP., Mar. 27, 1989, at 20 (asserting that largest, most difficult and costly environmental cleanup in U.S. history will be radioactive and chemical waste at federal nuclear weapons plants and military installations). Federal facility cleanup expenses have rocketed from \$183 million for 276 projects in fiscal year 1984 to \$12 billion budgeted for 10,200 projects in fiscal year 1993. Satchell, *supra*, at 20; see also *infra* notes 8, 17 and accompanying text (discussing environmental contamination at nation's military bases and staggering estimated cleanup costs).

4. See *infra* Part II (discussing causes and effects of U.S. Environmental Protection Agency's targeting of government contractors for cleanup liabilities).

5. OFFICE OF FED. ACTIVITIES, U.S. ENVTL. PROTECTION AGENCY, REP. NO. 130/48g/003, FEDERAL FACILITIES COMPLIANCE STRATEGY VI-14 (1988) [hereinafter COMPLIANCE STRATEGY]. *But cf. Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 194-95 (1987) [hereinafter *Federal Environmental Compliance Hearing*] (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice) (asserting that Justice Department does not treat government contractors differently than other private parties).

6. See *infra* Part I.A-C (discussing primary federal environmental statutes, state implementation and enforcement programs, and common-law tort theories as sources of contractor liability).

7. See Kyle E. McSarrow et al., *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, 21 ENVTL. L. REP. 10,367, 10,368 (1991) (concluding that expansion of CERCLA liability "has continued unabated and began to encompass government activities at all levels").

produces products or other materials for the Federal Government at the contractor's own facility (COCO—contractor-owned/contractor-operated); and (4) the contractor that the Federal Government retains to perform environmental cleanup projects at federal facilities or Superfund sites.⁸ Although the relative scope of the risk may vary, the environmental concerns and potential exposure of the contractor under each of these scenarios is significant.

This Article addresses the increased significance of environmental issues in government contracting and discusses ways that government contractors can minimize and manage their risk of exposure to environmental cleanup and other liabilities. Part I reviews the sources of environmental liabilities for government contractors. Part II examines why the EPA increasingly is targeting government contractors for environmental cleanups. Part III discusses the so-called "contractor defense" and why it has not allayed the environmental concerns of government contractors. Part IV examines contractual agreements and protections that may minimize the government contractor's environmental risks. Finally, Part V sets forth ways that government contractors can minimize and manage environmental cleanup and other liabilities while ensuring compliance with the broad range of environmental laws and regulations affecting their Federal Government projects.

I. SOURCES OF ENVIRONMENTAL LIABILITIES FOR GOVERNMENT CONTRACTORS

One of the main reasons for the growing significance of environmental issues in government contracting is the emergence and growth over the last twenty years of environmental laws containing broad liability and penalty provisions.⁹ Statutory and regulatory developments at the federal, state, and local levels have resulted in complex, often overlapping, environmental regulatory regimes that impose

8. COMPLIANCE STRATEGY, *supra* note 5, exhibit III-2, at III-7. The fourth arrangement described above is not directly addressed in any of the categories identified by EPA in the Compliance Strategy. Nonetheless, government contractors face increasing environmental exposure in this context as the Departments of Defense and Energy struggle with the significant environmental contamination problems posed by the nation's military bases and nuclear weapons facilities. See RESOURCES, COMMUNITY AND ECON. DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED NO. 93-167, DOE MANAGEMENT: CONSISTENT CLEANUP POLICY IS NEEDED 2 (1993) [hereinafter GAO/DOE REPORT] (estimating that cleanup of weapons complex will exceed \$160 billion and take at least 30 years); see also *infra* note 17 and accompanying text (providing other cost estimates of environmental cleanup of U.S. military bases).

9. See *supra* note 1 (identifying primary environmental laws affecting government contractors).

significant controls on ongoing business activities.¹⁰ Under these regimes, government contractors risk substantial liability for past management of hazardous substances, even if the activities were legal at the time and undertaken in accordance with then-acceptable standards and requirements.¹¹ Moreover, common-law doctrines of nuisance, trespass, and strict liability are being used with increasing frequency by private parties seeking compensation for personal injuries and property damage related to environmental pollution.¹²

The current environmental regulatory scheme reflects Congress' response to mounting public concern about environmental conditions and, in particular, alarm over hazardous waste disposal practices that have been increasingly identified as the cause of injury, illness, and property damage.¹³ These general concerns regarding environmental conditions mirror recent specific concerns raised regarding environmental conditions at federal facilities. For example, both civilian and military Federal Government facilities routinely produce, manage, and dispose of large quantities of hazardous waste.¹⁴ An estimated twenty million tons of hazardous or mixed hazardous and radioactive waste are generated annually by the Department of Energy (DOE) and the Department of Defense (DOD) alone.¹⁵ As recently

10. See *infra* notes 94-107 and accompanying text (discussing state environmental laws and interplay between state and federal regulation at federal facilities).

11. Courts consistently have held that liability under CERCLA encompasses activities that occurred prior to CERCLA's enactment in 1980, even if such activities were legal at the time. See, e.g., *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) (holding that "effective date" of CERCLA merely indicates date when action can first be brought and that effectiveness of CERCLA requires application to past conduct); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1442-45 (W.D. Mich. 1989) (upholding retroactive application of CERCLA because "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability on past acts") (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072-73 (D. Colo. 1985) (concluding that retroactive application of CERCLA is consonant with Congress' intent to impose cleanup costs of polluters).

12. See *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 833-34 (Ct. App. 1991) (finding that recent California cases recognize definition of nuisance "broad enough to encompass almost every conceivable type of interference with the enjoyment or use of land or property," including direct injury to property from hazardous waste contamination caused by or resulting from former lessee's activities); see also *infra* notes 104-05 and accompanying text (discussing potential liability of contractors under common-law theories).

13. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120 (urging passage of CERCLA because existing law is inadequate to deal with "a major new source of environmental concern . . . the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices . . . [which have] received national attention amidst growing public and Congressional concern over the magnitude of the problem").

14. See H.R. REP. NO. 111, 102d Cong., 2d Sess. 2 (1992), reprinted in 1992 U.S.C.C.A.N. 1287, 1288 (identifying history of noncompliance by federal facilities with hazardous and solid waste disposal requirements under RCRA).

15. *Id.*

as 1991, 116 federal facilities, identified as DOE, DOD, Department of Transportation, Department of the Interior, and Small Business Administration facilities, have been included on the federal Superfund list of the nation's most contaminated waste sites.¹⁶ Additionally, many other federal facilities have not yet been fully evaluated to determine whether the degree and nature of contamination requires their inclusion on the Superfund list.¹⁷

The potential exposure of the government contractor is broad. The activities of government contractors, such as performing services or manufacturing goods for federal agencies, potentially subject these contractors to substantial environmental compliance costs, cleanup liabilities, and other requirements imposed by environmental statutes and regulations.¹⁸ In addition, such activities potentially subject contractors to environmental liability for personal injuries and property damage under common law.¹⁹ Finally, government contractors may be liable for all or a portion of the cleanup costs at some federal facilities, particularly at GOCO facilities and facilities owned by the Federal Government but leased to private parties.²⁰

A. *The Comprehensive Environmental Response, Compensation, and Liability Act*

The primary federal statute addressing the cleanup of inactive hazardous waste sites is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also commonly referred

16. *Id.* at 3, 1992 U.S.C.C.A.N. at 1289.

17. *Id.* During recent testimony before the Defense Base Closure and Realignment Commission, Patrick J. Meehan, director of the Office of Deputy Assistant Secretary of Defense, estimated that one-time environmental cleanup costs for the nation's military bases would be \$410 million between 1994 and 1999. *Savings from Shutting Down Bases Exceed Costs of Cleanups, Officials Say*, 23 ENV'T REP. 3050 (Mar. 26, 1993). This figure, however, was derived from military base estimates prepared before the bases were placed on the closure list, and without the benefit of completed environmental studies. *Id.* Most experts believe that actual environmental cleanup costs at the nation's military bases will be much higher. *See supra* note 3 (reporting projections of environmental cleanup at federal facilities). For fiscal 1994, the Department of Defense is seeking \$2.3 billion for its environmental program, mostly for actual cleanup of contaminated sites. *DOD Seeks \$2.3B for Cleanup of Contaminated Sites in FY 1994*, 59 Fed. Cont. Rep. (BNA) 559, 559 (Apr. 26, 1993).

18. *See infra* notes 64-88 and accompanying text (detailing, by way of example, RCRA requirements for treatment, storage, and disposal of hazardous waste, including permits, recordkeeping, and reporting, as well as penalties and corrective actions that may be imposed for violations).

19. *See infra* text accompanying notes 104-07 (discussing common-law theories as source of environmental liability for government contractors).

20. *See infra* text accompanying notes 32-52 (explaining liability scheme of CERCLA under which persons who generated or transported hazardous substances may be jointly and severally liable).

to as Superfund).²¹ CERCLA was enacted in 1980 to address the public health threat posed by the nation's worst abandoned or inactive hazardous waste sites.²² Congress amended the statute significantly in 1986²³ to authorize an additional ten billion dollars for Superfund cleanups,²⁴ to establish stringent national cleanup standards for Superfund sites,²⁵ and to create new, independent regulatory programs, such as the Emergency Planning and Community Right-to-Know Act.²⁶

Under CERCLA, EPA has a number of enforcement tools for responding to releases or threatened releases of hazardous substances into the environment. Under its authority to "secure such relief as may be necessary"²⁷ to abate a danger or a threat, EPA may order a party to cease immediately its activities.²⁸ It can also direct a potentially responsible party (commonly referred to as a "PRP") to conduct a remedial investigation and to clean up a site, or to finance an environmental cleanup.²⁹ Where a PRP is unable or unwilling to pay or is unavailable to clean up a site, EPA can clean up the site directly.³⁰ To fund the cleanups and finance certain response actions, EPA can draw on an eight and one-half billion dollar trust

21. 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

22. See H.R. REP. NO. 1016, *supra* note 13, at 17-18, 1980 U.S.C.A.N. at 6120 (stating that in 1979, EPA estimated that approximately 30,000 to 50,000 improperly managed hazardous waste sites existed in United States, of which 1200 to 2000 were believed to present serious risk to public health).

23. Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.). In November 1990, Congress extended the taxing authority under CERCLA through December 1995. Pub. L. No. 101-508, 104 Stat. 1388-319 (1990) (codified at 42 U.S.C. § 9611 (1988 & Supp. IV 1992)). The statute currently is on the agenda for legislative reauthorization. No substantive legislative action is expected before mid-1994 because significant concerns have been raised regarding CERCLA's broad liability scheme. See NATIONAL COMM'N ON SUPERFUND, FINAL CONSENSUS REPORT OF THE NATIONAL COMMISSION ON SUPERFUND vi (prepublication draft Dec. 21, 1993) (proposing revision of CERCLA liability system and recommending "creation and implementation of fair-share allocation approach"); see also ABA STANDING COMM. ON ENVTL. LAW, REPORT TO THE HOUSE OF DELEGATES WITH RECOMMENDATION TO AMEND CERCLA I (1994) ("In many instances, [CERCLA] has also resulted in imposition of liability grossly disproportionate to the conduct involved.").

24. 42 U.S.C. § 9611 (1988 & Supp. IV 1992).

25. *Id.* § 9621.

26. *Id.* §§ 11001-11050.

27. *Id.* § 9606(a).

28. *Id.* (authorizing abatement actions where there is "imminent and substantial endangerment to the public health or welfare").

29. *Id.* § 9604(a)(1) (allowing, upon EPA approval, removal and other remedial actions by potentially responsible parties). The term "potentially responsible party" ("PRP") is not defined in CERCLA, but is used synonymously with the categories of responsible parties under § 107(a) of CERCLA. See *infra* notes 33-45 and accompanying text.

30. 42 U.S.C. § 9604 (authorizing EPA removal and response actions, as well as investigations, monitoring, and testing to obtain information on hazardous substance release).

fund (the Superfund), which is funded primarily by industry³¹ and federal appropriations.³² Under CERCLA's liability scheme, the United States, a state, or a private party can bring an action against a responsible party to recover cleanup costs or other response costs incurred under CERCLA.³³

Section 107(a) of CERCLA establishes four categories of "responsible" parties who may be liable for the costs incurred to clean up a release or threatened release³⁴ of hazardous substances:³⁵ (1) the current owner and operator of a vessel or facility;³⁶ (2) any person who owned or operated the facility at the time of disposal of hazardous substances (past owner and operator);³⁷ (3) any person who by contract, agreement, or otherwise arranged, directly or indirectly, for disposal or treatment of hazardous substances (generator);³⁸ and (4) any person who transported hazardous substances to the site (transporter).³⁹

Under CERCLA's liability scheme, federal agencies, such as DOD and DOE, typically are responsible parties as the current or past owners of government-owned facilities, including facilities where the

31. See 26 U.S.C. § 9507(b) (1988) (providing for taxation of petroleum products and certain inorganic chemicals to fund Superfund).

32. See 42 U.S.C. § 9611 (specifying authorized uses, limitations, funding requirements, and other details of Hazardous Substance Superfund).

33. *Id.* § 9607(a). Environmental cleanups under CERCLA can be very expensive in terms of both liability and transaction costs, such as attorney's fees, administrative time, consultant fees, and expert witness costs. See BRADFORD F. WHITMAN, SUPERFUND LAW AND PRACTICE 5-6 (1991) (concluding that "stakes" of CERCLA action are extremely high). Estimated response costs at a typical cleanup site listed by EPA on the National Priorities List include an average of \$1.3 million for a complete Remedial Investigation and Feasibility Study (RI/FS), \$1.5 million for remedial design, \$25 million for remedial action, and nearly \$4 million for 30-year operation and maintenance of the site. *Id.*

34. 42 U.S.C. § 9607(a)(4) (creating liability where there is "release or a threatened release . . . of a hazardous substance"). CERCLA broadly defines the term "release" to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." *Id.* § 9601(22). As the statutory language makes clear, there does not have to be an actual release of a hazardous substance. For example, the storage of hazardous substances in deteriorating drums may present a "threat" of release, subjecting the facility to CERCLA liability. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (finding "threatened release" where hazardous substances where stored in corroding tanks and drums, and site owner lacked expertise in waste disposal).

35. See 42 U.S.C. § 9601(14) (defining term "hazardous substance" by reference to other federal environmental statutes, including Clean Water Act, Resource Conservation and Recovery Act, Clean Air Act, Toxic Substances Control Act, but specifically excluding petroleum, natural gas, and synthetic gas usable for fuel).

36. *Id.* § 9607(a)(1). Current owners and operators are liable for environmental cleanup costs even if they did not own or operate the site at the time of disposal or cause the release of hazardous substances. See *Shore Realty*, 759 F.2d at 1044 (holding present owner liable even though he had not caused or contributed to environmental contamination).

37. 42 U.S.C. § 9607(a)(2).

38. *Id.* § 9607(a)(3).

39. *Id.* § 9607(a)(4).

government operates all of the activity, facilities leased by the government to contractors or other private parties, and GOCO facilities.⁴⁰ In the latter two scenarios, the government contractor also may be a responsible party as the operator of the facility.⁴¹ In addition, contractors and other parties operating at government-owned facilities may be liable for response costs if they arranged for the disposal of hazardous substances that required a CERCLA cleanup, even if they did not own the waste or cause the contamination.⁴² With respect to COCO facilities, the contractor is potentially liable for cleanup costs as an owner and operator, generator, or transporter of hazardous substances. Under this scenario, CERCLA liability generally is not shared with the Government, unless the government agency arranged for disposal of the hazardous substances⁴³ or unless a contractual arrangement provides otherwise.⁴⁴

Courts have consistently held that liability under CERCLA is strict, retroactive, and joint and several.⁴⁵ Section 101(32) provides that the standard of liability under CERCLA will be the same standard of liability imposed by section 311 of the Clean Water Act (CWA).⁴⁶ Based on the legislative history of CERCLA and on judicial interpretations of section 311 of the CWA, courts have concluded that CERCLA imposes strict liability on responsible parties.⁴⁷ Similarly, courts have

40. See *id.* § 9620(a)(1) (providing express application of CERCLA to facilities owned or operated by "department, agency, or instrumentality of the United States").

41. See *id.* § 9620(a)(2) (holding liable under CERCLA all facilities that are "owned or operated by a department, agency, or instrumentality of the United States").

42. See *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 847 (W.D. Mo. 1984) (finding corporate executive who had direct supervision over and knowledge of hazardous waste disposal practices liable under CERCLA even though he did not actually own waste). But see *United States v. Ward*, 618 F. Supp. 884, 893 (E.D.N.C. 1985) (using language suggesting that Government must prove defendant owned or possessed hazardous substances to establish liability under § 107(a)(3) of CERCLA).

43. See 42 U.S.C. § 9607(a)(3).

44. See *infra* notes 54-57 and accompanying text (discussing fact that Government and contractor may agree to apportion liability, but such agreements are ineffective to negate underlying liability).

45. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (declaring that Congress intended responsible parties to be strictly liable under CERCLA); *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 790-91 (D.N.J. 1989) (finding retroactive application of CERCLA to private parties supported by case law and purpose of statute); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059-60 (C.D. Cal. 1987) (asserting that imposition of joint and several liability promotes legislative intent).

46. 42 U.S.C. § 9601(32).

47. See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-54 (1st Cir. 1989) (concluding that nothing in language, legislative history, or case law of CERCLA supports argument that proof of causation must be provided); *United States v. Monsanto Co.*, 858 F.2d 160, 167-68 (4th Cir. 1988) (finding that plain language of CERCLA establishes strict liability scheme under which culpability is not prerequisite for liability); *United States v. Bliss*, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987) (construing CERCLA liability to be strict, "without regard to liable party's fault or state of mind").

held that CERCLA must apply retroactively to effectuate its remedial purposes.⁴⁸ As a result, parties can be held liable for acts or omissions that occurred well before the date of CERCLA's enactment, even if such acts or omissions were legal when they occurred.⁴⁹

With respect to contractor liability, it is even more significant that courts have determined that CERCLA imposes joint and several liability at sites where more than one party may be responsible under section 107 for the cleanup of contamination.⁵⁰ At multiparty sites, it is possible that one responsible party can be held liable for more than its share of cleanup costs and can, in fact, be held liable for cleanup of the entire site.⁵¹ If the environmental harm is reasonably divisible, liability may be apportioned among the responsible parties.⁵² In most multiple-generator hazardous waste sites, however, there will be no reasonable basis for apportioning liability.⁵³

Thus, under CERCLA's broad liability scheme, government contractors can be held liable for the entire cleanup cost of a federal or non-federal facility where hazardous substances have been disposed, regardless of whether the contractor exercised due care or otherwise complied with the applicable legal requirements for handling hazardous substances, and regardless of whether the contractor caused or contributed to contamination at the facility. Moreover, a government contractor's potential liability under

48. See, e.g., *Philadelphia v. Stepan Chem. Co.*, 748 F. Supp. 283, 287-89 (E.D. Pa. 1990) (finding retroactive application of CERCLA clearly supported by overriding remedial purpose of statute); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1443-44 (W.D. Mich. 1989) (rejecting argument that retroactive application of CERCLA is unconstitutional); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 839 (W.D. Mo. 1984) (determining from case law and legislative history that Congress intended CERCLA to apply retroactively), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

49. See *Thomas Solvent*, 714 F. Supp. at 1439 (striking down defenses to retroactive application of CERCLA as not within statute's enumerated defenses); *Amland Properties*, 711 F. Supp. at 790-91 (rejecting argument that in private actions, CERCLA should not apply to conduct occurring prior to statute's enactment).

50. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (stating that because Congress intended scope of CERCLA liability to be determined in accordance with "traditional and evolving principles of common law," joint and several liability is imposed where two or more persons cause single indivisible harm).

51. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989) (finding that party liable for indivisible harm has right of contribution against other defendants under CERCLA); *Monsanto*, 858 F.2d at 171-73 (recognizing defendants' concern over "just" apportionment of liability for response costs but noting availability of contribution action to address such issue).

52. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-69 (3d Cir. 1992) (stating that CERCLA defendants may escape joint and several liability by demonstrating that harm is subject to reasonable apportionment under divisibility rule recognized in RESTATEMENT (SECOND) OF TORTS § 433A (1965)).

53. See, e.g., *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Ca. 1987) (stating that in multi-generator sites harm is incapable of division due to synergistic effects of commingling different wastes).

CERCLA cannot be eliminated by any contractual agreement between the contractor and federal agency for apportioning environmental cleanup liabilities. CERCLA specifically provides that no indemnification, hold harmless, or similar agreement shall negate liability in CERCLA cost-recovery actions.⁵⁴ Such agreements, however, are not prohibited,⁵⁵ and a federal agency may agree to assume the government contractor's hazardous waste cleanup costs regardless of whether the agency itself has any liability under CERCLA.⁵⁶ In this situation, although the contractor is still liable under CERCLA, the contractor will have a contractual claim for reimbursement from the federal agency.⁵⁷

In order to escape liability, a government contractor must invoke one of three defenses to CERCLA liability. To avoid CERCLA liability, a responsible party must establish that the release or threatened release of hazardous substances was caused by "(1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party other than an employee or agent of the defendant" or one who has a contractual relationship with the defendant.⁵⁸ Government contractors, by virtue of their relationship to or involvement with the contaminated site, generally will not be in a position to avail themselves of any of these defenses.

B. Other Federal Environmental Laws Potentially Applicable to Government Contractors

A myriad of other federal environmental laws regulate day-to-day operations and activities of contractors performing projects for the Federal Government.⁵⁹ These laws include, but are not limited to: (1) the Resource Conservation and Recovery Act (RCRA),⁶⁰ which regulates the management of hazardous waste; (2) the Clean Air Act

54. 42 U.S.C. § 9607(e) (1988).

55. *Id.*

56. *See, e.g., Kaufman & Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468, 1473 (N.D. Cal. 1993) (stating that private parties can enter into agreements between themselves to apportion CERCLA liability, but they cannot alter their underlying liability to EPA to remediate contamination); *see also infra* note 57 and accompanying text.

57. *See Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) (holding that contractual arrangements apportioning CERCLA liability between responsible parties cannot alter or excuse underlying liability, but can only change who ultimately pays that liability).

58. 42 U.S.C. § 9607(b). The third-party defense is applicable only provided the defendant exercised due care with respect to the hazardous substances concerned and that he or she took precautions against the foreseeable acts or omissions of the third party and any foreseeable consequences. *Id.*

59. *See supra* note 1 (listing various federal environmental laws applicable to government contractors).

60. 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992).

(CAA),⁶¹ which controls emissions of hazardous air pollutants; (3) the Clean Water Act (CWA),⁶² which governs the discharge of pollutants into waters of the United States; and (4) the Toxic Substances Control Act (TSCA),⁶³ which prescribes requirements for the manufacture, use, and disposal of harmful chemicals in the marketplace. These environmental laws generally impose stringent monitoring, reporting, and other compliance requirements on certain specified classes of persons, such as owners, operators, and generators. A detailed review of the regulatory requirements imposed by RCRA on hazardous waste facilities illustrates the impact environmental laws may have on both federal agency activities and government contractors performing projects for the Government.

Congress enacted RCRA in 1976 to provide "cradle-to-grave" management of hazardous waste by imposing requirements on generators and transporters of hazardous wastes, and on owners and operators of facilities that treat, store, or dispose of hazardous wastes.⁶⁴ Under RCRA regulations, the definition of "operator" is "the person responsible for the overall operation of a facility."⁶⁵ This definition clearly encompasses government contractors who operate at federal facilities.

The requirements of RCRA generally apply to the Federal Government. Section 6001 of RCRA provides that all branches of the Federal Government with jurisdiction over any solid waste management facility or disposal site must comply with federal, state, and local solid and hazardous waste disposal requirements, both substantive and procedural, in the same manner and to the same extent as any private person subject to such requirements.⁶⁶ In 1992, the Federal Facility Compliance Act further amended RCRA to clarify that the definition of "persons" under RCRA encompassed "each department, agency, and instrumentality of the United States"⁶⁷ and that the Government

61. 42 U.S.C. §§ 7401-7671q.

62. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

63. 15 U.S.C. §§ 2601-2671 (1988 & Supp. V 1993).

64. See H.R. REP. NO. 1491, 94th Cong., 2d Sess., pt. 1, at 2-4, reprinted in 1976 U.S.C.C.A.N. 6238, 6239-42 (stating that RCRA legislation is designed to eliminate unregulated land disposal of discarded materials and hazardous wastes). "From point of generation, through transportation, storage, treatment and disposal, those wastes listed [pursuant to EPA criteria] as hazardous are federally regulated." *Id.* at 5, 1976 U.S.C.C.A.N. at 6242.

65. 40 C.F.R. § 260.10 (1993).

66. 42 U.S.C. § 6961(a) (1988 & Supp. IV 1992). Other environmental laws contain similar provisions regarding federal facility compliance. See, e.g., Clean Water Act, 33 U.S.C. § 1323(a) (1988); Safe Drinking Water Act, 42 U.S.C. § 300j-6(a); Clean Air Act, 42 U.S.C. § 7418(a).

67. Federal Facility Compliance Act, Pub. L. No. 102-386, sec. 103, § 1004(15), 106 Stat. 1505, 1507 (1992) (codified at 42 U.S.C. § 6903(15) (1988 & Supp. IV 1992)).

would be subject to fines for RCRA violations.⁶⁸ The applicability of RCRA and other environmental laws to the Federal Government, however, is not without limits: the principle of sovereign immunity, which states that the Federal Government is not always subject to federal law,⁶⁹ must also be considered.

Government contractors, of course, do not enjoy the protections of sovereign immunity and, therefore, will be fully subject to environmental laws, even when the Government is not.⁷⁰ RCRA compliance obligations, therefore, apply to government contractors that directly operate federal facilities, lease space at federal facilities, or otherwise generate, transport, treat, store, or dispose of hazardous wastes in fulfilling their government contract obligations.⁷¹

For example, owners and operators of treatment, storage, and disposal (TSD) facilities must have a permit issued by EPA, or issued under an authorized state RCRA program,⁷² and are subject to extensive regulatory requirements.⁷³ In a 1987 policy memorandum, EPA declared that government contractors, not federal agencies, generally should be the primary signatories on TSD facility permit applications and permits.⁷⁴ The policy memorandum stated, "Whenever a contractor or contractors at a government-owned facility, [sic] are responsible or partially responsible for the operation, management or oversight of hazardous waste activities at the facility; they should sign the [TSD] permit as the operator(s)."⁷⁵ The memorandum concluded that, because contractors will usually satisfy

68. *Id.* sec. 102, § 6001, 106 Stat. at 1505 (codified at 42 U.S.C. § 6961(a)).

69. See *infra* notes 112-63 and accompanying text (discussing constitutional and statutory limitations on applicability of environmental laws to Federal Government); see also United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992) (noting common rule that any waiver of Federal Government's sovereign immunity must be unequivocal).

70. See *infra* notes 107-78 and accompanying text (discussing causes and effects of increased environmental enforcement against government contractors).

71. See 40 C.F.R. §§ 261.1-264.1102 (1993) (identifying hazardous waste standards applicable under RCRA to generators and transporters of hazardous waste and to owners and operators of hazardous waste facilities).

72. 42 U.S.C. § 6926 (1988); see also *infra* notes 94-95 and accompanying text (discussing authorized state RCRA programs).

73. See 40 C.F.R. §§ 270.1-73 (detailing EPA's Hazardous Waste Permit Program); *id.* §§ 264.1-.1102 (providing standards for owners and operators of hazardous waste treatment, storage, and disposal facilities).

74. Memorandum from Gene Lucero, Director, Office of Waste Programs Enforcement, EPA, and Marcia E. Williams, Director, Office of Waste, EPA, to EPA Waste Management Division Directors Regions I-X, at 1 (June 24, 1987) (on file with *The American University Law Review*).

75. *Id.* at 1.

this test, they should be responsible for signing the permit application.⁷⁶

TSD facilities also must comply with hazardous waste manifest requirements.⁷⁷ EPA has promulgated standards that govern the location, design, construction, operation maintenance, insurance, monitoring, contingency planning, training, closure, and other aspects of TSD operations.⁷⁸ EPA can compel owners and operators of TSD facilities, including government contractors that operate federal facilities, to take potentially costly corrective action whenever a release of hazardous waste or constituents from any solid waste management unit occurs, regardless of the time at which the waste was placed in such units.⁷⁹ Furthermore, TSD facilities are subject to extensive recordkeeping and reporting requirements,⁸⁰ and owners and operators of TSD facilities must demonstrate that their financial resources are adequate to properly close the facilities.⁸¹

In addition to these regulatory requirements under RCRA, virtually all environmental laws, including RCRA, contain enforcement provisions authorizing EPA to seek administrative, civil, or criminal penalties against government contractors and others, including key individuals within corporations, for failure to comply with regulatory requirements.⁸² For example, violations of RCRA may result in the

76. *Id.*

77. See 40 C.F.R. § 264.71 (outlining manifest requirements for owners and operators of TSD facilities). RCRA's manifest provisions require hazardous waste to be accompanied at all times by a manifest that details the composition of the waste, the identity of involved parties, and other related information. *Id.* § 262.20.

78. See *id.* §§ 264.10-19 (providing national standards of management for TSD facilities). Specific hazardous waste management requirements have been established for certain types of units, such as containers, *id.* §§ 264.170-178; tanks, *id.* §§ 264.190-199; surface impoundments, *id.* §§ 264.220-231; waste piles, *id.* §§ 264.250-259; land treatment, *id.* §§ 264.270-283; landfills, *id.* §§ 264.300-317; and incinerators, *id.* §§ 264.340-351.

79. 42 U.S.C. § 6924(u) (1988); 40 C.F.R. § 264.90(a) (1993). RCRA also requires corrective action beyond the facility boundaries when necessary to protect human health and the environment. 40 C.F.R. § 264.101(c).

80. See 40 C.F.R. §§ 264.70-77 (detailing RCRA requirements for maintenance of records and reports).

81. See *id.* § 264.143 (describing various methods of insuring sufficiency of financial resources to close TSD facility).

82. See, e.g., TSCA, 15 U.S.C. § 2615 (providing civil and criminal sanctions for enforcement of TSCA); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1319(b), (c), (g) (punishing violations of FWPCA with criminal, civil, and administrative penalties); RCRA, 42 U.S.C. § 6928 (outlining civil and administrative fines for RCRA violations); CERCLA, 42 U.S.C. §§ 9609, 9613 (describing administrative and civil penalties available under CERCLA). EPA estimates that civil penalties collected under RCRA in 1993 will exceed \$19 million, which is more than EPA has collected for both civil penalties and administrative settlements combined in any one year. See *EPA Expects to Collect Record Fines Under RCRA in 1993, O'Keefe Tells ABA*, DAILY ENV'T REP., Sept. 13, 1993, at A-1. According to EPA, RCRA currently yields a median civil penalty of \$600,000, a tenfold increase over 1989. *Id.* In addition, EPA has improved enforcement by reducing penalties in exchange for implementation of environmentally

imposition of administrative or civil judicial penalties of up to \$25,000 per day of violation.⁸³ A "knowing" violation of the statute is a felony⁸⁴ and may result in monetary penalties of up to \$50,000 for each day of violation or imprisonment for up to five years, or both.⁸⁵ Potential penalties for second and subsequent offenses are doubled with respect to both the fine and imprisonment.⁸⁶ Violators who fail to take corrective action within the time specified in a RCRA compliance order may suffer a penalty of up to \$25,000 for each day of continued noncompliance and risk suspension of their hazardous waste permit.⁸⁷ Any person who transports, treats, stores, exports, or disposes of hazardous waste and knowingly and imminently endangers another person is guilty of a felony and may be subject to a penalty of up to \$250,000 or fifteen years imprisonment, or both.⁸⁸

Most enforcement actions arise out of violations discovered during onsite facility inspections.⁸⁹ Whereas section 3007 of RCRA requires EPA to inspect federal TSD facilities on an annual basis,⁹⁰ RCRA requires only biannual inspections of non-federal TSD facilities.⁹¹ Thus, government contractors operating at GOCO facilities are more likely to be subject to EPA oversight than are private parties, and are more likely to be the focus of EPA enforcement actions. To further complicate the situation, states with authorized hazardous waste programs also may conduct inspections of any federal or non-federal facility to ensure the facility's compliance with the state program.⁹²

protective measures. *Id.*

83. 42 U.S.C. § 6928 (1988).

84. *See id.* § 6929(d)-(e) (describing circumstances in which felony sanctions apply to RCRA violators). The test for whether a violation was committed "knowingly" is whether the corporation and/or individual charged actually knew or should have known of the environmental requirement. *See, e.g., United States v. Hayes Int'l*, 786 F.2d 1499, 1503-05 (11th Cir. 1986) (holding that ignorance of RCRA's applicability to paint waste did not constitute defense to criminal charges under § 6928(d)(1)); *see also United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) (holding that actual knowledge that waste disposal permit had not been obtained was not requirement for conviction under RCRA).

85. 42 U.S.C. § 6928(d).

86. *Id.*

87. *Id.* § 6928(c).

88. *Id.* § 6928(e).

89. *See David Schnapf, State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 733 (1982) (explaining that enforcement of RCRA depends upon on-site inspection).

90. 42 U.S.C. § 6927(c) (1988).

91. *Id.* § 6927(e)(1).

92. *Id.* § 6927(c).

*C. State Environmental Laws May Be a Source of Liability for
Government Contractors*

Contractors performing projects for the Government also are subject to state environmental laws that regulate day-to-day activities and environmental cleanups at federal and non-federal facilities. Many of the major federal environmental statutes, such as RCRA, CWA, CAA, and the Safe Drinking Water Act (SDWA),⁹³ require EPA to develop compliance standards and then delegate implementation and enforcement authority to the states.⁹⁴ The state program must be at least as stringent as EPA's program.⁹⁵ In addition, Executive Order 12,088,⁹⁶ signed by President Carter in 1978, articulates the President's expectation that federal facilities will comply with applicable state pollution-control standards.⁹⁷ As a result, state environmental laws significantly affect environmental compliance by federal facilities and government contractors performing activities for the Federal Government.

Because many states have environmental statutes or regulations that are more stringent than federal laws,⁹⁸ state environmental agencies can add an often conflicting and complicating viewpoint to environmental compliance and cleanup issues. For example, federal-state conflicts often arise when environmental cleanups occur at federal

93. 21 U.S.C. § 349; 42 U.S.C. §§ 300f to 300j-26.

94. See, e.g., CWA, 33 U.S.C. § 1342(c) (requiring EPA to stop issuing permits under National Pollutant Discharge Elimination System (NPDES) upon state assumption of NPDES program); SDWA, 42 U.S.C. §§ 300g-1, 300g-2 (mandating establishment of maximum drinking water contaminant levels by EPA and enforcement of such standards by states); RCRA, 42 U.S.C. §§ 6922(a), 6926(b) (ordering EPA to set standards for generators of hazardous waste and authorizing states to administer and enforce them); CAA, 42 U.S.C. §§ 7409(a), 7410(a) (instructing EPA to prescribe national ambient air quality standards, which states shall implement and enforce).

95. See, e.g., CWA, 33 U.S.C. § 1342(c) (requiring state NPDES program to conform to EPA standards); SDWA, 42 U.S.C. § 300g-2 (ordering states to adopt drinking water regulations that are no less stringent than federal standards); RCRA, 42 U.S.C. § 6926(b) (withholding authorization of state hazardous waste program if inconsistent with federal program); CAA, 42 U.S.C. § 7410(a) (compelling states to adopt plan for implementing national ambient air quality standards).

96. 3 C.F.R. 243 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

97. Exec. Order No. 12,088, 3 C.F.R. 243 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

98. Environmental statutes typically delegate certain authority to the states. States must meet minimum federal requirements and can implement programs that are more stringent than federal requirements. For example, under the federal Clean Water Act, the federal industrial waste water discharge program anticipates a gradual delegation of authority to states demonstrating a capacity to administer their own programs, subject to a withdrawal of authorization for state's programs which fall short of federal requirements. 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.26 (1986). Similarly, most state governments have responsibilities for the management of solid waste. As Mr. Rodgers notes in his treatise, the consequence presents, among other things, a conflict among environmental agencies. See 4 RODGERS, *supra*, § 7.22, at 254-55 (1992).

facilities subject to both state RCRA and Federal CERCLA authority. A recent U.S. Court of Appeals for the Tenth Circuit opinion, *United States v. Colorado*,⁹⁹ addressed this issue in the context of a longstanding dispute between the Department of the Army and the Colorado Department of Health regarding cleanup of the Rocky Mountain Arsenal, a federal facility in Denver, Colorado. The Federal Government argued that CERCLA precluded the exercise of state RCRA authority over ongoing Federal Superfund remedial actions.¹⁰⁰ The court disagreed, ruling that RCRA and CERCLA can be harmonized and, when read together, reflected Congress' intent to permit states broad authority to enforce their hazardous waste laws at federal facilities, notwithstanding a CERCLA cleanup.¹⁰¹

Consequently, under *United States v. Colorado*, a state with an authorized hazardous waste program has authority to direct the cleanup of environmental contamination at a TSD facility.¹⁰² On the other hand, under CERCLA, EPA has final authority to direct cleanup of Superfund sites.¹⁰³ As a result of these overlapping authorities, government contractors performing cleanup activities at federal facilities in states with authorized hazardous waste programs may be subject to direct oversight by both EPA under CERCLA and state environmental agencies under RCRA.

State common-law tort theories also may be a source of environmental liability for government contractors. Under traditional common-law theories, such as nuisance, trespass, and strict liability, a contractor may be liable for damages and, in appropriate cases, injunctive relief for injuries related to environmental contamination.¹⁰⁴ Because these common-law theories have evolved almost entirely as a matter of state law, the nature and scope of liability varies considerably from state to state.¹⁰⁵ In cases where the Federal

99. 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

100. *United States v. Colorado*, 990 F.2d 1565, 1572, 1574, 1576 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

101. *Id.* at 1579-84.

102. *Id.* at 1584.

103. 42 U.S.C. § 9621(a) (1988).

104. See generally DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW §§ 2.01-4.05 (1993) (providing overview of role of common law in environmental law); FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION §§ 1.13-.22 (1981) (discussing application of common law to environmental problems). Under nuisance law, a substantial infringement on the use or enjoyment of property may be remedied by damages or an injunction. SELMI & MANASTER, *supra*, §§ 3.01-.07. Trespass offers a strategy similar to nuisance, but poses greater conceptual difficulties because of its traditional reliance on a physical invasion of the property. *Id.* § 4.01[1]. Strict liability may apply in cases involving abnormally dangerous or ultra-hazardous activities, such as toxic waste disposal. *Id.* § 4.02[2].

105. See *Caudill v. Blue Cross & Blue Shield, Inc.*, 999 F.2d 74, 79 (4th Cir. 1993) (noting unfairness of applying state law to federal contract due to "vast differences in the common law

Government successfully invokes sovereign immunity,¹⁰⁶ common-law claims by individuals may expose a government contractor to liability far in excess of its proportionate share. Consequently, injured parties who are precluded from bringing an action against the Federal Government may turn to the contractors for compensation.¹⁰⁷

II. FEDERAL ENVIRONMENTAL ENFORCEMENT INITIATIVES TARGET GOVERNMENT CONTRACTORS

Although environmental laws generally apply to the Government, constitutional and statutory limitations present significant roadblocks when one federal agency, such as EPA or DOJ, brings an action for violations of environmental laws against another federal agency, such as DOD or DOE.¹⁰⁸ State, local, and private-party environmental enforcement efforts against the Federal Government also are impeded by such limitations.¹⁰⁹ As a result, environmental enforcement efforts against federal agencies have not been particularly successful.¹¹⁰ This Part discusses the various constitutional and statutory limitations that have fueled the growth of environmental issues in

from state to state").

106. See Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10326, 10327 (Oct. 1985) (discussing history of sovereign immunity in sphere of environmental law); see also *infra* notes 126-53 and accompanying text (discussing waivers of sovereign immunity by Federal Government in environmental protection legislation).

107. See Jim C. Chen & Kyle E. McLarrow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 *BUS. LAW.* 1031, 1039-41 (1992) (discussing exposure of government contractors to strict liability claims when Government asserts sovereign immunity at facilities slated for sale or closure).

108. See *infra* notes 112-25, 141-63 and accompanying text (analyzing interagency environmental enforcement in light of U.S. Constitution, Federal Facility Compliance Act, Anti-Deficiency Act, and national defense considerations).

109. See *infra* notes 126-63 and accompanying text (evaluating efficacy of environmental litigation against Federal Government considering constitutional and statutory provisions).

110. For example, instead of issuing compliance orders to another federal agency for environmental violations, EPA issues a "proposed order" or a "proposed Compliance Agreement" and then must negotiate the terms of the order or Agreement with the agency. If agreement is not reached, EPA typically must utilize internal dispute resolution mechanisms. If these mechanisms do not work, then EPA must resort to the procedures established in Executive Order 12,088, 3 C.F.R. 243 (1979), *reprinted in* 42 U.S.C. § 4321 (1988) (mandating federal compliance with pollution control standards), and Executive Order 12,146, 44 Fed. Reg. 42,658 (1979), *reprinted as amended in* 28 U.S.C. § 509 (1988) (providing method for resolution of interagency legal disputes). See COMPLIANCE STRATEGY, *supra* note 5, at VI-4 to VI-12 (describing civil and administrative enforcement procedures for federal facilities). According to the legislative history of the Federal Facility Compliance Act, "In the past several years the informal dispute resolution process forced on EPA by challenges to its statutory authority has been extremely ineffective and slow to resolve violations. Essentially the process involves jawboning by the EPA at elevated bureaucratic levels." H.R. REP. NO. 111, *supra* note 14, at 17, 1992 U.S.C.C.A.N. at 1303; see also *id.* at 3 (arguing that federal facilities have been slow to comply and enforce RCRA and CERCLA).

government contracting and that make it imperative for contractors to protect themselves when performing federal contracts.

A. *Constitutional Limitations*

DOJ, which represents EPA in environmental enforcement litigation, perceives interagency litigation as barred by the Constitution. DOJ takes the position that, because of prohibitions contained in Articles II and III of the U.S. Constitution,¹¹¹ federal courts are not the proper forum for resolving disputes between federal executive agencies.¹¹² Rather, disputes between agencies "that serve at the pleasure of the President" should be resolved internally.¹¹³

DOJ bases its policy against interagency environmental litigation in part on the President's constitutional authority and responsibility under Article II to see that the laws of the United States are faithfully executed¹¹⁴ and a 1926 Supreme Court interpretation of Article II.¹¹⁵ In *Myers v. United States*,¹¹⁶ the U.S. Supreme Court addressed executive power under Article II and first articulated the so-called unitary executive theory. According to the Court in *Myers*, the President has "general administrative control" over individuals with delegated authority to execute the laws.¹¹⁷ The Court reasoned that the basic principle underlying Article II of the Constitution is that the executive power is vested in a single person, the President, who, as head of the executive branch, must supervise and guide executive officers in "their construction of the statutes under which they act in order to secure . . . unitary and uniform execution of the laws."¹¹⁸ In the view of DOJ, as a corollary to the obligation to supervise and

111. U.S. CONST. art. II, § 3; *id.* art. III, § 2.

112. See Letter from Robert A. McConnell, former Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Rep. John D. Dingell 1-2 (Oct. 11, 1983), reprinted in COMPLIANCE STRATEGY, *supra* note 5, at app. H [hereinafter DOJ Letter] (explaining DOJ's position on environmental enforcement actions and cleanup of federal facilities under RCRA and CERCLA); see also *Federal Environmental Compliance Hearing*, *supra* note 5, at 182 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice) (expressing DOJ's policy on environmental compliance and enforcement of federal facilities).

113. DOJ Letter, *supra* note 112, at 1-2.

114. U.S. CONST. art. II, § 3, cl.4.

115. See DOJ Letter, *supra* note 112, at 2-4 (explaining rationale for internal resolution of executive agency disputes and describing process) (citing *Myers v. United States*, 272 U.S. 52 (1926); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)).

116. 272 U.S. 52 (1926).

117. *Myers*, 272 U.S. at 163-64.

118. *Id.* at 135 (emphasis added).

guide executive officers, the President also must have the opportunity to resolve disputes arising within the executive branch.¹¹⁹

DOJ also bases its policy against interagency environmental litigation on Article III of the Constitution, which prohibits the judiciary from hearing cases that lack justiciability.¹²⁰ According to DOJ, EPA judicial enforcement actions against another federal executive agency have only one real party in interest, the executive branch.¹²¹ Such enforcement actions, therefore, lack the "concrete adverseness" required to meet the Article III case or controversy requirement for federal court jurisdiction.¹²²

DOJ believes that the constitutional infirmity with respect to interagency lawsuits applies with equal force to unilateral administrative orders issued by EPA against other federal executive agencies.¹²³ DOJ reasons that such orders are inconsistent with the constitutional principles of unity and unitary responsibility within the executive branch and that such orders, like lawsuits, interfere with presidential management of the executive branch.¹²⁴ Accordingly, DOJ has concluded that federal executive agencies cannot sue one another, nor may one agency issue a compliance order against another agency unless an internal executive branch dispute resolution process is not available.¹²⁵

119. See *Federal Environmental Compliance Hearing*, *supra* note 5, at 209 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice) ("[I]f the intentions of the Framers are to be fulfilled, the President must have an unfettered opportunity to take action in the event of disagreements within the Executive Branch.").

120. See U.S. CONST. art. III, § 2. The Supreme Court has defined "justiciability" as follows:

[A] controversy . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite or concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

121. DOJ Letter, *supra* note 112, at 4.

122. DOJ Letter, *supra* note 112, at 4.

123. *Federal Environmental Compliance Hearing*, *supra* note 5, at 210-11 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice).

124. *Federal Environmental Compliance Hearing*, *supra* note 5, at 210 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice).

125. *Federal Environmental Compliance Hearing*, *supra* note 5, at 29 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice). Executive Orders 12,146 and 12,088 provide a mechanism for federal agencies to submit their disputes concerning compliance with environmental laws to the Attorney General or the Director of the Office of Management and Budget, respectively. Under Executive Order 12,146, "Whenever two or more Executive agencies are unable to resolve a legal dispute between them, . . . each agency is encouraged to submit the dispute to the Attorney General." Exec.

It is generally undisputed that EPA has enforcement authority with respect to environmental matters over other federal agencies. DOJ, however, has taken the position that, as a result of the above-mentioned constitutional limitations, EPA's authority does not extend to filing actions in federal court or issuing unilateral compliance orders against any federal agency. EPA, therefore, must negotiate and coordinate environmental compliance issues with the other federal agencies, an often time consuming and tedious process.

B. Statutory Limitations

1. Waivers of sovereign immunity

The constitutional limitations proscribing interagency litigation do not, of course, apply to environmental litigation initiated by states or private parties. Nonetheless, states or private parties seeking damages or penalties from federal agencies for environmental contamination must overcome the strict burden of proof imposed by courts in determining whether the Federal Government has agreed, by statute, to waive its sovereign immunity.¹²⁶

The doctrine of sovereign immunity is a seminal principle of federal constitutional law.¹²⁷ As a corollary to the Supremacy Clause of the Constitution,¹²⁸ the Supreme Court has long held that "[i]t is of the very essence of supremacy to remove all obstacles to [federal] action within its own sphere."¹²⁹ It is thus well-settled that federal installations and activities are shielded from regulation by the states, unless there is a "clear and unambiguous" waiver of immunity in a

Order No. 12,146, 44 Fed. Reg. 42,658 (1979), *reprinted as amended in* 28 U.S.C. § 509 (1988). Similarly, Executive Order 12,088 provides that "[t]he [EPA] Administrator shall make every effort to resolve conflicts regarding [violations of pollution control standards] between Executive agencies. . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict." Exec. Order No. 12,088, 3 C.F.R. 245 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

126. *See* United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992) (noting that in context of CWA and RCRA suit by Ohio against DOE, "any waiver of the National Government's sovereign immunity must be unequivocal").

127. *See, e.g.*, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1988) (Scalia, J., dissenting) (noting importance of Eleventh Amendment sovereign immunity in context of Superfund suit against Pennsylvania); *Ex parte New York*, 256 U.S. 490, 497 (1921) (prohibiting nonconsensual suits against states based on fundamental constitutional rule of sovereign immunity); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819) (denying states power to tax federal bank based on implicit yet fundamental principle of sovereign immunity).

128. U.S. CONST. art. VI, § 2, cl. 2. The Supremacy Clause states, "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding." *Id.*

129. *McCulloch*, 17 U.S. (4 Wheat.) at 427.

particular statute.¹³⁰ Furthermore, the Supreme Court has held that any statutory waiver must be given a narrow construction by the courts.¹³¹

The extent to which a state may control federal facility activities is thus determined by the sovereign immunity waiver provisions of the environmental statute at issue. Each of the major federal environmental laws contains provisions that make the statutory requirements generally applicable to federal agencies and that purport to waive sovereign immunity.¹³² The "clear and unambiguous" standard of review imposed by the courts, however, may cloud the applicability of federal and state environmental requirements to specific federal activities.

For example, section 313(a) of the Clean Water Act contains a typical waiver provision:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity The preceding sentence shall apply (A) to any requirement whether substantive or procedural . . . , (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.¹³³

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130. *Hancock v. Train*, 426 U.S. 167, 179 (1976); see also *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 211 (1976) ("Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous.").

131. See *Hancock*, 426 U.S. at 179-80 (explaining that congressional intent to submit federal activity to state control cannot be implied).

132. See *supra* note 66 and accompanying text (listing environmental statutes and their waiver of sovereign immunity provisions).

133. 33 U.S.C. § 1323(a) (1988). Congressional amendments to § 313 in 1977 modified the first quoted sentence and added the second and third sentences. CWA, Pub. L. No. 95-217, sec. 61(a), § 313, 91 Stat. 1566, 1598 (1977) (codified at 33 U.S.C. § 1323(a)). Prior to these amendments, the Supreme Court had held that federal facilities were not subject to state NPDES permit requirements because the CWA did not waive sovereign immunity with the requisite degree of clarity. *California ex rel. State Water Resources Control Bd.*, 426 U.S. at 227-28.

Notwithstanding this seemingly clear and broad waiver of sovereign immunity, the Federal District Court for the Eastern District of California, in *McClellan Ecological Seepage Situation (MESS) v. Weinberger*,¹³⁴ refused to construe section 313(a) as a complete waiver of sovereign immunity.¹³⁵ Under section 309(d) of the CWA, civil penalties may be assessed against “[a]ny person who violates [certain sections of the CWA] . . . or any permit condition or limitation implementing any of such sections.”¹³⁶ The court held that federal agencies cannot be subjected to civil fines and penalties under the CWA because such agencies are excluded from the definition of “person” in section 502(5) of the CWA.¹³⁷ The court was not persuaded by additional language in section 313(a) providing that “the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.”¹³⁸ According to the court in *MESS*, the CWA federal facilities provision is a “compilation of ambiguity” and, therefore, insufficient to constitute a waiver of sovereign immunity with respect to civil fines and penalties.¹³⁹

Despite court decisions challenging EPA’s statutory authority over federal facilities, Congress has become less tolerant of federal agencies’ efforts to hide behind the sovereign immunity curtain with respect to environmental liabilities. In 1992, Congress passed and the President signed the Federal Facility Compliance Act¹⁴⁰ to ensure greater compliance by federal facilities with RCRA’s requirements for handling hazardous wastes.¹⁴¹ According to the legislative history of the Act, the legislation reaffirms Congress’ original intent that federal

134. 655 F. Supp. 601 (E.D. Cal. 1986).

135. *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601, 604-05 (E.D. Cal. 1986).

136. 33 U.S.C. § 1319(d) (1988) (emphasis added).

137. *MESS*, 655 F. Supp. at 605. Section 502(5) of the CWA defines the term “person” as an “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

138. *MESS*, 655 F. Supp. at 604.

139. *Id.* The Supreme Court has found CWA and RCRA provisions insufficient to constitute a waiver of sovereign immunity. In *United States Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992), the Court concluded that “neither statute [CWA or RCRA] defines ‘person’ to include the United States . . . a fact that renders the civil penalties sections inapplicable to the United States.” *Id.* at 1634-35. This case was decided before Congress enacted the Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (codified as amended in scattered sections of 42 U.S.C. (Supp. IV 1992)), which amended the definition of “person” under RCRA to waive sovereign immunity with respect to civil fines and penalties for federal facility hazardous waste violations. 42 U.S.C. § 6903(15) (Supp. IV 1992).

140. Pub. L. No. 102-386, 106 Stat. 1505 (1992) (codified as amended in scattered sections of 42 U.S.C. (Supp. IV 1992)).

141. H.R. REP. NO. 111, *supra* note 14, at 2, 1992 U.S.C.C.A.N. at 1288.

agencies are to be treated as "persons" under RCRA.¹⁴² Moreover, the Act explicitly provides that federal facilities are subject to the same substantive and procedural requirements, including enforcement sanctions, as state and local governments and private companies.¹⁴³ In essence, the Act purports to place federal agencies on an equal footing with private parties.¹⁴⁴ In that regard, EPA now has discretionary authority to initiate an administrative enforcement action against a federal facility in the same manner and under the same circumstances as it would initiate an action against a private party.¹⁴⁵ Thus, federal agencies that refuse to resolve hazardous waste violations in a timely manner will be subject to appropriate sanctions.¹⁴⁶

In addition, the Federal Facility Compliance Act requires EPA to conduct annual hazardous waste inspections of federal facilities.¹⁴⁷ States with approved RCRA programs can also conduct such inspections.¹⁴⁸ The federal department, agency, or instrumentality owning or operating the facility is required to reimburse EPA or the authorized state for the cost of conducting the assessment.¹⁴⁹

The Act also requires DOE, not later than 180 days after enactment of the Act, to conduct a national inventory, on a state-by-state basis, of mixed waste¹⁵⁰ at each DOE facility.¹⁵¹ For each facility where mixed waste is stored or generated, DOE is required to prepare a plan for developing treatment capacity and technologies for handling such mixed waste, regardless of when the waste was generated.¹⁵² Additionally, DOE is required to include a compliance schedule in the plan, and submit annual progress reports to Congress.¹⁵³

142. *Id.*

143. 42 U.S.C. § 6961(a) (Supp. IV 1992).

144. H.R. REP. NO. 111, *supra* note 14, at 2, 1992 U.S.C.C.A.N. at 1288 (quoting former President Bush's acknowledgement that government agencies are among worst environmental offenders and that "government should live with the laws it imposes on others").

145. 42 U.S.C. § 6961(b)(1).

146. *Id.* § 6928 (1988 & Supp. IV 1992); *see* H.R. REP. NO. 111, *supra* note 14, at 15, 1992 U.S.C.C.A.N. at 1301 (stating Energy and Commerce Committee's intent to reaffirm that federal facilities are subject to enforcement penalties).

147. 42 U.S.C. § 6927(c) (Supp. IV 1992).

148. *Id.*

149. *Id.*

150. *See id.* § 6903(41) (defining "mixed waste" as waste containing "both hazardous waste and source, special nuclear, or by-product material").

151. *Id.* § 6939c(a)(1).

152. *Id.* § 6939c(b).

153. *Id.* § 6939c(c).

2. *The Anti-Deficiency Act and other constraints*

Even though Congress may waive sovereign immunity with respect to civil penalties and fines assessed against federal agencies under certain environmental statutes, such penalties might run afoul of the Anti-Deficiency Act.¹⁵⁴ The Anti-Deficiency Act prohibits federal agency officials from obligating the United States to spend money that has not been appropriated by Congress.¹⁵⁵ EPA recognized this potential roadblock to enforcement in its recently adopted policy implementing the Federal Facility Compliance Act.¹⁵⁶ According to EPA, "unique payment issues [might] arise with regard to payment of penalties by such agencies."¹⁵⁷ EPA policy provides that if the federal agency demonstrates that it cannot pay a penalty because of the Anti-Deficiency Act, the agency should be required to agree to request additional funds from Congress.¹⁵⁸

Additional factors may contribute to the EPA's inability to collect penalties from federal agencies. Even if federal agencies rank pollution control as a high priority, facility managers and agency administrators still must weigh the costs of environmental compliance against budget constraints, production goals, and other priorities.¹⁵⁹ A lack of funding, however, generally does not excuse a federal agency from complying with a statutory obligation.¹⁶⁰ Moreover, the

154. Anti-Deficiency Act, ch. 510, 34 Stat. 49 (1906) (codified as amended in scattered sections of 31 U.S.C. (1988 & Supp. V 1993)).

155. 31 U.S.C. § 1341(a) (1988 & Supp. V 1993).

156. Federal Facility Compliance Act: Enforcement Authorities Implementation, 58 Fed. Reg. 49,044 (1993) (to be codified at 40 C.F.R. pt. 22).

157. *Id.* at 49,045-46 n.5; see also COMPLIANCE STRATEGY, *supra* note 5, at VI-13 ("EPA recognizes that the Anti-Deficiency Act prohibits federal officials from committing funds beyond those they are authorized to spend.").

158. COMPLIANCE STRATEGY, *supra* note 5, at VI-13. In the legislative history to the Federal Facility Compliance Act, Congress stated that the system for paying civil penalties under the Clean Air Act should be equally applicable to hazardous waste violations. H.R. REP. NO. 111, *supra* note 14, at 15-16, 1992 U.S.C.C.A.N. at 1301. The source of payment for penalties was described in a formal opinion issued by the Comptroller General on July 19, 1979. *Id.* With respect to air quality penalties, the Comptroller General ruled that "if the federal agency concedes liability and agrees to pay the penalty administratively assessed, then a penalty is payable from the agency's appropriation, assuming that the penalty was incurred in the course of conducting activities necessary and proper or incidental to fulfilling the purpose for which the appropriation was made." *Id.* If the agency disputes the penalty, then a compromise settlement or judgment is payable from "the permanent indefinite 'judgment fund' appropriation by Congress (31 U.S.C. § 1304)." *Id.*

159. RAMI S. HANASH, ENVIRONMENTAL LIABILITY OF GOVERNMENT CONTRACTORS 21-22 (BNA Corporate Practice Series 1992).

160. See *New York Airways v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("It has long been established that the mere failure of Congress to appropriate funds without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute."); see also *Will v. United States*, 478 F. Supp. 621, 629-30 (1979) (applying *New York Airways* and holding that failure to appropriate

environmental statutes preclude lack of funding alone as a reason for noncompliance by a federal agency.¹⁶¹

Fiscal considerations aside, an agency may be able to escape compliance altogether. In certain limited circumstances, such as where compliance will impair national defense measures, the President may grant an exemption from statutory environmental requirements.¹⁶² The President has used this exemption power only once.¹⁶³

C. *Impact on Government Contractors*

As a result of the constitutional and statutory roadblocks that bar or impede environmental enforcement actions against federal agencies, government contractors stand out as prominent targets for EPA, DOJ, states, and private parties attempting to enforce environmental cleanup laws or recover for environmental cleanup liabilities at federal facilities.¹⁶⁴ Moreover, because of the Federal Government's involvement, these cases receive substantial public exposure as well as congressional attention.¹⁶⁵ With the increasing public awareness of federal facility environmental contamination problems, the likelihood of government contractors being targeted grows as the full extent of the problems at DOD and DOE facilities becomes known.

EPA and DOJ both readily acknowledge that the constitutional and statutory limitations applicable to federal agencies do not bar or

funds did not preclude federal district court judges from recovering compensation due them under Adjusting Act).

161. CWA, 33 U.S.C. § 1323(a); RCRA, 42 U.S.C. § 6961(a) (Supp. IV 1992); CAA, 42 U.S.C. § 7418(b) (Supp. IV 1992).

162. See RCRA, 42 U.S.C. § 6961 (1988). Section 6961 provides:

The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such [hazardous waste] requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation

Id.; see also CWA, 33 U.S.C. § 1323(a) (1988) (presidential exemption provision); CAA, 42 U.S.C. § 7418(b) (1988 & Supp. IV 1992) (presidential exemption provision).

163. See Exec. Order No. 12,244, 45 Fed. Reg. 66,443 (1980), reprinted in 22 U.S.C. § 2601 (1988) (exempting Fort Allen from requirements of CAA, Federal Water Pollution Control Act, Solid Waste Disposal Act, and Noise Control Act in order to effectuate immediate relocation and temporary housing of Haitian and Cuban nationals).

164. See HANASH, *supra* note 159, at 25 (stating that government contractors have always been exposed to liability claims by those who cannot get compensation from government because of sovereign immunity); see also Robert T. Lee & Scott E. Slaughter, *Government Contractors and Environmental Litigation*, [Current Developments] *Env't Rep.* (BNA) 2138 (Feb. 10, 1989) (noting EPA's October 1988 announcement that environmental enforcement actions would begin against government contractors).

165. See Lee & Slaughter, *supra* note 164, at 2138 (describing public anger at expenditure of tax dollars on environmentally damaging contracts and noting congressional focus on facilities under congressional oversight).

impede environmental enforcement efforts against government contractors. In congressional testimony, then-Assistant Attorney General F. Henry Habicht II explained that "practical realities require that we recognize these inherent distinctions between private entities and federal agencies."¹⁶⁶ With respect to government contractors, DOJ affirmed that it intended to use the "full panoply of its judicial enforcement tools" against GOCO violators that are operating on federal facilities.¹⁶⁷

Similarly, EPA's *Compliance Strategy* clearly states EPA's intention "to exercise its full authority to bring civil suits and assess civil penalties, as appropriate, against [private] parties."¹⁶⁸ EPA's policy with respect to government contractors was further delineated in a 1988 interagency memorandum, which recommended that EPA exercise all enforcement authorities available under RCRA and CERCLA for non-federal facility actions when a contractor is the primary operator at a federal facility.¹⁶⁹ Moreover, the memorandum recognized the value of proceeding against GOCOs, especially at facilities where contractors perform the bulk of the waste management work.¹⁷⁰ Although EPA specifically addressed GOCO facilities, it is reasonable to assume that EPA would employ the same rationale with respect to enforcement actions involving cleanup contractors and others. Thus, government contractors are in a unique and unenviable position with respect to alleged environmental violations or liabilities at GOCO facilities, or in any other situation where the contractor is performing services under contract with the Federal Government.

Congress recognizes the dilemma facing government contractors with respect to tort and statutory liability, but has been unable to fashion a legislative solution. For example, the proposed Government

166. *Federal Environmental Compliance Hearing*, *supra* note 5, at 188 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice).

167. *Federal Environmental Compliance Hearing*, *supra* note 5, at 216 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice).

168. COMPLIANCE STRATEGY, *supra* note 5, at VI-14. As a result of the Federal Facility Compliance Act of 1992, however, EPA issued a new policy that, with respect to RCRA enforcement, amends the 1988 Compliance Strategy. Enforcement Authorities Implementation, 58 Fed. Reg. 49,044 (1993). Under the Act and new implementing policy, EPA will issue administrative compliance orders to federal facilities for RCRA violations and, in appropriate circumstances, assess civil and administrative penalties and fines. *Id.* at 49,044-45.

169. Memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA, to EPA Regional Administrators 4 (Jan. 25, 1988) (on file with *The American University Law Review*).

170. *Id.*

Contractor Liability Reform Act of 1986¹⁷¹ recognized that government contractors have "encountered a rapid expansion in their tort liability which seriously interferes with the contractors' ability to provide many of the goods and services required by the United States."¹⁷² The proposal further recognized that the problem of liability is most acute with respect to federal programs designed to protect public health and safety in situations in which contractor liability was not based on fault.¹⁷³ Accordingly, the Act would have established a system of government contractor liability based on a negligence standard.¹⁷⁴

While Congress has failed to pass legislation that directly addresses government contractor liability, the Federal Facility Compliance Act¹⁷⁵ may take some of the focus off government contractors for hazardous waste violations. In March 1993, the Washington Department of Ecology assessed \$100,000 in fines and issued a compliance order jointly against DOE and DOE's operating contractor, Westinghouse Hanford Co., for hazardous waste violations at the Hanford Nuclear facility.¹⁷⁶ The fines were imposed under authority from the Federal Facilities Compliance Act, which provides states with "explicit authority to enforce hazardous waste laws at federal facilities."¹⁷⁷ According to the state, the fine and order were issued jointly because DOE is the "owner" of the facility and is ultimately responsible for its activities, and Westinghouse, as the facility operator, is under a duty to operate in compliance with state and federal environmental laws.¹⁷⁸ Prior to the Federal Facilities Compliance Act, the fine and order likely would have been issued only against the government contractor.

III. THE GOVERNMENT CONTRACTOR DEFENSE AND OTHER SHIELDS TO LIABILITY

Government contractors cannot look to sovereign immunity to shield them from environmental liabilities. Although the "govern-

171. S. 2441, 99th Cong., 2d Sess. (1986); *see also* H.R. 2378, 100th Cong., 1st Sess. (1987) (indemnifying government contractors from civil liability in certain circumstances); H.R. 4765, 99th Cong., 2d Sess. (1986) (placing limitations on civil liability of government contractors).

172. S. 2441, *supra* note 171, § 2.

173. S. 2441, *supra* note 171, § 2.

174. S. 2441, *supra* note 171, § 5(a).

175. *See supra* notes 141-53 and accompanying text (discussing provisions of Federal Facility Compliance Act that make agencies liable for environmental violations).

176. *Washington Fines DOE, Westinghouse Under New Federal Compliance Statute*, 23 *Env't Rep.* (BNA) 3019 (Mar. 19, 1993).

177. *Id.*

178. *Id.*

ment contractor defense"¹⁷⁹ may provide some protection in this regard, typically this defense is used successfully only against tort and product liability claims.¹⁸⁰ The viability of the government contractor defense has not been directly addressed in the context of statutory environmental compliance requirements or cleanup liability cases.

Nevertheless, alternative defenses may be available to government contractors facing environmental enforcement litigation. Other potential liability shields include the government-furnished property defense,¹⁸¹ the principal-agent doctrine,¹⁸² the real-party-in-interest defense,¹⁸³ and protections afforded by certain provisions of the Defense Production Act.¹⁸⁴ This Part addresses the most promising defenses and their potential applicability to contractors performing services for the Federal Government.

179. The government contractor defense operates on a theory of shared immunity and may insulate contractors from environmental tort liability by bringing them beneath the Government's umbrella of sovereign immunity. HANASH, *supra* note 159, at 54.

180. See, e.g., *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1452 (9th Cir. 1990) (citing historical use of defense in cases where military personnel sued military contractors in product liability cases); *Bynum v. FMC Corp.*, 770 F.2d 556, 567 (5th Cir. 1985) (providing that basis for government contractor defense in products liability action lies in federal common law); *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 252 (3d Cir. 1982) (holding government contractor defense is available in strict liability cases).

181. This defense is applicable in situations where the contract contains a "government property clause," a provision allowing the Government to retain title to all property it furnishes a contractor. HANASH, *supra* note 157, at 38. This clause may allow the contractor to impute liability to the Government for CERCLA and RCRA costs. *Id.*; see also *infra* notes 212-23 and accompanying text (explaining nature of government-furnished property defense).

182. See *Shaw v. Grumman AeroSpace Corp.*, 778 F.2d 736, 739 (11th Cir. 1985) (allowing contracting agent to share Government's immunity when agency relationship is established). The court in *Shaw* described a three-part analysis used to determine whether the contractor could share the Government's immunity: (1) was the Government immune; (2) was the contractor an agent under the agency doctrine; and (3) did the contractor, as an agent, act within the scope of its duties. *Id.* at 740.

Generally, courts are reluctant to construe the relationship between the Government and the contractor as an agency relationship. HANASH, *supra* note 159, at 37. If the agency relationship is established, however, the defense would not be limited to tort liability actions and could be used in the context of environmental liability. *Id.* at 37-38.

183. See FED. R. CIV. P. 17(a) (requiring that "every action shall be prosecuted in the name of the real party of interest"). To establish that the government agency is the real party in interest, the contractor must show that the agency shares the duty to comply with environmental regulations and that the result of the litigation will affect it. HANASH, *supra* note 159, at 41.

184. 50 U.S.C. app. §§ 2061-2170 (1988 & Supp. IV 1992). The Defense Production Act authorizes the President to order government contractors to perform a government contract before fulfilling its obligations to other customers. *Id.* § 2071. In return, contractors are protected from liability that results from compliance with the Act. *Id.* § 2157. One commentator argues that this protection could be extended to cover environmental liabilities. HANASH, *supra* note 157, at 27-28. In support of this argument, Hanash notes that the language of the Act was broadened in 1952 to include liability protection for "any act or failure to act." *Id.* at 28.

A. Government Contractor Defense

Traditionally, the government contractor defense was successful only in product liability actions against military contractors for injuries resulting from product design defects.¹⁸⁵ In *Boyle v. United Technologies Corp.*,¹⁸⁶ however, the Supreme Court expanded this defense to prohibit actions against government contractors that would affect "uniquely federal interests" and infringe on discretionary functions of federal agencies.¹⁸⁷

The Court, comparing the civil liability of a government contractor to that of a federal official who is protected from liability for actions taken in the course of official duties, fashioned a three-part test for determining whether a government contractor would be immunized from liability:¹⁸⁸ (1) "the United States approved reasonably precise specifications,"¹⁸⁹ (2) "the equipment conformed to those specifications,"¹⁹⁰ and (3) "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."¹⁹¹ The Court also noted that the government contractor defense was applicable not only to procurement contracts, but to other types of contracts as well, including service contracts.¹⁹²

Although the Court's rationale in *Boyle* appears applicable to civil liability claims based on violations of environmental statutes, the

185. See *supra* note 180 (discussing application of government contractor defense in product liability cases).

186. 487 U.S. 500 (1988).

187. *Boyle v. United Technologies Corp.*, 487 U.S. 504, 511-12 (1988). The Court looked to the "discretionary function" exception of the Federal Tort Claims Act (FTCA). *Id.* at 511. Under the FTCA, Congress authorized the recovery of damages against the United States for injuries caused by the negligent or wrongful conduct of government employees, to the extent that a private person would be liable under applicable state law. 28 U.S.C. § 1346(b) (1988). This waiver of sovereign immunity did not apply, however, to situations where a federal agency or government employee exercised or failed to exercise a discretionary function or duty. *Id.* § 2680(a).

188. *Boyle*, 487 U.S. at 512.

189. *Id.*

190. *Id.*

191. *Id.* The Court in *Boyle* relied heavily on *Yearsley v. W.A. Ross Construction Co.*, which held that a government contractor, who was an agent of the Government, could not be held liable for property damage under state law because the authority to carry out the project had been validly conferred. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

192. *Boyle*, 487 U.S. at 506; see also *Carley v. Wheeled Coach*, 991 F.2d 1117, 1125 (3d Cir. 1993) (holding that government contractor defense is available to non-military contractors). The court in *Carley* reasoned that, under *Boyle*, private contractors should not be denied extension of sovereign immunity merely because they are not engaged in military procurement. *Carley*, 991 F.2d at 1124. The court noted, however, that there is a split of authority on this issue. See *id.* at 1119 n.1 (listing cases that have extended defense to non-military contractors and cases that rejected that application).

defense is unlikely to immunize contractors from state or federal environmental enforcement actions where Congress has waived sovereign immunity and has required the Federal Government to comply with environmental statutes and regulations.¹⁹³ Under *Boyle*, the government contractor defense is based on the Federal Government's decisionmaking discretion.¹⁹⁴ Thus, in situations where Congress waives sovereign immunity and compels federal agencies to comply with environmental laws, the agency no longer has the discretion to decide whether or not it should comply.¹⁹⁵ Even in cases where Congress has not waived sovereign immunity, a federal agency's own regulations or an executive order may remove discretionary authority.¹⁹⁶

For example, in *Crawford v. National Lead Co.*,¹⁹⁷ the Federal District Court for the Southern District of Ohio held that the government contractor defense did not immunize DOE and its contractor from tort liability resulting from environmental law violations.¹⁹⁸ The court conceded that the operation of a nuclear weapons plant was a uniquely federal interest.¹⁹⁹ The court determined, however, that if such operations violate applicable environmental laws²⁰⁰ and, as a result, give rise to state-law tort claims, there is no conflict between federal policy and the operation of state law.²⁰¹

Commentators suggest that the government contractor defense may be applicable in circumstances where there is no congressional waiver of sovereign immunity and the federal agency is not bound by its own regulations or an executive order.²⁰² The applicability of the

193. See *supra* notes 60-63 and accompanying text (noting that generally, federal environmental statutes contain waiver of sovereign immunity provisions and require Federal Government to comply with federal, state, and local environmental laws to same extent as any other person).

194. *Boyle*, 487 U.S. at 511.

195. See HANASH, *supra* note 159, at 58 (noting that waiver of sovereign immunity removes compliance with environmental regulations from scope of discretionary decisionmaking).

196. See *Clark v. United States*, 660 F. Supp. 1164, 1176 (W.D. Wash. 1987) (holding that exemption from liability based on discretionary function does not apply when agency fails to comply with its own regulations); see also *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (noting that discretion is absent where federal regulation, statute, or policy prescribes cause of action).

197. 784 F. Supp. 439 (S.D. Ohio 1989).

198. *Crawford v. National Lead Co.*, 784 F. Supp. 439, 447 (S.D. Ohio 1989).

199. *Id.* at 446.

200. The facility violated the Refuse Act of 1899, 33 U.S.C. § 407 (1988), and the Atomic Energy Commission's regulations for maximum permissible releases of radioactive material. *Crawford*, 784 F. Supp. at 447.

201. *Crawford*, 784 F. Supp. at 447.

202. See HANASH, *supra* note 159, at 59 (contending that "*Boyle* demonstrates a judicial recognition that under certain circumstances a contractor may be exposed to liability out of

defense will depend on whether the contractor acted pursuant to explicit agency instructions with respect to an important federal interest and notified the agency of potential environmental violations.²⁰³ In a recent case, *Lamb v. Martin Marietta Energy Systems, Inc.*,²⁰⁴ a federal district court addressed the potential applicability of the government contractor defense to a contractor's alleged violations of environmental laws in the operation of a government-owned nuclear production facility.²⁰⁵ In *Lamb*, the contractor was responsible for the daily operation of the plant, but was required to follow DOE's directions and instructions while DOE maintained close supervision over the contractor's work.²⁰⁶

Although the court in *Lamb* upheld the validity of the government contractor defense in the context of environmental violations,²⁰⁷ it refused to grant the defendants' motion for summary judgment based on the defense.²⁰⁸ According to the court, the defendants failed to show that DOE oversight involved a discretionary policy judgment.²⁰⁹ If DOE officials were merely following a course of action prescribed by a federal statute, regulation, or policy, then the action would not be considered discretionary.²¹⁰ In addition, the defendants in *Lamb* failed to show that contractor personnel faithfully adhered to DOE's orders.²¹¹ Finally, the court questioned whether the contractor promptly notified DOE of the environmental problem.²¹²

The most likely application of the government contractor defense in the environmental area will be in defending common-law tort actions for environmental injuries where harm has occurred as a

necessity, and that the government may be so closely connected to the violation that the contractor's actions should be equated to those of the government"); *Lee & Slaughter, supra* note 164, at 2139 (arguing that defense should be applicable where environmental injury occurs as result of contractor's compliance with discretionary decisions of federal officials); *cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180-81 (1988) (finding that federally owned facility performing federal function is shielded from direct state regulation, even when federal function is carried out by private contractor, unless Congress clearly authorizes such regulation).

203. HANASH, *supra* note 159, at 59.

204. 835 F. Supp. 959 (W.D. Ky. 1993).

205. *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 965-66 (W.D. Ky. 1993).

206. *Id.* at 966.

207. *See id.* (holding that defense may be applied to case at bar).

208. *Id.* at 968 (rejecting summary judgment motion because defendants failed to establish that they followed DOE's orders and that DOE's orders fell within discretionary function of Federal Government).

209. *Id.*

210. *Id.* at 967.

211. *Id.*

212. *Id.* at 968.

result of the contractor's actions that are based on the decisions of federal officials.²¹³

B. Government Property Defense

If environmental liabilities arise from hazardous substances furnished or otherwise owned by the Federal Government, the contractor may establish that the Federal Government is responsible for all or a major portion of those liabilities. An early Court of Claims decision held that the Government is the owner of all materials supplied to a contractor, regardless of their current form, including scrap and waste.²¹⁴ In addition, virtually all government contracts now contain an explicit clause providing that the Government retains title to all government-furnished property.²¹⁵ This is a far reaching clause because the Federal Acquisition Regulations (FAR)²¹⁶ define the term "property" to incorporate "all property, both real and personal,"²¹⁷ including that which "may be incorporated into or attached to a deliverable end item or that may be consumed or expended in performing a contract."²¹⁸

At least two courts, in decisions not involving government contracts, have held a manufacturer that provided raw materials to an independent contractor liable for cleanup costs under CERCLA for improper waste disposal.²¹⁹ For example, in *United States v. Aceto Agricultural*

213. *Lee & Slaughter, supra* note 164, at 2139.

214. *See* National Metal Moulding Co. v. United States, 76 Ct. Cl. 194, 199-201 (1932) (concluding that Government continued to own materials supplied to manufacturer where materials were to be returned to Government, albeit in processed form).

215. *See, e.g.*, 48 C.F.R. § 52.245-2(c) (1993) (setting forth model government contract provision for fixed-price contract); *id.* § 52.245-4(b) (providing model government contract provision for short form contract); *id.* § 52.245-5 (presenting model government contract provision for cost-reimbursement, time and material, and labor contracts). The model contracts also provide that the Government retains title to certain contractor-acquired property. *See, e.g.*, *id.* § 52.245-2(c)(4) (assigning title to Government in model fixed-price contract if contractor is required to purchase material and obtain reimbursement from Government as direct item of cost); *id.* § 52.245-5(e)(3) (assigning title to Government in model cost-reimbursement, time and material, and labor contracts for property purchased by contractor when Government reimburses contractor).

216. 48 C.F.R. ch. 1. The FAR is intended to both codify and make uniform the acquisition policies of the executive branch. W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 1.2, at 4 (1986). The FAR applies to all acquisitions that are not expressly excluded from its scope. *Id.* at 5. It is issued and maintained under the auspices of DOD, the General Services Administration, and NASA. *Id.* at 4-5.

217. 48 C.F.R. § 45.101(a).

218. *Id.* § 45.301. This is the FAR definition of the term "material," which is included within the regulatory definition of "property." *Id.* § 45.101(a).

219. *See* *United States v. Aceto Agric. Chems. Co.*, 872 F.2d 1373, 1379-82 (8th Cir. 1989) (applying 42 U.S.C. § 9607(a) (1982) and RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 427, 427A (1965) to hold that pesticide manufacturer may be liable for cleanup costs arising from contractor activities); *United States v. Velsicol Chem.*, 701 F. Supp. 140, 142-43 (W.D. Tenn. 1987) (applying 42 U.S.C. §§ 9601(29), 9607 (1982) to hold that manufacturer that provided

Chemicals,²²⁰ a manufacturer furnished a pesticide, a hazardous raw material, to an independent contractor for formulation into a final product and packaging.²²¹ While the manufacturer retained ownership of the pesticide throughout the formulation process,²²² the contractor's activities resulted in soil contamination at the facility.²²³ Applying section 107(a) of CERCLA,²²⁴ the U.S. Court of Appeals for the Eighth Circuit held that the manufacturer may be responsible for the cost of cleaning up the contamination because the manufacturer owned the hazardous waste at the time of disposal.²²⁵ Applying the court's rationale in the government contracts context, when the government furnishes or otherwise retains ownership of materials, the contractor may be able to shift all or a portion of its environmental liabilities to the contracting federal agency.

C. Defense Production Act

Under the Defense Production Act (DPA),²²⁶ the President has the authority to issue "rated order" contracts²²⁷ that compel contractors to give priority to the performance of any government contracts or orders deemed necessary or appropriate to promote the national defense.²²⁸ The DPA further provides that contractors acting under this provision will not be held liable "for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act."²²⁹ The few courts that have interpreted this immunity provision concluded that the DPA does not provide the government contractor with an implied-in-fact contractual indemnification.²³⁰

pesticides may be liable for CERCLA cleanup costs).

220. 872 F.2d 1373 (8th Cir. 1989).

221. *United States v. Aceto Agric. Chems. Co.*, 872 F.2d 1373, 1375 (8th Cir. 1989).

222. *Id.* at 1381.

223. *Id.* at 1376.

224. 42 U.S.C. § 9607(a) (1982).

225. *Aceto*, 872 F.2d at 1379-82. The court also relied on the RESTATEMENT (SECOND) OF TORTS § 427A (1965). *Aceto*, 872 F.2d at 1379, 1382. The relevant provision states: "One who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity." RESTATEMENT (SECOND) OF TORTS § 427A (1965).

226. 50 U.S.C. app. §§ 2061-2170 (1988 & Supp. IV 1992).

227. See *United States v. General Dynamics*, CA No. 4-87-312k, 1988 U.S. Dist. LEXIS 17256, at *7 n.8 (N.D. Tex. June 9, 1988) (applying "rated order" label to contracts and orders issued under 50 U.S.C. app. § 2071 (1988)).

228. 50 U.S.C. app. § 2071 (1988 & Supp. IV 1992). Employment contracts are exempted from the scope of § 2071. *Id.*

229. 50 U.S.C. app. § 2157 (1988).

230. See, e.g., *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 28-30 (1992) (holding § 2157 of DPA does not indemnify plaintiff, but only provides government contractor with

The federal district court in *United States v. General Dynamics Corp.*²³¹ addressed the potential applicability of the DPA to violations of environmental laws. In that case, the Government filed suit against General Dynamics, the operator of an Air Force plant, alleging violations of the Clean Air Act.²³² The alleged environmental violations resulted from the use of materials specified in General Dynamics' "rated order" contract with the Air Force.²³³

In response to the government's claims, General Dynamics argued that the DPA immunizes defense contractors with rated order contracts from liability under the CAA.²³⁴ The court disagreed, reasoning that neither the language nor the legislative history of the DPA exempted defense contractors from liability.²³⁵ In addition, the court explained that such an interpretation would allow defense contractors to "violate the Clean Air Act with impunity, as long as [they] were attempting to fulfill and comply with their respective contracts."²³⁶ The court also noted that the CAA requires federal agencies to comply with federal, state, and local air quality laws.²³⁷ Therefore, it would be inconsistent to exempt defense contractors working for federal agencies from CAA requirements.²³⁸

The district court in *In re Agent Orange*,²³⁹ however, suggested that product liability immunity may apply to strict liability claims because the defendant is liable "despite the fact that it may not have been at fault and the liability thus truly 'result[s] . . . from compliance with . . . this Act.'"²⁴⁰ Based on *In re Agent Orange*, government contractors performing work pursuant to rated order contracts may be able

defense). Cf. *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 845 (E.D.N.Y. 1984) (concluding that § 2157 of DPA indemnifies only damages due to contract reprioritization under § 2071, not "the risk of injuries to those using or exposed to the contractor's product").

231. CA No. 4-87-312, 1988 U.S. Dist. LEXIS 17256 (N.D. Tex. June 9, 1988).

232. *United States v. General Dynamics*, CA No. 4-87-312, 1988 U.S. Dist. LEXIS 17256, at *1 (N.D. Tex. June 9, 1988) (applying 42 U.S.C. §§ 7401-7642 (1982)). The suit was filed by DOJ on behalf of EPA. *Id.* The Government sought injunctive relief to halt the use of certain coatings and civil penalties for each day of violation of a five-year period. *Id.*

233. *Id.* at *8 (noting General Dynamics' defense that terms of its contract could not be modified without Air Force permission).

234. *Id.* at *7. General Dynamics also argued that the court could not rule on the suit, which was in effect a suit by the Federal Government (specifically the EPA) against itself (specifically the Air Force). *Id.* at *7-8. The court rejected this defense because the alleged Clean Air Act violations stemmed directly from General Dynamics' corporate decision not to install emission controls. *Id.* at *9.

235. *Id.* at *11-12.

236. *Id.* at *11.

237. *Id.* at *12.

238. *Id.*

239. 597 F. Supp. 740 (E.D.N.Y. 1984).

240. *In Re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 845 (E.D.N.Y. 1984) (quoting 50 U.S.C. app. § 2157 (1982)).

to claim immunity under the DPA from the strict liability provisions of CERCLA or RCRA. According to the court's decision in *General Dynamics*, however, any such immunity would likely exist only if the contractor was complying with applicable environmental laws.

IV. CONTRACTUAL AGREEMENTS AND PROTECTIONS FOR MINIMIZING CONTRACTORS' ENVIRONMENTAL LIABILITIES

One reason for the growth of environmental issues in government contracting is the lack of specific defenses that government contractors can rely on in the event that an environmental enforcement action is brought against them for statutory violations. Although the defenses discussed above may apply in limited situations, most defenses initially were intended to address tort liabilities, not statutory violations. As a result, government contractors seeking to minimize potential environmental liabilities generally must rely on contractual agreements.

Currently, both Congress and the regulated community are addressing the extent to which the Federal Government should reimburse or indemnify government contractors for environmental liabilities.²⁴¹ Ironically, when determining whether to bring an environmental enforcement action, DOJ does not consider the extent of contractor indemnification by and, therefore, reimbursement from the Federal Government for any resulting liabilities.²⁴²

This Part examines the different types of government contracts, addresses issues relating to indemnification of government contractors, and identifies special issues for environmental cleanup contractors.

241. See *Dingell Says DOE Offers Contractors Too Much Liability Protection*, ENVTL. POL'Y ALERT, Sept. 15, 1993, at 5, 5 (noting that "[m]embers of Congress have . . . battled" over indemnification of contractor's environmental cleanup costs); *Industry Calls for Negligence Standard, Limits on Liability for Cleanup Work*, 57 Fed. Cont. Rep. (BNA) 830, 830 (June 1, 1992) (describing position paper endorsed by 13 industry groups and over 40 individual contractors that requests DOD assign environmental liabilities based on negligence rather than strict liability).

242. See *Federal Environmental Compliance Hearings*, *supra* note 5, at 215 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice). Assistant Attorney General Habicht stated:

Let me say frankly that [contractual provisions concerning indemnity] are not of direct concern to my priorities in enforcing environmental laws. . . . When a federal agency is sued, or the contractor of any agency is sued, the contractual and/or indemnity relationship is not a major factor in assessing the environmental case.

Id.

A. Primary Types of Government Contracts

The contractor's ability to recover environmental cleanup costs from the Government will depend primarily on the nature of the contractual arrangement between the contractor and the federal agency. The two primary types of contracts used by federal agencies are the cost-reimbursement contract and the fixed-price contract.²⁴³ Contractors operating federal facilities, GOCOs, typically operate under a cost-reimbursement type contract.²⁴⁴ DOE, however, is increasing its use of fixed-price contracts for environmental restoration projects.²⁴⁵ Thus, the type of contract may significantly affect the allocation of risk between the contractor and the federal agency.

I. Cost-reimbursement contracts

Under a cost-reimbursement contract, the Government compensates the contractor through reimbursement for necessary expenses and some form of additional fee.²⁴⁶ The contract contemplates that

243. RALPH C. NASH, JR. & STEVEN L. SCHOONER, *THE GOVERNMENT CONTRACTS REFERENCE BOOK 405* (1992). Other types of government contracts considered in the FAR include incentive contracts, 48 C.F.R. §§ 16.401-16.405 (1993), indefinite-delivery contracts, *id.* §§ 16.501-16.506, and time-and-materials, labor-hour, and letter contracts, *id.* §§ 16.601-16.603-4.

244. See Merk J. O'Connor, *Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability*, 131 MIL. L. REV. 1, 12 (1991) (explaining that Army GOCO facilities are normally operated under cost-reimbursement contracts because environmental liability is too unpredictable to include in fixed-price contracts).

245. See *HWAC Urges DOE to Contract Directly for Environmental Restoration Projects, Bypassing M & O's*, 60 Fed. Cont. Rep. (BNA) 289, 290 (Sept. 27, 1993) [hereinafter *HWAC Urges DOE*] (positing that DOE employees use fixed-price contracts due to perceived financial savings). Fixed-price contracts typically are used when the government is acquiring commercial products. *Id.*

246. KEYES, *supra* note 216, § 16.11, at 248. The advantages of cost-reimbursement contracts for the contractor include low risk and flexibility in contract performance. JOHN CIBINIC, JR. & RALPH C. NASH, JR., *COST REIMBURSEMENT CONTRACTING* 68 (1981). The element common to all cost-reimbursement contracts is the Government's obligation to reimburse the contractor for certain costs incurred during performance. *Id.* at 382. The particular form of cost-reimbursement may vary. Possibilities include cost (cost reimbursed with no additional fee), cost sharing (portion of costs reimbursed), cost plus incentive fee (additional fee based on degree of compliance with target cost), cost plus award fee (additional fee of fixed amount plus award based on government's evaluation of contract performance), cost plus fixed fee (additional fee based on degree of compliance with target cost), cost plus award fee (additional fee of fixed amount plus award based on government's evaluation of contract performance), and cost plus fixed fee (additional fee set prior to performance). ANDREW K. GALLAGHER, *THE LAW OF FEDERAL NEGOTIATED CONTRACT FORMATION* 107-09 (1981).

According to the FAR, cost-reimbursement contracts are suitable for use only if uncertainties involved in contract performance do not permit an accurate estimate of costs in setting the terms of a fixed-price contract. 48 C.F.R. § 16.301-2 (1993). Additionally, cost-reimbursement contracts can only be used if "[t]he contractor's accounting system is adequate for determining costs applicable to the contract," *id.* § 16.301-3(a), and "[a]ppropriate Government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used." *Id.* § 16.301-3(b). The contract also contains a cost ceiling that the

"the actual cost of the work and the risk thereof are to be assumed by the government; that is, the contractor is to come out whole, regardless of contingencies, in performing the work in accordance with the contract."²⁴⁷ Accordingly, the contractor may seek reimbursement from the Government for environmental compliance and cleanup costs, so long as the costs are "allowable incurred costs."²⁴⁸

The FAR does not specifically address whether environmental cleanup or compliance costs are "allowable," and, therefore reimbursable. The FAR does, however, set forth factors to be considered in determining whether costs are allowable.²⁴⁹ In general, the costs must be reasonable, allocable, and not prohibited by the terms of the contract or by regulation.²⁵⁰ According to the FAR, "a cost is reasonable if in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."²⁵¹ A cost is "allocable" to a government contract if "it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship."²⁵²

Based on these guidelines, environmental *compliance* costs incurred by a contractor in connection with the performance of a government contract probably would be reimbursable. Whether environmental *cleanup* costs would be reimbursable, however, is much less clear. Some government contractors have taken the position that environmental cleanup costs are properly characterized as ordinary and

contractor may not exceed (except at its own risk) without the approval of the federal agency. *Id.* § 16.301-1.

247. 20 Comp. Gen. 632, 635 (1941).

248. 48 C.F.R. § 16.301-1; see KEYES, *supra* note 216, § 16.13, at 250 (noting that unallowable costs must be avoided or recouped through contractor's fee award).

249. 48 C.F.R. § 31.201-2(a).

250. *Id.*

251. *Id.* § 31.201-3(a). The regulation also identifies several factors for determining whether a cost is reasonable, including:

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and federal and state laws and regulations;

(3) The contractor's responsibilities to the government, customers, owners of the business, employees, and the public; and

(4) Any significant deviations from the contractor's established practices.

Id. § 31.201-3(b).

252. *Id.* § 31.201-4. The FAR further provides that a cost is allocable to a government contract if it:

(1) Is incurred specifically for the contract;

(2) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(3) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

Id.

necessary business expenses and therefore reimbursable by the Federal Government.²⁵³

Certain other provisions of the FAR, however, may also affect whether environmental cleanup costs are allowed under cost-reimbursement contracts. Under another section of the FAR, contingency costs that relate to "a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time"²⁵⁴ generally are unallowable.²⁵⁵ The FAR also prohibits reimbursement for fines and penalties resulting from violations of, or noncompliance with, federal, state, local, or foreign laws, except when the fine or penalty was incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the federal agency.²⁵⁶ Further, the regulations provide that normal maintenance and repair costs are allowable if they neither add to the permanent value of the property nor appreciably prolong its intended life.²⁵⁷ Finally, the FAR states that certain manufacturing and production engineering costs are allowable.²⁵⁸

Environmental cleanup costs may fall into several categories: costs for investigation, repair, or replacement of defective waste management units; construction of equipment to perform soil and/or ground water cleanup; operation and maintenance of such equipment; and prevention of future contamination problems. Under the current FAR, determining whether environmental cleanup costs are allowable will depend on (1) how such costs are categorized, (2) whether the costs resulted from noncompliance with provisions of the contractor's contract or environmental laws, and (3) the contractor's ability to

253. See *DOD to Revisit Draft FAR Cost Principle, Will Reassess Government's Fair Share of Costs*, 59 Fed. Cont. Rep. (BNA) 681, 682 (May 24, 1993) [hereinafter *DOD to Revisit Draft FAR Cost Principle*] (referring to GAO survey showing that seven of DOD's largest contractors have requested environmental cleanup cost reimbursements totaling \$133 million). According to Dale Babione, vice president of contracts, Boeing Defense and Space Group, environmental cleanup costs are treated as ordinary and necessary business expenses by Boeing and included by Boeing in its total cost base. *Id.* at 681. Some early cost-reimbursement contracts included provisions that indemnified the contractor for any act "incident" to the contract. KEYES, *supra* note 216, § 16.17, at 252-53. Recent indemnity provisions, however, generally only apply to specific losses and expenses. *Id.*

254. 48 C.F.R. § 31.205-7(a).

255. *Id.* § 31.205-7(b). An exception exists for "minor unsettled factors," the recognition of which will speed settlement of reimbursement disputes. *Id.* The meaning of this exception is unclear. See KEYES, *supra* note 216, § 13.14, at 408 (describing § 7(b) as "a very nebulous test").

256. 48 C.F.R. § 31.205-15(a).

257. *Id.* § 31.205-24.

258. *Id.* § 31.205-25(a). Allowable costs in this category include "[d]eveloping and deploying new or improved materials, systems, processes, methods, equipment, tools and techniques that are or are expected to be used in producing products or services." *Id.* § 31.205-25(a)(1).

negotiate recovery of such costs with the contracting agency—a difficult task, at best. The current lack of clear regulatory guidance has resulted in disparate treatment of environmental cleanup costs by the Federal Government²⁵⁹ and uncertainty among government contractors.²⁶⁰

Because of the uncertainties concerning the potential liability of government contractors for environmental cleanup and other costs, an ad hoc task force of federal agency representatives developed a “draft environmental cost principle” (DECP) for incorporation into the FAR.²⁶¹ If adopted, the DECP would establish two categories of environmental costs: (1) environmental compliance costs, including costs incurred to prevent environmental damage, properly dispose of waste, and comply with federal, state, and local environmental laws,²⁶² and (2) environmental cleanup costs.²⁶³ Environmental compliance costs would be allowable under the DECP unless they resulted from the violation of a law, regulation, or compliance agreement.²⁶⁴ Environmental cleanup costs, however, are presumed unallowable unless the contractor is able to demonstrate that it:

- (1) [w]as performing a [g]overnment contract at the time the conditions requiring correction were created and performance of the contract contributed to the creation of the conditions requiring correction;
- (2) [w]as conducting its business prudently at the time the conditions requiring correction were created, in accordance with then-accepted relevant standard industry practices, and in compliance with all then-existing environmental regulations, permits, and compliance agreements;
- (3) [a]cted promptly to

259. See GAO Says DOD ‘Inconsistent’ in Reimbursing Cleanup Claims, Urges FAR Cost Principle, [1993] Daily Rep. for Executives (BNA) No. 97, at A-29, A-29 (May 21, 1993) (reporting GAO testimony that DOD acts inconsistently in reimbursing contractors’ environmental cleanup costs).

260. Cf. GAO/DOE REPORT, *supra* note 8, at 10 (concluding that DOE approach to indemnification results in inconsistent granting of indemnification provisions and contractor inability to determine scope of indemnification without negotiating with DOE); *Experts Offer Advice to Government Contractors on Avoiding Environmental Criminal Liability*, 59 Fed. Cont. Rep. (BNA) 682, 682 (May 24, 1993) (recounting views of associate general counsel for Martin Marietta that current nature of government contracting increases contractors’ exposure to liability for environmental damage).

261. *Allowable Costs, Environmental Cost Principle Cleared for Issuance as Proposed Rule*, 58 Fed. Cont. Rep. (BNA), at 184, 184 (Aug. 17, 1992). The DECP originally was expected to be issued as a proposed rule late in 1992, but was delayed when President Bush imposed a general moratorium on regulations. *DOD to Revisit Draft FAR Cost Principle*, *supra* note 253, at 681. The issuance was further delayed by the Clinton administration’s decision to review significant regulations carried over from the Bush administration. *Id.*

262. *Draft FAR Environmental Cost Principle*, reprinted in 57 Fed. Cont. Rep. (BNA) 692, 692 (May 4, 1992) (§ 31.205-9(a)(i)).

263. *Id.* (§ 31.205-9(a)(ii)).

264. *Id.* (§ 31.205-9(b)).

minimize the damage and costs associated with correcting it; and (4) [h]as exhausted or is diligently pursuing all available legal and contributory sources . . . to defray the environmental costs.²⁶⁵

The DECP specifically addresses a situation that occurs in many CERCLA cleanups. Under CERCLA's strict and joint and several liability provisions, a government contractor may be required to clean up environmental conditions that it did not cause or contribute to merely because the contractor is the facility's current operator.²⁶⁶

The DECP provides that such costs are unallowable, and therefore not reimbursable, unless the current contractor demonstrates that: (1) the previous owner, user, or other lawful occupant's actions satisfy the first three elements described in the preceding paragraph; and (2) the government contractor complied with the third and fourth elements described in the preceding paragraph during the period that it has owned, used, or occupied the property.²⁶⁷

The DECP has been widely criticized by government contractors.²⁶⁸ At a recent congressional hearing, representatives of Aerojet General Corporation, Lockheed Corporation, and the Boeing Company contended that the DECP was unnecessary because current FAR provisions are adequate to deal with the allowability of environmental costs.²⁶⁹ In addition, government contractors believe that the DECP will have an "immediate adverse financial impact on some contractors" because of financial statement changes necessary to account for cleanup costs that are presumed to be unallowable under the DECP.²⁷⁰

The Public Contract Law Section of the American Bar Association (ABA) proposed significant revisions to the draft environmental cost

265. *Id.* (§ 31.205.9(c)).

266. See 42 U.S.C. § 9607(a)(1) (1988) (applying CERCLA liability to "owner and operator of a . . . facility").

267. *Draft FAR Environmental Cost Principle*, *supra* note 262, at 692 (§ 31.205.9(d)).

268. See *Federal Contract Regulation: Changes in Contracting, Audit Practices Likely*, [Special Report] Daily Rep. for Executives (BNA) No. 28, at S-15, S-16 (Feb. 12, 1993) (noting contracting industry's vehement objection to DECP presumption that cleanup costs are unallowable).

269. *Defense Department Reimbursement of Contractors' Environmental Cleanup Costs: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 103d Cong., 1st Sess. 141 (1993) [hereinafter *Defense Department Reimbursement Hearings*] (testimony of Dale R. Babione, vice president of contracts, Defense and Space Group, Boeing Co.); *id.* at 112 (testimony of Ronald R. Finkbiner, vice president of contracts and pricing, Lockheed Corp.); *id.* at 49 (testimony of Suzanne L. Phinney, vice president, Environmental, Aerojet General Corp.).

270. See *Allowable Costs, Environmental Cost Principle Cleared for Issuance as Proposed Rule*, *supra* note 261, at 184.

principle.²⁷¹ The ABA believes that treating environmental cleanup costs as presumptively "unallowable" is inconsistent with the existing FAR framework for determining cost allowability.²⁷² The ABA proposes that, absent an administrative or judicial showing that a contractor violated a fault-based environmental law, remediation costs should be characterized as ordinary and necessary business expenses in pricing government contracts.²⁷³ The ABA also recommends that the DECP be revised to expressly recognize that liability under CERCLA does not constitute a "violation" of law for cost allowability purposes.²⁷⁴

The potential impact of the DECP on government contractors is significant. According to a recent GAO survey, future environmental cleanup costs for fifteen of DOD's largest contractors are estimated to total \$2.1 billion.²⁷⁵ At a congressional hearing, the DOD Deputy Under Secretary for Environmental Security acknowledged that, as a policy matter, DOD must determine the Government's "fair share" of cleanup costs in cases where there is no determination of fault.²⁷⁶ Accordingly, DOD has initiated an audit of environmental costs at five government contractor sites to determine the allowability of environmental costs and develop guidance and procedures regarding the allowability of such costs.²⁷⁷ The DECP probably will not be issued as a proposed rule until the audit is completed.²⁷⁸ While no formal

271. See Richard Hopf, *ABA Section Members Meet to Discuss Environmental Cost Principle*, 58 Fed. Cont. Rep. (BNA), at 12 (Oct. 5, 1992).

272. *Id.*

273. *Id.*

274. *Id.* But see *Federal Contract Regulation: Changes in Contracting, Audit Practices Likely*, *supra* note 268, at S-16 (arguing that hardline environmental stance of Vice President Gore makes concessions favorable to ABA position unlikely).

275. *Defense Department Reimbursement Hearings*, *supra* note 269, at 6 (testimony of Donna M. Heivilin, Director, Defense Management and NASA Issues, General Accounting Office).

276. *Defense Department Reimbursement Hearings*, *supra* note 269, at 29 (testimony of Sherri Wasserman Goodman, Esq., Deputy Under Secretary of Defense for Environmental Security, Department of Defense).

277. See DCAA, *DCMC Announce Pilot Audit Program to Develop Guidance on Allowable Costs*, 59 Fed. Cont. Rep. (BNA) 707, 707-08 (May 31, 1993) [hereinafter *Pilot Program Announcement*]. The audit is being conducted jointly by the Defense Logistics Agency's Contract Management Command (DCMC) and the Defense Contract Audit Agency (DCAA). *Id.* The DCMC and DCAA recently issued joint guidance on accounting for environmental remediation costs. See Memorandum from Robert P. Scott & Michael J. Thibault to Environmental Pilot Project Teams (Apr. 13, 1994) (on file with *The American University Law Review*). The guidance document addresses questions raised by the environmental pilot teams. The guidance does not have the force and effect of law; it does, however, indicate the position government auditors will take. Among the topics addressed in the document are (1) capitalization of environmental cleanup costs, (2) treatment of environmental cleanup costs incurred on property held for sale, and (3) allocation of costs of past environmental contamination. *Id.*

278. *Pilot Program Announcement*, *supra* note 277, at 708 (reporting DOD decision to "revisit" DECP in light of DOD's desire to pay "fair share" of environmental costs).

completion date has been established, the audit is considered a "high priority" within DOD and will include a comprehensive final report.²⁷⁹ The audit is likely to be reviewed and used by DOD and other federal agencies as a guide for addressing the allowability of environmental costs under cost-reimbursement contracts.

2. *Fixed-price contracts*

Fixed-price contracts provide for a predetermined firm contract price.²⁸⁰ A fixed-price contract's price is determined by the contractor's cost experience in performing the contract, and generally is not subject to any adjustment.²⁸¹ As a result, such contracts subject the contractor to maximum risk and full responsibility for all costs and resulting profit or loss.

According to the FAR, fixed-price contracts are "suitable for acquiring commercial products or commercial-type products . . . or for acquiring supplies or services on the basis of reasonably definite functional or detailed specifications."²⁸² The regulations suggest situations where this type of contract may be appropriate, including situations where performance uncertainties can be identified and reasonably quantified.²⁸³ DOE is reportedly increasing its use of fixed-price contracts for environmental restoration projects.²⁸⁴ In negotiating fixed-price contracts, government contractors will likely increase their contract prices commensurate with the amount of environmental risk they perceive.

The government contractor's ability to recover for increased environmental compliance costs or liabilities not originally accounted for is limited to situations where the Government agrees to modify the contract.²⁸⁵ For example, in *Warner Electric, Inc.*,²⁸⁶ the Veterans' Administration Board of Contract Appeals held that a contractor was not entitled to recover additional chemical disposal costs incurred by the contractor as a result of new EPA regulations

279. *Id.* at 707.

280. 48 C.F.R. § 16.201 (1993). The regulations permit price adjustment in fixed-price contracts when there are unstable market or labor conditions and when contingencies arise that are beyond the contractor's control. *Id.* § 16.203-2.

281. *Id.* § 16.202-1.

282. *Id.* § 16.202-2.

283. *See id.* § 16.202-2(d) (suggesting that firm fixed-price contracts should be used when there is adequate price competition, reasonable comparisons with prior activity, or when there is information to yield accurate costs of performance).

284. *See HWAC Urges DOE*, *supra* note 245, at 290.

285. *See* 48 C.F.R. § 52.236-1(b) (stating that contracting officer will determine if modification to contract will be made).

286. 85-2 B.C.A. (CCH) ¶ 18,131 (May 10, 1985).

promulgated six days after the contracting officer issued an invitation for bids.²⁸⁷

Fixed-price contracts often contain provisions that impose on the government contractor the burden of identifying potential environmental issues associated with a project.²⁸⁸ Pursuant to the FAR, a "site investigation and conditions affecting the work" clause requires certain fixed-price construction contracts and fixed-price demolition or removal of improvements contracts.²⁸⁹ Additionally, these contracts must contain a "differing site conditions" provision.²⁹⁰ This clause allows the federal agency to make an equitable adjustment in the contract price, but only in limited circumstances.²⁹¹ When requesting an adjustment pursuant to this provision, the contractor must give the federal agency prompt notice of the condition before the condition is disturbed.²⁹²

DOE's increasing use of fixed-price contracts for environmental restoration projects is problematic because it imposes significant environmental risks on government contractors. It is often impossible, even after conducting a thorough investigation, to identify the potential costs and liabilities associated with contamination.²⁹³ Often, the extent of an environmental problem is not fully known until remediation activities have commenced.²⁹⁴ Consequently, if the contractor is conducting environmental cleanup activities under

287. See Warner Elec. Inc., 85-2 B.C.A. (CCH) ¶ 18,131, at 90-997 to -99 (May 10, 1985) (ruling that Government passed EPA regulations as sovereign, and was therefore not liable for results in capacity as contracting party).

288. See 48 C.F.R. §§ 52.236-2(a), 52.236-3(a) (1993) (requiring contractor to investigate all physical conditions at worksite and report to contracting officer any subsurface or unknown physical conditions that will affect, and be effected by, work).

289. *Id.* § 36.503; see also *id.* § 52.236-3 (providing model "site investigation and conditions affecting the work" provision). The model contract language provides:

[The contractor] acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the . . . conditions which can affect the work or its cost, including but not limited to . . . (1) conditions bearing upon transportation, disposal, handling, and storage of materials.

Id.

290. *Id.* § 36.502.

291. *Id.* § 52.236-2(a). Equitable adjustments can only be made for:

(1) subsurface or latent physical conditions at the site which differ materially from those indicated in [the] contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

Id.

292. *Id.* § 52.236-2(b).

293. See *HWAC Urges DOE*, *supra* note 245, at 290 (noting that government contractors often face "substantial technical uncertainties") (citing Marilyn Meigs, ICF Kaisers Engineers Co.).

294. See *HWAC Urges DOE*, *supra* note 245, at 290 (pointing out that relevant site conditions may be subsurface and not clearly apparent).

a fixed-price contract that contains the model contract provisions, the contractor will be unable to recover any increased cleanup costs. The contractor may, however, recover some costs if it can show, to the satisfaction of the federal contracting officer, that subsurface conditions materially differed from identified conditions, or that the nature and extent of contamination actually encountered was somehow unusual in nature and previously unknown.²⁹⁵

B. *Indemnification for Environmental Liabilities*

One of the most controversial issues currently confronting government contractors is the extent to which contractors should be indemnified for environmental liabilities. Members of Congress and the Clinton administration believe that current federal agency indemnification policies afford government contractors too much liability protection.²⁹⁶ Contractors, however, are calling for additional limits on liability, particularly in the context of environmental cleanups.²⁹⁷

Federal agencies can use several different statutory and non-statutory means of indemnifying government contractors against environmental liabilities:²⁹⁸ (1) negotiated provisions in cost-reimbursement contracts requiring the agency to fully reimburse contractors for environmental compliance and/or cleanup liabilities;²⁹⁹ (2) "provisions that make profit-making contractors potentially responsible for some costs, such as those resulting from negligence

295. See 48 C.F.R. § 52.236-2(a)-(c) (1993) (requiring contractor to give written notice of subsurface or unknown physical conditions that differ from conditions normally encountered in order to receive equitable adjustment in contract).

296. Representative John D. Dingell, Chairman of the House Energy and Commerce Committee, recently accused the DOE of giving cleanup contractors too much liability protection. *Dingell Says DOE Offers Contractors Too Much Liability Protection*, *supra* note 241, at 5. Similarly, DOD Deputy Under Secretary for Environmental Security Sherri Wasserman Goodman recently informed a House Government Operations subcommittee that the Clinton administration "does not intend to reimburse cleanup costs incurred by contractors that violated specific environmental laws or regulations, nor does it intend to reimburse unreasonable amounts of such costs." *Defense Department Reimbursement Hearings*, *supra* note 269, at 29 (statement of Sherri Wasserman Goodman, Esq., Deputy Under Secretary of Defense for Environmental Security, Department of Defense).

297. Thirteen industry groups and more than 40 government contractors have endorsed a position paper calling on DOD to indemnify contractors against strict, joint and several liability under federal and state laws, and to assume responsibility for claims above a certain percentage of the contract price. *Industry Calls for Negligence Standard, Limits on Liability for Cleanup Work*, 57 Fed. Cont. Rep. (BNA) 830, 830-31 (June 1, 1992).

298. See, e.g., GAO/DOE REPORT, *supra* note 8, at 1 (discussing DOE's approaches to indemnifying contractors for cleanup costs).

299. GAO/DOE REPORT, *supra* note 8, at 1. By negotiating a specific provision addressing environmental cost reimbursement, the contractor is able to avoid issues relating to whether such costs are allowable under the FAR guidelines. See *supra* notes 244-79 and accompanying text (discussing cost-reimbursement contracts).

or willful misconduct by a contractor's employees";³⁰⁰ (3) "special indemnification clauses written into individual contracts" limiting a contractor's liability for environmental costs;³⁰¹ (4) "protection from unusually hazardous risks under Public Law 85-504";³⁰² and (5) "protection from liability from nuclear accidents under the Price-Anderson Act."³⁰³

Recent studies indicate that federal agencies use inconsistent approaches for indemnifying government contractors.³⁰⁴ Some contractors have received only one form of indemnification, while others have received potentially more favorable terms.³⁰⁵ Thus, government contractors should be aware of the available indemnification approaches and be prepared to negotiate such provisions during contract talks. The current emphasis by federal agencies on environmental costs, however, undoubtedly will make it increasingly difficult for contractors to negotiate the type of favorable indemnification and reimbursement terms contained in prior government contracts.³⁰⁶

The cost reimbursement provision negotiated by AT&T Technologies in its nonprofit contract for operating Sandia National Laboratories for DOE illustrates the types of protections available to government contractors.³⁰⁷ The contract states, in part:

300. GAO/DOE REPORT, *supra* note 8, at 1.

301. GAO/DOE REPORT, *supra* note 8, at 1.

302. GAO/DOE REPORT, *supra* note 8, at 1; *see also* National Defense Contracts Act, Pub. L. No. 85-804, 72 Stat. 972 (1958) (codified at 50 U.S.C. § 1431 (Supp. IV 1992)) (allowing indemnification under certain defense-related contracts).

303. GAO/DOE REPORT, *supra* note 8, at 1; *see also* Price-Anderson Act, 42 U.S.C. § 2011 (1988) (stating U.S. policy regarding development and control of atomic energy).

304. *See* GAO/DOE REPORT, *supra* note 8, at 1-2 ("DOE has not performed a comprehensive analysis to determine how to indemnify its cleanup contractors. Rather, DOE has selected indemnification approaches on an individual basis, often as part of contract negotiations."); *see also* Defense Department Reimbursement Hearings, *supra* note 269, at 11 (statement of Donna M. Heivilin, Director, Defense Management and NASA Issues, National Security and International Affairs Division, General Accounting Office) (stating that DOD has been inconsistent in its decisions on "whether and how much to reimburse contractors" for their environmental cleanup efforts).

305. GAO/DOE REPORT, *supra* note 8, at 2; *see* DOE Contract Management: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 103d Cong., 1st Sess. 87 (1993) [hereinafter *DOE Hearings*] (statement of Rep. Dingell) ("DOE's indemnification policies have resulted in providing blank checks to DOE Contractors . . . to defend themselves against paying damages for injuries caused by the contractor's own poor environmental practices.").

306. *See* DOE Hearings, *supra* note 305, at 93-94 (statement of Hazel O'Leary, Secretary of Energy). Secretary O'Leary stated:

With respect to civil penalties, it's my belief and sense that it makes no sense for the American taxpayer to be reimbursing contractors for civil penalties. That has got to stop, and it has got to stop, first of all, through directive from this Secretary. We have taken that matter under hand and I will be, today, signing such a directive.

Id.

307. *See* GAO/DOE REPORT, *supra* note 8, at 4 (discussing complete indemnification of contracts involved with nuclear weapons production).

[I]t is agreed that no cost or expense . . . shall be denied payment by the DOE as outside the scope of this Contract, unless the Contracting Officer shall establish that such cost or expense resulted from willful misconduct or bad faith on the part of some corporate officer having complete or substantially complete charge of the Sandia National Laboratories.³⁰⁸

This clause is broad enough to encompass environmental costs and, notably, shifts the burden of proving that an expense is not reimbursable from the contractor to the federal agency. For profitmaking contractors, DOE has implemented an "accountability" rule, which provides that contractors are liable for certain avoidable costs, such as costs resulting from negligence or willful misconduct by their employees.³⁰⁹ The contractor's liability for avoidable costs is subject to a cap, and the Government is responsible for costs over the cap amount.³¹⁰

Similarly, contractors may be able to negotiate special provisions that modify standard federal agency contract clauses. For example, a provision in General Electric Company's nonprofit contract at DOE's Knolls Laboratory states that "[a]ll costs incurred by the Contractor . . . with respect to any and all liabilities, damages, claims, demands, fines, sanctions, or penalties arising out of environmental . . . activities" will be allowable costs.³¹¹

As noted, the Anti-Deficiency Act³¹² is one potential limitation on a federal agency's ability to provide contractors with liability protection. Because indemnification clauses commit the agency to pay an indefinite sum of money at a future date if certain events occur, there is no way to determine whether there are sufficient funds in the agency's appropriation to cover the liability when it arises. Although the Comptroller General has ruled that open-ended indemnification provisions contravene the Anti-Deficiency Act,³¹³ not all indemnity contracts are proscribed by the Comptroller General's opinion. An agency may grant an indemnification that is authorized by statute,³¹⁴

308. GAO/DOE REPORT, *supra* note 8, at 4.

309. 48 C.F.R. § 970.5204-56 (1993).

310. *Id.* § 970.5204-55.

311. GAO/DOE REPORT, *supra* note 8, at 5.

312. 31 U.S.C. §§ 1341, 1349-1351, 1511-1519 (1988 & Supp. V 1993); *see also supra* notes 154-57 and accompanying text (discussing constraints placed on agencies contracting for environmental cleanup by Anti-Deficiency Act).

313. *See* B-201072, 83-1 Comp. Gen. Procurement Dec. (BNA) ¶ 501, at 9-10 (May 12, 1983) (reconsidering and upholding earlier decision invalidating indemnification clause used in cost-reimbursement contracts).

314. *See, e.g.*, Exec. Order No. 10,789, 3 C.F.R. 426 (1954-1958), *reprinted as amended in* 50 U.S.C. § 1431 (1988) (allowing Government to provide for unlimited indemnification in contracts involving nuclear or unusually hazardous activity).

or where the maximum amount of liability is fixed or readily ascertainable, and where the agency had sufficient funds in its appropriation that could be obligated or administratively reserved to cover the maximum liability.³¹⁵

Some statutes also authorize federal agencies to provide indemnification to government contractors under specific circumstances. For example, under the Price-Anderson Amendments Act of 1988,³¹⁶ the Government provides indemnification protection from nuclear incidents or nuclear waste activities to all DOE contractors that bear the risk of a nuclear incident.³¹⁷ Federal agencies are also authorized to provide extraordinary contract relief under the National Defense Contracts Act³¹⁸ if a contractor's activities are necessary to facilitate the national defense.³¹⁹ This authority, in conjunction with an Executive Order,³²⁰ allows federal agencies to enter into contracts containing provisions that indemnify contractors against unusually hazardous or nuclear risks.³²¹ Federal agencies, however, have broad discretion in deciding whether to offer this type of indemnification.³²²

C. *Special Protection for Response Action Contractors*

Under CERCLA, a "response action contractor" responsible for environmental cleanup at a site listed on the Federal Superfund list is not liable to any person for "injuries, costs, damages, expenses, or other liability . . . which results from such release or threatened release."³²³ This liability protection is limited, however, because it does not apply to a release caused by conduct of the response action contractor that is "negligent, grossly negligent, or which constitutes intentional misconduct."³²⁴

315. B-201072, 83-1 Comp. Gen. Procurement Dec. (BNA) ¶ 501, at 7 (May 12, 1993); *see also* 48 Comp. Gen. (GAO) 361, 364 (Nov. 26, 1968) (holding that selective service may indemnify carriers for damage to vehicles in absence of statute because damage will be limited to value of vehicles); 42 Comp. Gen. (GAO) 708, 712 (June 19, 1963) (allowing FAA to include liability clause in contracts because maximum liability is measurable), *overruled in part by* 54 Comp. Gen. 824, 826 (1975).

316. 42 U.S.C. § 2011 (1988).

317. *Id.* § 2210.

318. 50 U.S.C. § 1431.

319. *Id.*

320. Exec. Order No. 10,789, 3 C.F.R. 426 (1954-1958), *reprinted as amended in* 50 U.S.C. § 1431.

321. *Id.* § 1A(a), 50 U.S.C. § 1431.

322. Currently, only one of 27 management and operations contracts offers the contractor protection available under this Act, and another three provide that DOE will seek such indemnification if it becomes necessary. GAO/DOE REPORT, *supra* note 8, at 16.

323. 42 U.S.C. § 9619(a)(1) (1988).

324. *Id.* § 9619(a)(2).

In addition, CERCLA authorizes EPA and other federal agencies to indemnify cleanup contractors against liabilities arising out of the contractor's negligence in performing its cleanup activities, provided that: (1) the liability covered by the indemnification agreement exceeds or is not covered by commercially available insurance at a fair and reasonable price, (2) the contractor made diligent efforts to obtain insurance, and (3) such diligent efforts are undertaken with respect to each facility at which work is performed in a multi facility contract.³²⁵ The indemnification agreement also must include deductibles and limits on the amount of indemnification.³²⁶

In January 1993, EPA issued final guidelines for implementing this CERCLA provision that significantly limited the potential effect of the indemnification.³²⁷ The guidelines suggest that EPA intends to offer indemnification only if it does not receive a sufficient number of qualified bids or proposals, and the lack of response can be linked to the absence of indemnification.³²⁸ The guidelines also establish a sliding scale of limits and deductibles and set a ten-year time limit for claims.³²⁹

This indemnification policy has not yet been widely used. For example, GAO reported that DOE has sixteen sites on the Federal Superfund list, and that twelve contractors have cleanup responsibility at these sixteen sites.³³⁰ DOE has not used CERCLA to indemnify any of these contractors.³³¹ Nevertheless, this provision is likely to acquire added significance as DOD commences environmental cleanups at the many military bases slated for closure.

V. CONCLUSION:

MINIMIZING AND MANAGING ENVIRONMENTAL RISKS

The risk of exposure to cleanup and other environmental liabilities is currently a growing concern among government contractors. Although government contractors always have been subject to environmental laws, environmental issues have gained increased prominence in the context of government contracting because of the significant potential liabilities associated with the operation, closure, and cleanup of the nation's military installations and nuclear weapons

325. *Id.* § 9619(c)(4).

326. *Id.* § 9619(c)(5)(B).

327. Superfund Response Action Contractor Indemnification, 58 Fed. Reg. 5972 (1993).

328. *Id.* at 5974.

329. *Id.* at 5974-75.

330. GAO/DOE REPORT, *supra* note 8, at 9.

331. GAO/DOE REPORT, *supra* note 8, at 9.

facilities. Moreover, EPA increasingly is targeting contractors to pay for cleanup costs, and the prevailing view in Congress and the Administration is that contractors have received too much liability protection.³³² Thus, contractors are now less likely to receive favorable indemnification and reimbursement concessions when negotiating contracts with federal agencies. Moreover, there are no specific defenses available to contractors for violations of environmental laws, even if the actions that resulted in such violations were conducted in accordance with the contractor's government contract.³³³

Nonetheless, contractors can take some affirmative steps to minimize their environmental risks when conducting projects under contract with the Federal Government. First, contractors should make themselves aware of the potential environmental compliance and cleanup issues associated with particular projects. At a minimum, the contractor should identify environmental compliance problems at a particular facility and develop both technical and legal strategies for addressing the problems.

Second, contractors should attempt to enter into a cost-reimbursement type of contract, rather than a fixed-price contract, unless environmental liabilities can be quantified with a high degree of certainty and taken into consideration in developing the overall contract price.

Third, contractors should be familiar with the various approaches available for indemnification and reimbursement. The inconsistent approaches currently used by federal agencies may assist contractors in receiving more favorable liability protections, despite the trend toward more restrictive protections.

Fourth, significant law in this area currently is being developed and contractors should make every effort to involve themselves in this effort, either directly or indirectly, through an industry or trade association. For example, federal agencies are now evaluating various environmental cost principles that, if adopted in the current draft format, threaten to affect significantly the contractor's business and the costs associated with working on government projects.³³⁴ By

332. See *supra* note 296 and accompanying text.

333. See *supra* notes 177-236 and accompanying text (reviewing merits of certain defenses used by government contractors to avoid liability for environmental costs).

334. Under the draft environmental cost principle proposed for the Federal Acquisition Regulations, environmental cleanup costs are presumed to be unallowable. *Draft FAR Environmental Cost Principle*, *supra* note 262, at 692 (§ 31.205-9(c)). The contractor has the burden of establishing that such costs are allowable. *Id.*

getting involved now, contractors can influence the Government's handling of environmental costs.

Finally, contractors who currently operate or previously operated federal facilities that are being cleaned up under CERCLA should become involved in negotiation and implementation of the Federal Facilities Agreement (FFA) under section 120 of CERCLA.³³⁵ Because of CERCLA's strict, joint and several liability provisions,³³⁶ contractors that currently operate or previously operated at such facilities have significant potential liability for response and cleanup costs. By actively participating in the FFA process, contractors can ensure that response costs are adequately controlled, that the cleanup is proceeding in a timely manner, and that their exposure to adverse publicity is minimized. Until environmental law is fully integrated with government contracting law, the best that contractors can do is make affirmative efforts to minimize and manage the potential environmental risks associated with government projects.

335. 42 U.S.C. § 9620 (1988 & Supp. IV 1992).

336. *See supra* notes 43-53 and accompanying text (detailing liability under CERCLA).

