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THE RECOVERY OF ENVIRONMENTAL COSTS BY GOVERNMENT CONTRACTORS

By Michael K. Murphy and Stacie B. Fletcher

For corporations historically involved in heavy manufacturing or industrial enterprises, environmental liabilities have become an accepted cost of doing business. Government contractors and their customers are no exception. Indeed, due to the close working relationship between contractors and their contracting agencies, the United States and its contractors often share environmental liability at the same facilities.

As costs are incurred to clean up contamination from historical operations, Government contractors have several avenues to recover these environmental costs under federal procurement contracts for work performed and under federal laws. Under the current Federal Acquisition Regulation cost principles, the majority of environmental costs are allowable as long as they are reasonable and can be properly allocated. Current and former Government contractors also have successfully recovered environmental costs under various indemnification and cost- reimbursement clauses in the contracts under which the contamination occurred—contracts dating from as far back as World War II. Lastly, like any person, Government contractors are able to use the Comprehensive

IN BRIEF

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Environmental Response, Compensation, and Liability Act (CERCLA)[1] to recover these costs from other potentially responsible parties (PRPs), including the United States. But unlike other persons, Government contractors face new defenses under CERCLA based upon their prior recovery of costs under Government contracts.

This BRIEFING PAPER covers the various regulations and laws governing how a Government contractor can successfully recover environmental costs under both Government contracts and CERCLA and how these various mechanisms can interact. The PAPER first sets forth the current rules governing the allowability of environmental costs under cost-reimbursement and fixed-price contracts. Second, the PAPER looks at recent successes by contractors in recovering environmental costs under valid indemnification clauses. And lastly, the PAPER discusses the use of CERCLA to recover environmental costs and certain special considerations for Government contractors in pursuing these costs.

Recovering Environmental Costs Under Current Contracts

No specific FAR cost principle governs the allowability of environmental costs. Rather, the allowability of these costs is determined by advance agreements with contracting agencies and under the general "catchall" allowability cost principle, which provides that costs are allowable if they are reasonable, allocable to the contract, accounted for in accordance with applicable Cost Accounting Standards or generally accepted accounting principles, and not made specifically unallowable by regulation or contract terms.[2] This section of the PAPER provides a brief overview of the types of costs properly characterized as "environmental costs," past attempts to create a special cost principle for environmental costs, and current treatment of these costs under general cost principles.

■ Definition Of Environmental Costs

Before discussing the allowability of environmental costs, it is important to define the term "environmental costs." For the purposes of this PAPER, an "environmental cost" is a legal obligation to make a financial expenditure due to the past release or threatened release of a particular hazardous substance due to the past or ongoing manufacture, use, or handling of the substance in question. Laws such as CERCLA and the Resource Conservation and Recovery Act (RCRA)[3] can impose liability without regard to fault or negligence on the part of the contractor. Environmental costs incurred by a contractor to prevent the contamination from occurring, including altering its own practices or adopting new practices to avoid or reduce adverse environmental impact, are also considered environmental costs.

These costs differ from environmental costs associated with fault-based liability to third parties or regulatory agencies.[4] Examples of fault-based liabilities to third parties include health impairment, property damage, or property devaluation for residents or property owners near a contaminated site—costs typically at issue in third-party claims.[5] These costs are therefore not considered "environmental costs" for the purposes of allowability under the general cost principle. Instead, the allowability of legal costs incurred in defending against environmental third-party

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claims, such as a toxic tort action, is determined under a separate FAR cost principle governing legal costs.[6]

■ Past Attempts To Regulate Allowability

Although there is currently no FAR cost principle for environmental expenses, contracting agencies and the FAR councils have tried in the past to formulate an environmental cost principle. Development of a cost principle to guide Contracting Officers on reimbursement of environmental cleanup costs started in 1987 at the request of the Air Force.[7] Initially, the Air Force proposed an environmental cost principle making compliance costs allowable and cleanup costs unallowable except for Government-owned, contractor-operated facilities.[8] This proposal eventually was withdrawn in response to opposition from the contracting community.[9]

In December 1991, a joint Department of Defense and civilian agency ad hoc group proposed a revised draft of the 1987 principle, proposed FAR 31.205-9. Like its predecessor, this revised proposed cost principle addressed both preventive and cleanup costs. It generally allowed expenses to prevent pollution but provided that remediation costs would be treated as presumptively unallowable unless the contractor demonstrated that it (a) performed work under a Government contract that contributed to the pollution, (b) acted prudently, complied with then-existing environmental laws and regulations, and followed generally accepted industry practices, (c) acted promptly to minimize the damage and costs, and (d) exhausted or diligently pursued other funding sources such as insurance and other responsible parties under environmental laws.[10] Additionally, the draft principle provided that costs which resulted from liability to a third party were unallowable.[11]

Like its predecessor, the revised environmental cost principle faced substantial opposition from the Government contracts bar. The American Bar Association's Section of Public Contract Law, for example, argued that the presumption against allowability was inconsistent with the FAR's general presumption to the contrary and CERCLA's strict liability scheme.[12] Other critics cited the proposed environmental cost principle's heavy evidentiary burden with respect to demonstrating a causal nexus between contract performance and the contamination as well as historical compliance with environmental laws and industry practice and argued that the proposed cost principle would require factual showings beyond those required by environmental laws (particularly CERCLA).[13] Additionally, commentators noted that the proposed cost principle's requirement of prompt action to minimize damage and costs was inconsistent with CERCLA to the extent that the statute required lengthy investigations before selecting a final remedy and would potentially frustrate negotiations between regulators and responsible parties as to the most cost effective and efficient cleanup strategy.[14]

Ultimately, the draft environmental cost principle failed. Although the proposed cost principle received approval from the Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council and was sent to the FAR Secretariat for final publication in the spring of 1992, the draft was never released for publication due to an intervening moratorium on new regulations imposed by President George H.W. Bush in 1992.[15]

■ Current Method For Determining Allowability

Absent a cost principle specifically governing these costs, environmental cleanup costs are governed by advance agreements with contracting agencies or the FAR's "catchall" allowability cost principle, which, as noted above, provides that costs are allowable if the costs are (a) reasonable, (b) allocable, (c) in accordance with applicable Cost Accounting Standards or generally accepted accounting principles, and (d) not made specifically unallowable by regulation or contract terms.[16] While each of these requirements governing allowability is defined by regulation, only two of the requirements—reasonableness and allocability—are generally relevant with respect to environmental costs.[17]

(1) *Reasonableness*—The FAR provides that a cost is deemed 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."[18] Whether or not a cost is reasonable is largely a factual determination and might depend on a variety of factors, including whether the cost is typically recognized as ordinary and necessary for the contractor's performance under the contract, whether it comports with federal and state law, and whether it is consistent with the contractor's responsibilities to the Government and the public at large.[19]

In determining the reasonableness of environmental costs, the Defense Contract Audit Agency *Contract Audit Manual* explains that "the methods employed and the magnitude of the costs incurred must be consistent with the actions expected of an ordinary, reasonable, prudent businessperson performing non-government contracts in a competitive marketplace."[20] This standard requires the contractor to take steps that a prudent businessperson would pursue in preventing or reducing contamination.[21]

In implementing this standard, contract auditors and professionals employ a "totality of the circumstances" test that generally allows cleanup costs if the contamination occurred despite the exercise of due care and compliance with law.[22] Accordingly, "[i]f environmental clean-up costs are the result of contractor violation of laws, regulations, orders or permits, or disregard of warnings for potential contamination, the clean-up costs including any associated costs, such as legal costs, would be unreasonable and thus unallowable."[23] Before disallowing such costs, however, the Government must show that the contractor violated laws, regulations, or permits or disregarded warnings by a preponderance of the evidence.[24] Importantly for historical sites, the "contractor should not be denied recovery for clean-up costs, if it complied with laws, regulations, and permits in effect at the time of contamination."[25]

(2) *Allocability*—In addition to demonstrating that its environmental costs are reasonable, a contractor must show that its costs are allocable—that is, "assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship."[26] This determination includes "both direct assignment of cost and the reassignment of a share from an indirect cost pool."[27] FAR 31.201-4, governing allocability, separates costs into three categories and provides that a cost is allocable if it "(a) [i]s incurred specifically for the contract; (b) [b]enefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) [i]s necessary to the overall operation of the business, although a direct relationship to any particular contract cannot be shown."

Environmental costs directly related to a specific, current contract fall under FAR 31.201-4(a) and are charged directly to the contract under which the cost arises. In general, however, the majority of contractor costs for environmental remediation are historical and not directly chargeable to current contracts. In these cases, the environmental costs typically are evaluated under the FAR 31.201-4(b) and (c), governing costs deemed to benefit both the contract and other work or to be necessary to the overall operation of the business and are included in overhead or general and administrative costs.

Although FAR 31.201-4 is drafted in the disjunctive, courts interpreting the regulation generally treat subsections (b) and (c) as complementary.[28] Judged by this standard, environmental historical costs are almost always found to be "necessary business expenses." As a manual on environmental costs by the Defense Contract Management Command (predecessor to the Defense Contract Management Agency explains: [29]

> [I]n the majority of clean-up cases, clean-up costs are necessary requirements under the environmental laws of either the State or the Federal government. The extent of the penalties for a failure to take a remedial action could cause substantial harm to a business. CERCLA liability is based on strict liability theory, without any time constraints. Defenses such as foreseeability, negligence or due care are irrelevant in the CERCLA definition of liability.…Because CERCLA mandates this outcome, clean-up costs arising under CERCLA generally qualify as necessary business expenses.

Despite the fact that historical environmental costs are generally accepted as "necessary business expenses" under FAR's allocability provisions, there is no universal mechanism for spreading those costs among operating units and contracts under applicable Cost Accounting Standards. Contractors can use any generally accepted method of allocating environmental costs as long as the

chosen method is allowed by the Cost Accounting Standards, is equitable, and is consistently applied.

The fact-specific nature of these allocation determinations is demonstrated by DCAA guidance on allocation of historical environmental costs. The DCAA *Contract Audit Manual* recommends that, for costs arising[30]

> from a site the contractor segment previously occupied, the costs for a clean-up usually would be allocated to the segment's site whether the work was transferred. However, if the segment is closed with none of its former work remaining within the company,…[the] closed segment case must be reviewed based on its own facts to determine if the costs incurred for the closed segment should be directly allocated to other segments, be allocated as residual home office costs, or be treated as an adjustment of costs associated with the closing of the segment.

As this guidance recognizes, there are many possible variations for the cost accounting treatment of environmental costs for a closed segment, making allocation of environmental costs from historical operations a fact-dependent determination unique to each contracting relationship.

■ Advance Agreements

Advance agreements on allowability of environmental costs are a convenient alternative to the uncertainty inherent in CO decisions and interpretations of procurement regulations. In fact, DCMA guidance to DCAA auditors and COs suggests that advance agreements are a preferred means of addressing contractor's historical environmental costs.[31]

The FAR authorizes COs to enter into advance agreements governing reasonableness, allocability, or allowability of certain costs.[32] These agreements can be negotiated at any time but must be in writing, signed by both parties, and incorporated into applicable contracts.[33] Despite the added flexibility provided by advance agreements, however, COs may not agree to a treatment of costs inconsistent with the FAR cost principles.[34]

■ A Contractor's Obligation To Pursue Other Sources

While historical environmental costs are generally allowable as outlined above, the Government's acceptance of these costs comes with strings. As a condition to accepting contingent funding for these costs, contractors have an obligation to pursue other sources of recovery, such as insurance coverage and other responsible parties under environmental laws, and then to credit the Government for these recoveries under FAR 31.201-5, "Credits."

Under general contract principles, only a contractor's own environmental costs are allowable and allocable to its Government contracts. Any costs incurred by the contractor later deemed to be the responsibility of other responsible parties under CERCLA are unallowable. The DCAA *Contract Audit Manual* confirms this view, stating that allowable environmental costs only include the Government contractor's share of cleanup costs "based on the actual percentage of the contamination attributable to the contractor."[35]

At the time environmental costs are incurred, however, it often is impossible to reasonably estimate the total cost of a cleanup project or to predict who also may be responsible for the contamination in question. Accordingly, the DCAA recognizes that "[b]ecause of the uncertainty of the cost projections and of future recoveries from the insurance companies, as well as the difficulty in identifying all the other PRPs, both forecasted and incurred environmental clean-up costs and related legal costs that are allowable should be accepted contingent upon the Government participating in any insurance recoveries or the identification of other PRPs at a later date."[36] Therefore, when they are incurred, a contractor's cleanup costs are only contingently allowable, subject to repayment to the Government if the contractor should recover those costs in the future from other PRPs.

Consequently, a contractor has an obligation to pursue other sources of funding for its environmental costs—including insurance coverage and other responsible parties—if it submits costs over and above what it believes it is responsible for under CERCLA. As explained by the DCAA *Contract Audit Manual*: "If the contractor pays out more than its share of clean-up costs, it is up to that contractor to exercise its contribution rights to collect the amount over its share from the other PRPs who did not pay their share."[37]

By permitting a contractor to recover contingent costs as the contractor incurs the environmental costs, subject to the continuing obligation to credit future recoveries, the DOD has created a hierarchy for recovery of contractor costs, with the Government customer essentially financing cleanups until its contractors can establish final liability with other PRPs. While the Government will allow contractors to include environmental costs in their overhead or as direct costs for a specific contract to avoid private financing of massive cleanups by contractors (and subsequent interest expense), federal law requires the contractor to pursue all possible sources of funding for its costs and to credit the Government with any actual recovery. To ensure effective implementation of this hierarchy, the Government often will assist contractors in litigation to recover environmental costs from third parties such as insurance companies and other responsible parties under CERCLA. For example, in supporting contractors in insurance litigation, the United States filed a statement of interest arguing that environmental costs are paid to contractors only on a contingent basis, that the credits provision ensures that the Government will receive the benefit of non-contract recoveries (thereby preventing contractors from recovering costs twice), and that the Government must be the "payer of last resort."[38]

One open issue under procurement law is whether contractors can recover under contracts those environmental costs that are deemed to be the responsibility of another party but are uncollectible by the contractor. On this issue, the DCAA and the DCMA appear split. The DCAA *Contract Audit Manual* provides that that "[i]f a contractor cannot collect contribution or subrogation claims from other PRPs, the uncollected amounts are, in their essential nature, bad debts. Bad debts and associated collection costs, including legal fees, are unallowable costs (FAR 31.205-3 and 31.204[(d)])."[39] The DCAA guidance gives some relief from this rule, however, if (1) a contractor is legally required to pay another PRP's share of the cleanup costs, (2) that PRP is out of business, and (3) there is no successor company having assumed that PRP's liabilities. When these three conditions are met, "the clean-up costs which are attributable to the other PRP's contamination should not be disallowed as bad debt type expenses since there is no one against whom the contractor can take recovery action."[40]

The DCMA, however, appears to take a different view. Its manual on environmental costs states that for such uncollectible costs to be reasonable and thus allowable, contractors only need to "take the actions expected of a prudent businessperson in the identification of other contributing parties and the reasonable pursuit of contribution or reimbursement from them."[41] In support of this theory, the manual cites *General Dynamics Corp.*,[42] where the Armed Services Board of Contract Appeals found reasonable General Dynamics' settlement for approximately 65% of a debt owed to it by a company, a named responsible party, to whom General Dynamics sold scrap aluminum. The ASBCA held that, given the expense, uncertainty, and time associated with litigation, settling the dispute constituted the exercise of good business judgment. The board rejected the Government's argument that the uncollected amount in the settlement agreement (i.e., the difference between the contract price for the scrap and the amount accepted in settlement) constituted an unallowable bad debt. The DCMA guidance explains that, under *General Dynamics*, "the only issue is the reasonableness of the contractor's actions under FAR 31.205-3."[43]

Environmental Costs Recovered Through Indemnification

Indemnity agreements are another contractual mechanism that Government contractors have used effectively to recover environmental costs. Upon the discovery of environmental liabilities, a contractor should carefully review all contract documents to locate any indemnities or cost-reimbursement clauses potentially applicable to the performance of work that resulted in the contamination. Often, these contracts can be decades old, and locating the relevant contract documents will require a thorough search of the contractor's and Government's archives.

A contract clause that on its face covers the environmental liabilities is not sufficient by itself to provide a mechanism of recovery—the indemnity clause at issue must be specifically

authorized by federal statute to provide a valid means of recovery.

■ Valid If Authorized By Statute Or Limited In Some Manner

An indemnity clause is only valid if it has been authorized by Congress or is sufficiently limited in some manner so not to constitute an open-ended obligation. Otherwise, the purported indemnity clause falls victim to the restrictions of the Anti-Deficiency Act and cannot be enforced against the United States. The ADA prohibits federal agencies from obligating the Government to pay sums in excess of the dollars currently appropriated by Congress or in advance of an appropriation unless authorized by law.[44]

Thus, to be enforceable, an indemnity provision must be either (1) authorized by statute or (2) limited to amounts appropriated. The U.S. Supreme Court has confirmed that open-ended indemnification clauses violate the ADA because they constitute an agreement for a future payment of money in advance of, or in excess of, an existing appropriation.[45]

Although the question whether an indemnification clause has been authorized by law is fairly straightforward, as the cases discussed in the next section of this PAPER reveal, the question whether an indemnification clause that is "limited to the amounts appropriated" is valid under the ADA is a more difficult. In a case decided by the ASBCA, for example, the Government agreed to indemnify a contractor for any loss of the contractor's construction equipment, subject to the availability of funds, under the contract's "War Risks" clause.[46] When the contractor sought to recover for the loss of its construction equipment due to hostile combat action, the Government argued that the indemnity clause violated the ADA and was thus void as a matter of law. The ASBCA rejected this argument, finding the clause was valid because it limited the indemnification obligation to available appropriations.

But if an indemnification clause limited to available appropriations survives challenge under the ADA, whether and to what extent it is enforceable against the United States if appropriations are not available is another question. In the event payment under a limited indemnity provision becomes due, and the agency lacks funding in its then-current appropriations, the agency may be entitled to delay payment until Congress appropriates funds, if that event ever happens. In the alternative, a contractor may seek to enforce its right to receive indemnification at the U.S. Court of Federal Claims or board of contract appeals as a breach of contract claim.

Courts have recognized that if funds are available in a lump-sum appropriation and the agency has the authority to reprogram those funds, there are "available funds" to fund the obligation in question, and the contract clause is enforceable regardless of the limit in appropriations.[47] In addition, the Judgment Fund is available as a permanent, indefinite fund for the payment of final judgments that are "not otherwise provided for" under law.[48] The Court of Federal Claims has found that the unavailability of funds does not discharge the United States' obligations under contracts, and that any judgment against the Government on a claim under the Contract Disputes Act "shall be paid promptly in accordance with [the Judgment Fund]."[49]

For example, in one case, the Department of Health and Human Services argued that it was not obligated to pay full contract support costs due to a lack of funds in the applicable appropriations acts. The U.S. Court of Appeals for the Federal Circuit rejected this argument, stating that "in the absence of a statutory cap or other explicit statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations."[50] Another case involved claims brought by three helicopter companies to obtain payment for transporting mail for the Government. The companies were obligated by statute to transport mail whenever directed by the Postmaster General. In return, the Postmaster General and the Civil Aeronautics Board were obligated to pay the carriers "out of appropriations." The carriers were not paid in full due to a lack of appropriated funds. The court stated that once the carriers provided the required services, thereby obligating the Government to pay for the services, "the failure of Congress to grant appropriations would not relieve the Government of its contract obligation…to pay [the]

carriers."[51] Hence, although the failure of Congress to appropriate funds may prevent the CO from making the payments, a contractor's right to such payments under applicable clauses may be enforceable in the Court of Federal Claims or board of contract appeals under a CDA claim. Of course, this result would seem to frustrate the intent of the ADA itself.

■ Indemnification Authorized In World War II Contracts

Regardless of the question of limited indemnifications, open-ended indemnification clauses are legal, no matter how broad, if they are authorized by the express provisions of a statute.[52] Over the past several years, contractors have had particular success in using various contract clauses to recover environmental costs. Most prominently, several contractors have relied upon contract clauses found in World War II-era contracts to recover environmental costs against the United States. These open-ended obligations survived challenges under the ADA because they were specifically authorized by statutes passed during World War II.

The Federal Circuit first considered whether World War II-era indemnification clauses were valid in *E.I. DuPont de Nemours & Co. v. United States*, in which DuPont sought to recover costs it incurred pursuant to CERCLA for an ordnance plant it built and operated for the Government during World War II in Morgantown, West Virginia. The cost-reimbursement clause governing the performance of services included the following indemnification clause:[53]

> It is the understanding of the parties hereto, and the intention of this contract, that all work under this Title III is to be performed at the expense of the Government and that the Government shall hold [DuPont] harmless against any loss, expense (including expense of litigation), or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of the work under this Title III, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of [DuPont], or of other representatives of [DuPont] having supervision or direction of the operation of the plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of [DuPont's] business.

The Court of Federal Claims had previously found that this clause violated the ADA because no specific statute authorized the unlimited obligation assumed by the Government when the contract was entered.[54] The Federal Circuit did not dispute the fact that the clause was invalid when it was first entered. Instead, it focused on the Contract Settlement Act of 1944,[55] which authorized specifically permitted contracting agencies "in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement."[56] Because the contract in question was later terminated pursuant to the Contract Settlement Act, and because that termination settlement specifically ratified the preexisting indemnity, the Federal Circuit found that the indemnification clause was specifically authorized by statute and enforceable. The court held that the United States was liable to DuPont for the environmental costs covered by the indemnification.[57]

The Federal Circuit also applied this reasoning to a claim brought by Ford Motor Co. to recover environmental costs the company had incurred to address contamination at its former Willow Run bomber plant in Michigan, which had produced B-24 bombers during World War II.[58] Manufacturing processes, such as metal degreasing and plating, had resulted in soil and groundwater contamination. The Federal Circuit found that the following language in the termination agreement entered between Ford and the Air Force pursuant to the Contract Settlement Act provided for recovery of reimbursable costs that were not then known:[59]

> (4) Claims of the Contractor against the Government which are based upon responsibility of the Contractor to Third parties...and which involve costs reimbursable under the Contract...but which are not now known to the Officers, Directors, or other personnel of the Contractor whose duties include the acquisition of such knowledge.

Following its reasoning in the *DuPont* case, the Federal Circuit found that the ADA did not bar the contractor from recovering under this clause and similarly found that its plain terms covered the environmental costs incurred by Ford. Much of the decision focused on the procedural requirements for bringing a claim under the Contract

Settlement Act. Under the Act, if a claim has not been settled by agreement, a contractor may submit a demand for written findings from the contracting agency. The claim is subsequently time barred if the contractor fails to initiate civil proceedings within 90 days after delivery of the findings or, if no findings are provided, within one year after the demand for findings.[60]

More recently, the Court of Federal Claims considered Shell Oil Co.'s attempt to recover environmental costs associated with its cleanup of the McColl Superfund site in California. The site had been contaminated through the production and disposal of aviation gas during World War II in connection with work performed pursuant to a cost-reimbursement contract that contained a "Taxes" clause. This clause stated that "[the Government] shall pay…,any new or additional taxes, fees, or charges, other than income, excess profit, or corporate franchise taxes, which Seller may be required to pay by any municipal, state or federal law in the United States or any foreign country to collect or pay by reason of the production, manufacture, sale, or delivery of the [aviation gas]."[61] The court found that the environmental costs being incurred by Shell under CERCLA were reimbursable under this clause because those costs were "charges" and "by reason of" the production of the aviation gas.[62] This open-ended obligation did not violate the ADA, the court concluded, because the contracts were authorized under the First War Powers Act of 1941 and various Executive Orders issued during the war to facilitate production of vital war materials.[63]

■ Public Law 85-804 Coverage

Another potential avenue of recovery for contractors is the protection provided by Public Law 85-804, which provides that "[t]he President may authorize any department or agency of the Government which exercises functions in connection with the national defense…to enter into contracts or into amendments or modifications of contracts…without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense."[64]

The history of P.L. 85-804 extends back to the First War Powers Act of 1941.[65] Title II of the Act empowered the President to authorize any department or agency exercising functions in connection with the national defense to enter into any contract and contract modifications without regard to applicable provisions of law. Because the explicit language of the Act did not authorize the Government to indemnify contractors, the Secretary of War asked the Attorney General for an opinion on whether such authority existed under the statute. The Attorney General concluded that the power to indemnify if such action would facilitate the war effort was "clearly within the authority" of the War Department.[66]

In August 1958, Congress enacted P.L. 85-804 as permanent legislation, using wording similar to the War Powers Act of 1941. The legislative history of P.L. 85-804 confirms that Congress not only accepted that the power to indemnify was implicit in the Act's language, but that the power to indemnify was one of the basic reasons the Act was needed:[67]

> Based on the broad language of that act, the authority [to indemnify] would be continued under this bill. The need for indemnity clauses in most cases is a direct outgrowth of military employment of nuclear power and the highly volatile fuels required in the missile program. Because of the magnitude of the risks involved, commercial insurance policies are either unavailable or provide insufficient coverage. Testimony before a subcommittee of the House Judiciary Committee by representatives of the military departments indicated that contractors were therefore reluctant to enter into contracts involving the risk of a catastrophe without an indemnification provision. Although the military departments have specific statutory authority to indemnify contractors engaged in research and development, this authority does not extend to production contracts. Nevertheless, production contracts for items like nuclear-powered submarines and missiles, although not considered especially hazardous, still give rise to the possibility of an enormous amount of claims. The Department of Defense and the committee believe, therefore, that to the extent that commercial insurance is unavailable, the risk of loss should be borne by the United States.

Shortly after its passage, the President issued Executive Order 10789 delegating his authority to the Secretaries of Defense, the Army, the Navy, and the Air Force.[68] In response, the military branches promulgated regulations under P.L.

85-804 to provide for indemnification, requiring such agreements to define the "unusually hazardous or nuclear risks" covered by the agreement.[69] Thereafter, in 1971, President Nixon issued Executive Order 11610, amending the 1958 Executive Order to memorialize the specific rules for indemnification. Executive Order 11610 clarified that indemnification is not limited to the amounts appropriated and the contract authorization provided therefor, required that the contract define unusually hazardous risks, and set forth the types of losses for which indemnification was available. Moreover, the Order stated that "the United States may discharge its obligation under [an indemnification agreement] by making payments directly to subcontractors or to third persons to whom a contractor or subcontractor may be liable."[70]

The key issue for a contractor seeking to use an indemnification clause authorized by P.L. 85-804 is the definition of the "unusually hazardous" risk covered by the agreement. If the definition of the risk being indemnified is broad enough to cover the resulting contamination, the indemnification should cover all third-party claims for bodily injury or property damage. In a case currently pending before the ASBCA, a contractor is pursuing its right to indemnification under subcontracts for the production of solid-rocket motors in the late 1960s and early 1970s. These procurement contracts included indemnification clauses that were flowed down from the prime contract pursuant to P.L. 85-804. The indemnification clauses defined the covered unusually hazardous risk in part as "the use of materials containing radioactive, toxic, explosive or other hazardous properties of chemicals or energy sources."[71] The contractor has incurred costs as the result of claims by toxic tort plaintiffs alleging personal injury and in response to cleanup and abatement orders issued by the State of California. These claims allege that ammonium perchlorate, a main ingredient in solid-rocket fuel, and trichloroethylene, a common degreaser, escaped from the facility during the performance of these contracts. The Air Force disputes that the indemnification clauses at issue cover historical soil and groundwater contamination, and the case has not yet been decided by the board.

The ASBCA did deny, however, the Air Force's motion to dismiss the indemnification claim for lack of jurisdiction. The Air Force argued that any relief sought under P.L. 85-804 is a request for "extra-contractual relief" that precluded jurisdiction under the CDA. The decision to grant relief under P.L. 85-804 is generally considered to be "extra-contractual" and outside the jurisdiction of the Court of Federal Claims and the board.[72] The board found otherwise, recognizing the distinction between the decision to grant relief under Public Law 85-804—which results in a contract or contract amendment—and an action to enforce the relief once it is granted. Once an indemnification clause is inserted into a procurement contract pursuant to P.L. 85-804, the obligation of the parties is set and the Government's failure to abide by the promise to indemnify constitutes a valid claim under the CDA. Moreover, the board found again that because the open-ended indemnification had been specifically authorize by statute— P.L. 85-804—it did run afoul of the ADA.[73]

■ Base Closure & Realignment Acts

Indemnification clauses of a more modern vintage also have been the source of environmental cost recovery for contractors. The Court of Federal Claims found that cleanup costs incurred by developers of the former Lowry Air Force Base were the responsibility of the Federal Government pursuant to the statutory indemnification scheme provided by § 330 of the National Defense Authorization Act for Fiscal Year 1993.[74] Generally, § 330(a)(1) provides that the DOD must indemnify certain statutorily defined parties against claims for personal injury or property damage caused by the release of hazardous substances by the DOD.[75] As the result of several warnings issued by the state environmental regulators, the contractors spent nearly $9 million to clean up hazardous materials found on site that were attributable to the U.S. Air Force activities at the base.

The Air Force refused to reimburse the plaintiffs for their cleanup costs and the plaintiffs filed suit. In denying the plaintiffs' request for reimbursement, the Government maintained that a "claim" must first have been filed in a court of law against the plaintiffs in order for the indemnification

provision of § 330(a)(1) to be invoked against the Government. The Government further contended that the state regulator's instructions to clean up the hazardous materials, absent legal action, were not "claims" for personal injury or property damage, as required by the statute. Generally, the Government urged the court to adopt a narrow interpretation of the scope of its obligations under § 330(a)(1), contending that the indemnification obligation would only come into play if a "third party" sued for personal injury or property damage.[76]

The court rejected the Government's assertions that the term "claim" should be held to a strict and limited meaning. Instead, the court applied an expansive construction of the word "claim" and concluded that the "compliance advisories" issued by the Colorado regulators were sufficient.[77] The court was clear that a third party does not have to sue the new owner of the property for personal injury or property damage in order for the § 330(a)(1) indemnification obligation to be triggered.[78] In reaching the conclusion that "the protections of Section 330(a)(1) are sweeping" and should be applied broadly, the court looked to the basic broad language of the statute and its legislative history indicating that the statute was intended to "help facilitate a safe and timely transfer of base property to other productive uses."[79] A narrow construction of the statute would contravene the basic purpose behind its enactment. Accordingly, the court concluded that a broad application of § 330(a)(1) was warranted and denied the Government's motion for summary judgment.[80]

■ Which Pot Of Money Pays For Indemnification Clauses

A question often asked with respect to the payment of environmental costs under indemnification clauses, which typically occurs years after the procurement contract that was the impetus of the costs has been closed, is what appropriation is available to pay for an obligation undertaken decades earlier. As previously mentioned, the Judgment Fund exists as a permanent, indefinite fund for the payment of final judgments.[81] Agencies are able to access the Judgment Fund only if an indemnity request is not governed by an existing statute that provides or identifies a source of payment.[82]

The Judgment Fund's governing statute, 28 U.S.C.A. § 1304, provides that the fund is available to pay awards and compromise settlements whenever the following three conditions are met: (1) "payment is not otherwise provided for," (2) "payment is certified by the Secretary of the Treasury," and (3) the amount is payable pursuant to one the statutes set forth in the act.[83] These statutes governing payment include (a) an award by a district court under 28 U.S.C.A. § 2414, (b) an award by the Court of Federal Claims under 28 U.S.C.A. § 2517, (c) a settlement by the attorney general pursuant to 28 U.S.C.A § 2414 or § 2672, or (d) a decision of a board of contract appeals.[84]

In determining whether an agency may access the Judgment Fund, therefore, the key question is whether payment is "otherwise provided for." As explained by the Comptroller General, "[p]ayment is 'otherwise provided for' if some appropriation or fund under the control of the agency involved is legally available to pay the judgment in question."[85] The issue is not whether funds are available or sufficient, but whether the funds are legally available. Whether funds are legally available often depends on a "review, on a case-by-case basis, of such things as the nature of the defendant agency, the type of judgment, or the funding scheme applicable to the agency or the program involved."[86]

CERCLA, for example, represents the type of statutory scheme in which payment *is not* "otherwise provided for." CERCLA provides that federal agencies are subject to and must comply with the Act's requirements in the same manner as nongovernmental PRPs.[87] However, there is no discussion in CERCLA or its legislative history regarding the source from which the Government must pay for its liability under CERCLA. The general rule the Comptroller General has followed is that "[a]gency appropriations are not available to pay litigative awards, unless provided by law."[88] Given the absence of guidance in the statutory scheme regarding funding, the Comptroller General concluded that payment was not "otherwise provided for," and, therefore, CERCLA judgments could be paid out of the Judgment Fund.[89]

The CDA, in contrast, represents a situation in which payment *is* "otherwise provided for." The CDA provides that payment of any court judgment or monetary award by a board of contract appeals will be paid out of the judgment fund established by 28 U.S.C.A. § 1304, *subject to reimbursement* out of agency appropriations.[90] An agency may use its existing appropriations or request additional appropriations to accomplish reimbursement.[91] In this case, the CDA establishes a funding source, so its requirements apply over those set forth in section 28 U.S.C.A. § 1304. Therefore, any indemnification award or settlement pursuant to the terms of the CDA can be paid initially under the Judgment Fund, but the agency responsible for the indemnification would be required to reimburse the fund thereafter.

Depending on the factual circumstances, the general appropriation process also may be considered a source for payment of judgments. In one case, for example, the Office of Legal Counsel has opined that the Judgment Fund cannot be used to fund settlement of an indemnification claim brought under the Price-Anderson Act. In this case, the Department of Energy sought access to the Judgment Fund to pay a $73 million settlement of an indemnity claim under the Price-Anderson Act to fund the cleanup of the Fernald facility.[92] Similar to P.L. 85-804, the Price-Anderson Act authorizes the DOE to enter into open-ended indemnification agreements without regard to the ADA.[93] Although the Price-Anderson Act does not contain a specific funding mechanism for any indemnity agreements executed under this authority, the Office of Legal Counsel concluded that Congress had "otherwise provided for" payment of indemnity claims under the Act. It explained that "[t]he fair inference from the express exception to the Anti-Deficiency Act… is that Congress intended for indemnity obligations (and, by logical extension, settlements negotiated upon such obligations) to be satisfied out of appropriated funds."[94] The DOE either had to use its own existing funds or request additional funds from Congress.

Recovery Of Environmental Costs Through Federal Laws

Federal environmental laws—most notably CERCLA[95]—are an extra-contractual mechanism for contractors to recoup environmental cleanup costs from the United States. Through its national defense and energy operations, the United States likely has more environmental liability than any private company in the United States. According to a 2008 report by the Department of the Treasury, the United States faces an estimated $342.8 billion in environmental liabilities.[96] Moreover, the Environmental Protection Agency reports that 158 of the 1,264 sites on the CERCLA National Priorities List are currently or formerly owned by the United States.[97] As a result, the United States frequently is named as a defendant in CERCLA litigation, including in suits brought by Government contractors that are seeking to allocate responsibility for hazardous waste cleanup at their formerly operated or owned war plants or production facilities used to perform Government contracts.

Through CERCLA, contractors seek to hold the U.S. Government liable as a co-polluter for contractor cleanups. If a contractor is successful, the Government can either pay its fair share of the future environmental costs directly or reimburse the contractor for the Government's share of past liability, which would then be credited to the contractor's Government customers to the extent the contractor had received payment for such costs under its Government contracts as described above. Both results have the effect of lowering the contractor's overhead for current contracts and increasing competitiveness for future contract bids by lowering legacy costs.

■ Overview Of Cost Recovery/Contribution Under CERCLA

CERCLA is the main federal statute used to clean up contaminated sites resulting from historical operations. There are four commonly held requirements for a plaintiff to establish liability under CERCLA: "(1) the property is a 'facility'; (2) there has been a 'release' or 'threatened release' of a hazardous substance; (3) the release has caused the plaintiff to incur 'necessary costs of response' that are 'consistent' with the [National Contingency Plan]; and (4) the defendant is in one of four categories of potentially responsible parties."[98] CERCLA specifies, in 42 U.S.C.A. § 9607(a), the four categories of PRPs, who can be held liable jointly and severally to address

releases of hazardous substances: (1) the *current owner* of the facility, (2) the *owner* or *operator* of the facility *at the time of disposal*, (3) an *arranger* for the disposal of waste, and, (4) a *transporter* of the waste.[99] No negligence is required to be liable—a person need only qualify under CERCLA as a PRP at a contaminated facility to be held responsible for either all or a portion of the cleanup responsibilities. The purpose of CERCLA is remedial—to identify all persons potentially responsible for the contamination and to allocate responsibility among all parties.[100]

Under CERCLA, the United States can order a private party to clean up a hazardous waste sites or can clean up the site itself using Superfund money and seek reimbursement from PRPs later.[101] Private parties also may use CERCLA to recover response costs from other PRPs and to allocate responsibility to fund a remedial action among all responsible parties through a contribution action.[102] Because Congress waived sovereign immunity for the United States, it is liable as a defendant under CERCLA just like any other party.

■ Contractors That Are Also PRPs Can Use CERCLA

The law governing private party recoveries under CERCLA has undergone a major shift in the past couple of years—making statutory claims against the United States more readily available. Previously, nearly all U.S. Courts of Appeals had reached a consensus on when and how private parties could recover response costs from other PRPs. All plaintiffs who were also considered PRPs could bring contribution actions only under 42 U.S.C.A. § 9613(f)(1), which provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [42 U.S.C.A. §] 9607(a)." These suits were appropriate anytime the plaintiff had incurred response costs, regardless of whether a prior suit under CERCLA had been brought.[103] Access to 42 U.S.C.A. § 9607(a), and its more favorable joint and several liability standard, was reserved for "innocent" parties and the United States.

The Supreme Court's 2004 decision in *Cooper Services v. Aviall Industries* altered this landscape, directing that any person who had not been the subject of 42 U.S.C.A. § 9607 actions could not bring suit under the plain language of 42 U.S.C.A. § 9613(f)(1).[104] Read in conjunction with prior circuit court cases that had prohibited PRPs from using 42 U.S.C.A. § 9607(a) to recover response costs, this holding threatened the ability of PRPs to recoup a significant amount of costs for remediation of releases of hazardous waste that the PRPs were not responsible for causing. Although the Court recognized this issue, and discussed the legal framework surrounding it, the Court decided it "more prudent to withhold judgment" because of the factual context in *Cooper* and because the issue had not been fully briefed.[105]

Immediately after *Cooper*, the issue of whether PRPs had access to 42 U.S.C.A. § 9607 was litigated across the country.[106] The position against allowing PRPs access to 42 U.S.C.A. § 9607 was most often and strongly urged by the United States, which finally convinced the U.S. Court of Appeals for the Third Circuit to adopt this argument in its defense against a CERCLA action brought by DuPont seeking contribution from the United States at several of its "war plants" nationwide.[107]

Due to the resulting circuit split, the Supreme Court agreed to consider the issue in *Atlantic Research Corp. v. United States*.[108] Atlantic Research, at its facility in Camden, Arkansas, retrofitted rocket motors under contract with the United States from 1981 to 1986. During the retrofitting process, hazardous substances including trichloroethylene and ammonium perchlorate were released into the environment, causing soil and groundwater contamination at the site. The contractor voluntarily undertook cleanup operations to address these releases and then filed suit in the Western District of Arkansas to recover a portion of its cleanup costs from the United States. The Government moved to dismiss on the ground that respondent, as a PRP, could not assert a cause of action under 42 U.S.C.A. § 9607(a). The district court dismissed the suit, relying on then-controlling circuit precedent to conclude that a covered person "cannot rely on [42 U.S.C.A. § 9607(a)] to seek full cost recovery on a theory of joint and several liability from another jointly liable party." The Eighth Circuit reversed, finding that language of CERCLA permitted "any other person" to file a cost recovery action under 42 U.S.C.A. § 9607(a).[109]

The Supreme Court agreed with the Eighth Circuit and unanimously rejected the United States' position, holding that all persons who have incurred response costs (not just the Government) may bring cost recovery actions under 42 U.S.C.A. § 9607 regardless of their status as a PRP.[110] Together, *Cooper* and *Atlantic Research* confirm that contractor claims against the United States for cost recovery under CERCLA are properly brought under 42 U.S.C.A. § 9607(a).

■ CERCLA Cost Recovery Actions Against The United States

Government contractors have had mixed success in bringing CERCLA claims against the Government. Winning a CERCLA case against the Government is a two-step process. First, a plaintiff must establish that the United States qualifies as a PRP at the site. No equitable defenses or questions of causation are considered at this stage, only whether the United States qualifies as a PRP.[111] After the liability of the United States has been established, the question turns to the proper allocation between the United States and the contractor, assuming that the contractor incurring response costs also qualifies as a PRP.[112]

(1) *Establishing Owner Liability.* Depending upon the facts presented, Government contractors have several possibilities to establish that the United States is a PRP at a hazardous waste facility that has been used for Government contracts. The most straightforward possibility is liability based on the United States' ownership of the "facility" that caused the release of hazardous substances in question. Ownership is most easily found, of course, in cases where the United States owned the entire facility in question (as would be the case at Government-owned, contractor-operated facilities). During World War II, the Government financed the construction of war plants across the country that were operated by contractors. After the war, many of these facilities were subsequently sold to the operating contractors or held by the Government for a certain amount of time in the National Industrial Reserve.[113] If a contractor can show that the hazardous substances were used and released at the facility during the Government's period of ownership, it can establish that the United States is a PRP.

But ownership of the entire site is not required under CERCLA, which defines "facility" broadly as "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[114] Although contractors typically furnish all property necessary to perform a Government contract,[115] there are many situations where Government property, including materials and production facilities, are used in the performance of Government contracts, particularly in the production of defense equipment.[116]

Courts have held that Government ownership of equipment that was involved in the release of hazardous substances can form the basis of CERCLA liability.[117] Under the rationale set out these cases, the Government may incur liability as an "owner"[118] of a "facility" as defined under CERCLA by providing Government-furnished property. In addition, the Government may be liable when the contractor purchases equipment for which the Government will reimburse the contractor as a direct cost under the contract. In these situations, title for the equipment often passes to the Government pursuant to contractual clauses, making the Government the owner of the "equipment" and possibly of a CERCLA "facility."

But it is not always possible to prove the existence of certain pieces of equipment decades ago. For example, in *Raytheon Aircraft Co. v. United States*, Raytheon filed a CERCLA lawsuit against the United States seeking the recovery of environmental costs the contractor had incurred in cleaning up trichloroethylene groundwater contamination at the Tri-County Public Airport. A predecessor to Raytheon, Beech Aircraft Corp., leased portions of the airport from 1950 to 1959 for the disassembly of aircraft, and Raytheon had taken responsibility for the remediation of the site because of these activities. From 1942 through 1945, however, the U.S. Army had processed military aircraft, including metal cleaning operations, and Raytheon believed that the

United States should contribute to the costs of cleaning the groundwater at the airport.[119] After a 10-day trial, the district court found that Raytheon could not prove that the Army owned or operated vapor degreasers that would have used trichloroethylene during its period of ownership.[120] Raytheon's appeal is currently pending before the Tenth Circuit.

(2) *Establishing Operator Liability.* In addition to proving historical ownership of facilities or equipment that used or released the hazardous substances in question, contractors also have been successful in arguing that the Government's pervasive control of a facility during the time of release can rise to the level of an "operator"[121] under the paradigmatic case of Government control over wartime manufacturing facilities. The Third Circuit's *en banc* decision in *FMC Corporation v. United States* is the leading case under this theory.[122] In *FMC*, the court held that the Government exercised "actual control" over a manufacturing facility producing high-tenacity textile rayon during World War II upon consideration of various factors. Most important among these was the Government's control over what product the facility would produce, the level of production, the sale price of the product, and the customers of the product. The Third Circuit identified these as "the leading indicia of control."[123]

But since the *FMC* decision, the Supreme Court has provided more guidance on what it means to be an "operator" under CERCLA in the oft-cited *United States v. Bestfoods* decision: "[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility."[124] Like the Third Circuit's "indicia of control" test in *FMC*, the Supreme Court's operator test propounded in *Bestfoods* focuses on the affirmative acts of the operator in regards to the facility, or, in other terms, the operator's "actual control" over the facility. In *Bestfoods*, the Court "sharpen[ed]" the definition of "operator" to focus on "operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[125]

This focus on the activities relating to pollution are further illuminated by the factual setting in that case. In *Bestfoods*, the Court was tasked with determining when a parent company can be deemed to "operate" a subsidiary's facility. The Court had to distinguish the parent's direct operation of the facility from the parent's activities relating to its general supervisory role over the subsidiary's management of its assets, such as "[a]ctivities that involve the facility but which are consistent with the parent's investor status, [including]…supervision of the subsidiary's finance and capital budget decisions."[126] At bottom, *Bestfoods* teaches that "[f]or operator liability, there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility."[127] Although it was decided before *Bestfoods*, the Third Circuit's decision in *FMC* remains the seminal case on point in Government operator cases.[128]

(3) *Establishing Arranger Liability.* The United States' control over contractor disposal of waste is another hook for establishing Government liability under CERCLA. For example, at some contractor production or munitions plants, the substances used in production were so hazardous and inherently dangerous that the Government mandated specific protocols for handling and disposal of waste. In such cases, the Government could be liable under CERCLA as an "arranger."[129]

The standard of proof required for establishing arranger liability was recently addressed by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. United States.*[130] The Court affirmed that "arranger liability" was a fact-specific inquiry but posited a continuum for evaluating this type of CERCLA liability. On one end are cases where an entity entered into a transaction "for the sole purpose of discarding a used and no longer useful hazardous substance."[131] In such cases, there is a clear intent to discard the product, and there is arranger liability under CERCLA. On the other end of the continuum, "[i]t is similarly clear," the Court said that "an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination."[132] "Less clear," said the Court, are the cases in the middle—the "many permutations of 'arrangements' that fall between these two extremes."[133]

In these cases, the Court said, "liability may not extend beyond the limits of the statute itself."[134] Based on the "plain language" of the CERCLA statute, the Court held that "an entity may qualify as an arranger [under CERCLA] when it takes intentional steps to dispose of a hazardous substance."[135]

Although prior cases have found that "a government contract [may involve] sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA,"[136] contractors attempting to establish arranger liability will now face a higher hurdle in light of the standard set forth in *Burlington Northern*.

■ Allocation Of Liability

If a contractor can establish the liability of the United States under one of the tests set forth above, the court will then allocate responsibility for environmental costs between the United States and the contractor (assuming that the contractor incurring response costs also qualifies as a PRP). This allocation stage of the analysis is markedly different from the liability stage, both in application and outcome. In place of the rigid statutory requirements, courts are given only the broad guidance of 42 U.S.C.A. § 9613(f)(1): "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." This has been termed a "totality of the circumstances review."[137] Factors excluded from consideration in the liability determination are available in the allocation analysis. Causation, for example, is "brought back into the case—through the backdoor, after having been denied entry at the frontdoor—at the apportionment stage."[138] Ultimate financial responsibility, as determined at the allocation stage, is an equitable allocation that should have its roots in that party's responsibility for the environmental costs at issue. The touchstone is fairness, not precision.[139]

CERCLA grants courts "unique and unusual discretion"[140] to allocate costs such that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."[141] But myriad complexities can make it a difficult task to locate and measure "responsibility." Physical complexities arise at sites where multiple parties have contributed waste that has hopelessly commingled.[142] Legal complexities arise where the relationships between parties are obscured by time, incomplete contracts, or disputed facts.[143] Most difficult of all, moral complexity arises where responsibility was shared, and the analysis becomes encumbered with questions of culpability and blame.[144]

Two CERCLA allocation claims involving the United States' industrial buildup for World War II have been the subject of published opinions.[145] In both cases, the district and circuit courts found that the dominant equitable factor was that the Government had "conscripted [the firms] for a critical part of a great war effort."[146] Following an earlier case in which liability had been adjudicated against the Government for a World War II-related facility, these courts found that such an outcome placed "'a cost of war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy underlying CERCLA.'"[147] While these cases ultimately reflect their own unique facts (as all allocation cases must), they stand for the proposition that where private industry is brought under the Government's sway in the interest of national security, the Government may be largely or entirely responsible for the unintended costs of that participation.

The first of these cases, *United States v. Shell Oil Co.*, presented a claim by several oil companies against the United States for the cost to clean up the McColl waste dump in Fullerton, California. The companies had been responsible for the production of aviation fuel during World War II and had disposed of several varieties of hazardous wastes in earthen sumps on the property of Eli McColl.[148] The production of aviation fuel was not a new business for these companies, and they produced it for the Government in both existing facilities and in new facilities designed, built, and owned entirely by the companies themselves.[149] Before the outbreak of war, the companies had developed reprocessing technology for some of the waste, though such technology was not yet in wide use.[150] With the huge increase in demand brought on by the war effort (production increased

from 40,000 barrels per day to 514,000 barrels per day over four years), there was a corresponding increase in waste production, and the companies had little choice but to dump the waste.[151] The district court found that the oil companies had "at least tacit approval from the Government" for the dumping.[152] In practical terms, the companies had little choice. They were "essentially required to cooperate with the Government,"[153] and wartime shortages meant that any parallel effort to expand recycling and disposal operations was simply out of the question.[154] Although the Government did not design the aviation fuel processes and did not own or operate the refineries or the disposal site, the district and circuit courts agreed that the Government was entirely responsible for the environmental costs incurred by the consequences of its massive war buildup.[155]

The second case, *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, arose out of the Government's rubber program, a crash effort to supply the great quantities of rubber required by the Allied war machine when access to traditional sources in Southeast Asia was cut off by Imperial Japan.[156] Under the oversight of several Government agencies, Dow Chemical built and operated a Government-owned facility, along with several other companies.[157] The Government sold the facility in 1955, but it continued to produce rubber until 1972.[158] As in *Shell Oil*, both the district court and the circuit court held that the Government was 100% responsible for the costs of remediation resulting from the waste disposal at the site. The circuit court went out of its way to express its strong feelings on the question and left no doubt that its affirmation of the district court did not merely mean it had not found "clear error." "This is shocking case," the court wrote, "[t]he government is trying to take money from firms it conscripted for a critical part of a great war effort. The government's arguments are strikingly weak."[159]

■ Special CERCLA Defenses Advanced By The United States

Given the Government's massive environmental liabilities, and its derivative institutional interest in CERCLA litigation, the Government has long sought to create special rules under CERCLA to minimize its own exposure.[160] Following the *Atlantic Research* decision in 2007,[161] discussed above, the Department of Justice's Environmental Defense Section began asserting a defense unique to Government contractors—claiming that contractors that had included environmental remediation costs in their overhead submissions could not recover those costs under CERCLA. The Department of Justice has been pursuing this argument against contractors in CERCLA litigation nationwide. For example, in *Raytheon Aircraft Co. v. United States*, discussed above, the district court held that, where historical environmental remediation costs have been recovered under Government contracts, those contract payments may be considered an equitable factor when allocating costs under CERCLA.[162]

The Government's argument, in its most basic form, is that contractors do not have any claim against the United States for cleanup costs under CERCLA because the United States already has paid their cleanup costs through Government contracts. More specifically, the Government has articulated the defense a number of different ways: (1) CERCLA, in 42 U.S.C.A. § 9614(b), prohibits a contractor from seeking "double recovery" of its cleanup costs,[163] and payment of the same cleanup costs under CERCLA and Government contracts would amount to double recovery; (2) a contractor has not "incurred" any cleanup costs under CERCLA, 42 U.S.C.A. § 9607, because its cleanup costs have been paid by the United States through Government contracts; and (3) any potential recovery from the United States under CERCLA must be offset by any Government contract payments as a matter of law or as an "equitable factor" in determining an appropriate allocation.

The Government's position has some superficial appeal because contractors have included environmental remediation costs in overhead and have been paid under contracts for work performed. On closer examination, however, the Government's argument stretches the language of CERCLA and ignores both the structure and fundamental provisions of Government contracts. CERCLA, in 42 U.S.C.A. § 9614(b), only prohibits recovery of the same response costs under CERCLA and a state or federal analogue, and the only court to

have considered the Government's argument has rejected it.[164] It has never been applied to prohibit recovery under CERCLA of costs also subject to payment under a contract. Similarly, the term "incur" in CERCLA has been interpreted more broadly than the Government suggests. It does not mean "to actually pay for," but rather "to become liable for or subject to."[165]

The Government's argument also runs directly counter to the guidance provided by the DCAA and urged by the United States in other contexts, as discussed earlier in this PAPER.[166] Because environmental costs are paid on a contingent basis, and any remediation costs recovered under CERCLA from parties other than contractors are credited to the Government, there is no chance for an inequitable double recovery. And finally, the Government's effort to pay for its CERCLA liability with funds appropriated for military expenditures disadvantages contractors by burdening the company's overhead with the Government's CERCLA liability, which should be paid from the Judgment Fund.

To the authors' knowledge, this defense is being litigated in several cases nationwide, and it has not been addressed on the merits by any court. In formulating strategy for a current or future CERCLA action, Government contractors should be mindful of this development and make sure that environmental counsel understands the nuances of the Government contracts aspect of the defense, and vice versa.

■ DERP-FUDS Program

Another source of funding for contractors remediating historic contamination at current or former operating facilities is the Defense Environmental Restoration Program for Formerly Used Defense Sites (DERP-FUDS). Under this program, the DOD will provide funding to remediate contaminated properties that it once owned, leased, possessed, or otherwise had under its jurisdiction. Eligible sites include manufacturing facilities that were owned or leased by the DOD but operated by contractors (i.e., Government-owned, contractor-operated), sites where the DOD had a documented presence, and sites that were used for the disposal of DOD materials or waste.[167]

According to the U.S. Army Corps of Engineers' FUDS Program Policy Manual, almost anyone can request that a site be evaluated for eligibility for FUDS funding. To apply, contractors should make written application to the commander of the geographic military district.[168] The request should include (1) written or historical documentation indicating DOD activities that took place at the property before October 17, 1986 with the potential of causing contamination and/or hazardous conditions, (2) a description, as precise as possible, of the location of the suspected contamination and/or hazardous conditions, (3) a description, to the extent available, of the types of hazards or hazardous substances, pollutants, or contaminants released, (4) an explanation as to how the person is or may be affected by suspected former DOD contamination and/or hazardous conditions, and (5) a note on whether EPA, state, or tribal officials or local authorities have been contacted.[169]

If the documentation provides reasonable evidence as determined by the Corps of Engineers, that agency will proceed to determine the eligibility of the property for FUDS funding and, if eligible, perform the FUDS property screening.[170] If the facility is accepted into the DERP-FUDS program after this initial investigation, the remediation will be managed by Corps of Engineers on behalf of the DOD.

GUIDELINES

These *Guidelines* are intended to assist you in understanding how a Government contractor can successfully recover environmental costs under both contracts and CERCLA and how these mechanisms can interact. They are not, however, a substitute for professional representation in any specific situation.

1. If you are incurring significant environmental costs, be aware that an advance agreement on allowability and allocability is the preferred approach of the contracting agencies.

2. Make certain that any advance agreement addresses what environmental costs are covered

under the agreement, how the costs will be allocated, the availability of other sources of recovery, and the mechanism for crediting future recoveries to the Government.

3. If environmental costs are being recovered under procurement regulations or an advance agreement, you incur an obligation to pursue other sources of recovery—such as insurance and other responsible parties—that will ultimately reduce the costs of goods and services to the Government customer.

4. Upon the discovery of environmental liabilities, carefully collect and review all contract documents to locate any indemnification or cost-reimbursement clauses potentially applicable to the performance of work that resulted in the contamination.

5. Bear in mind that where a facility has operated for a long time, these contracts can be decades old, and locating the relevant contract documents will require a thorough search of contractor and Government archives. You should consider hiring an historical consulting firm familiar with these archives and knowledgeable about locating older Government contracts.

6. Remember that building a successful CERCLA case against the Government hinges on collecting and presenting sufficient facts to show that the United States qualifies as an owner or operator at the time of release of the hazardous substance in question. Locating this evidence can be time consuming and requires detailed investigation of the processes that occurred at the facility, as well as historical documents located in national archives, contractor-maintained archives, and other industrial archives located across the country.

7. Keep in mind that qualified expert testimony is often required to rebut historical and technical arguments presented by the Government, including historical testimony about chemical use, testimony from industrial experts about release scenarios, and testimony from hydrogeologists to explain how the contamination today is tied to releases from Government operations.

8. In planning CERCLA litigation against the Government, be sure that environmental counsel and contracts personnel coordinate your response to the Government's unique contractor defenses in CERCLA litigation.

★ REFERENCES ★

1/ 42 U.S.C.A. § 9601 et seq.

2/ FAR 31.204(d), 31.201-2.

3/ 42 U.S.C.A. § 6901 et seq.

4/ DCAA Contract Audit Manual ¶ 7-2120.2 (Dec. 31, 2008).

5/ DCAA Contract Audit Manual ¶ 7-2120.12 (Dec. 31, 2008).

6/ FAR 31.205-47. See generally Manos, "Allowability of Legal Costs," Briefing Papers No. 05-5 (Apr. 2005).

7/ General Accounting Office, Environmental Cleanup: Observations on Consistency of Reimbursements to DOD Contractors 7 (NSIAD-93-77, Oct. 22,1992); see 34 GC ¶ 629.

8/ Defense Acquisition Regulation Case 88-127.

9/ Kohns, McGowan & Riley, "A Primer on Contractor Environmental Remediation and Compliance Costs," 1993 Army Law. 22, 28 (Nov. 1993).

10/ GAO, supra note 7.

11/ Van Eaton, "A Not-So Equitable Allocation: The Need for An Environmental Cost Principle," 14 Mo. Envtl. L. & Pol'y Rev. 441, 460 (2007) (providing an overview of the environmental cost principle's history from the perspective of the contracting agencies).

12/ Kohns, McGowan & Riley, "A Primer on Contractor Environmental Remediation and Compliance Costs," 1993 Army Law. 22, 30–31 (Nov. 1993).

13/ Kohns, McGowan & Riley, "A Primer on Contractor Environmental Remediation and Compliance Costs," 1993 Army Law. 22, 29 (Nov. 1993).

14/ Kohns, McGowan & Riley, "A Primer on Contractor Environmental Remediation and Compliance Costs," 1993 Army Law. 22, 29–30 (Nov. 1993).

15/ GAO, supra note 7; see 34 GC ¶ 61; 34 GC ¶ 251; 34 GC ¶ 509.

16/ FAR 31.204(d), 31.201-2.

17/ DCAA Contract Audit Manual § 7-2120.1 (Dec. 31, 2008).

18/ FAR 31.201-3(a).

19/ FAR 31.201-3(b).

20/ DCAA Contract Audit Manual § 7-2120.5(a) (Dec. 31, 2008).

21/ DCAA Contract Audit Manual § 7-2120.5(a) (Dec. 31, 2008).

22/ DCAA Contract Audit Manual § 7-2120.5 (Dec. 31, 2008).

23/ DCAA Contract Audit Manual § 7-2120.13(a) (Dec. 31, 2008).

24/ DCAA Contract Audit Manual § 7-2120.13(d) (Dec. 31, 2008).

25/ DCAA Contract Audit Manual § 7-2120.13(e) (Dec. 31, 2008).

26/ FAR 31.201-4.

27/ FAR 31.001; see Manos, Government Contract Costs & Pricing § 7:B:2 (2004 & Supp. 2008).

28/ Shelley P. Turner, Defense Contract Mmgt. Command, Journey Through Environmental Remediation Costs in a Contractors Overhead ch. 3 (undated) (quoting Lockheed Aircraft Corp. v. United States, 375 F.2d 786 (Ct. Cl. 1967)).

29/ Id.

30/ DCAA Contract Audit Manual § 7-2120.7 (Dec. 31, 2008).

31/ Turner, supra note 28, ch. 4.

32/ FAR 31.109.

33/ FAR 31.109(b).

34/ FAR 31.109(c); see Manos, Government Contract Costs & Pricing § 7:E (2004 & Supp. 2008).

35/ DCAA Contract Audit Manual § 7-2120.9(a) (Dec. 31, 2008).

36/ DCAA Contract Audit Manual § 7-2120.14(b) (Dec. 31, 2008).

37/ DCAA Contract Audit Manual § 7-2120.10(a) (Dec. 31, 2008).

38/ Statement of Interest by the United States of America at 7, United Technologies Corp. v. American Home Assurance Co., No. 292-CV-00267 (JBA) (D. Conn. July 24, 2001) (filed May 11, 2001).

39/ DCAA Contract Audit Manual § 7-2120.10(b) (Dec. 31, 2008).

40/ DCAA Contract Audit Manual § 7-2120.10(c) (Dec. 31, 2008).

41/ Turner, supra note 28.

42/ General Dynamics Corp., ASBCA No. 3539, 58-1 BCA ¶ 1783.

43/ Turner, supra note 28.

44/ 31 U.S.C.A. § 1341(a)(1).

45/ Hercules, Inc. v. United States, 516 U.S. 417, 427 (1996); see E.I. DuPont de Nemours & Co. v. United States, 54 Fed. Cl. 361, 372 (2002) (holding that an open-ended indemnification clause violated the ADA where there was no funding or express statutory authority underlying the Government's indemnity obligation).

46/ Les Establissements Eiffel-Asie, ASBCA No. 22569, 80-2 BCA ¶14,779.

47/ Thompson v. Cherokee Nation of Okla., 334 F.3d 1075, 1086 (Fed. Cir. 2003); Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 553 (Ct. Cl. 1980).

48/ 31 U.S.C.A. § 1304. See generally Vacketta & Kantor, "Obtaining Payments From the Government's 'Judgment Fund,'" Briefing Papers No. 97-3 (Feb. 1997).

49/ Wetsel-Oviatt Lumber Co. v. United States, 38 Fed. Cl. 563, 571 (1997) (citing 41 U.S.C.A. § 612(a)); see also South Carolina Pub. Serv. Auth., ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,605 (finding that "[t]o the extent that the Government is liable for CDA claims, the judgment fund is generally available").

50/ Thompson, 334 F.3d at 1086 (citing the GAO Redbook for the principle that in some instances the agency's discretion to reprogram may rise to the level of a duty).

51/ New York Airways, Inc. v. United States, 369 F.2d 743, 746 (Ct. Cl. 1966).

52/ See Hercules, Inc. v. United States, 516 U.S. 417, 427 n.10 (1996); see also Government Accountability Office, II Principles of Federal Appropriations Law 6-67 (Feb. 2006) ("GAO Redbook") (stating that an indemnification clause will be legal, no matter how broad, if authorized by the express provisions of relevant law).

53/ E.I. DuPont de Nemours & Co. v. United States, 365 F.3d 1367, 1370 (Fed. Cir. 2004). See generally Nash, "Postscript: Contingent Liability Claims," 19 Nash & Cibinic Rep. ¶ 11 (Mar. 2005).

54/ E.I. Du Pont de Nemours & Co. v. United States, 54 Fed. Cl. 361 (2002).

55/ 41 U.S.C.A. § 101 et seq.

56/ E.I. Du Pont, 365 F.3d at 1375 (quoting 41 U.S.C.A. § 120(a)).

57/ E.I. Du Pont, 365 F.3d at 1380.

58/ Ford Motor Co. v. United States, 378 F.3d 1314, 1318 (Fed. Cir. 2004).

59/ Ford Motor Co., 378 F.3d at 1318.

60/ Ford Motor Co., 378 F.3d 1314; see also 41 U.S.C.A. § 113(a).

61/ Shell Oil Co. v. United States, 80 Fed. Cl. 411, 415 (2008).

62/ Shell Oil Co., 80 Fed. Cl. at 415–18.

63/ Shell Oil Co., 80 Fed. Cl. at 418–20.

64/ 50 U.S.C.A. § 1431 et seq. See generally Mullen, "Extraordinary Contractual Relief Under Public Law 85-804," Briefing Papers No. 02-13 (Dec. 2002).

65/ 55 Stat. 838 (1941).

66/ See 40 Op. Atty. Gen. 225 (1941).

67/ H.R. Rep. No. 85-2232, at 6 (1958).

68/ Exec. Order No. 10789, 23 Fed. Reg. 8897 (1958).

69/ See, e.g., ASPR 10-703 (1966).

70/ Exec. Order No. 11610, 36 Fed. Reg. 13755 (1971).

71/ Boeing Co., ASBCA No. 54853, 06-1 BCA ¶ 33,270. See generally, Dover & McGovern, "Risk Mitigation Approaches for Government Contractors," Briefing Papers No. 07-5 (Apr. 2007); Nash, " Indemnification Clauses: Litigation Breeders," 20 Nash & Cibinic Rep. ¶ 42 (Sept. 2006).

72/ See Coastal Corp. v. United States, 713 F.2d 728, 731 (Fed. Cir. 1983) ("action or decision by an agency under Public Law No. 85-804 is within the exclusive discretion of the executive branch of the government and is not subject to judicial review").

73/ Boeing Co., ASBCA No. 54853, 06-1 BCA ¶ 33,270.

74/ Richmond Am. Homes of Colo., Inc. v. United States, 75 Fed. Cl. 376 (2007).

75/ [T]he Secretary of Defense shall hold harmless, defend, and indemnify in full the persons and entities described in paragraph (2) from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance or pollutant or contaminant as a result of [DOD] activities at any installation (or portion thereof) that is closed pursuant to a base closure law. 10 U.S.C.A. § 2687 note.

76/ Richmond Am. Homes, 75 Fed. Cl. at 390.

77/ Richmond Am. Homes, 75 Fed. Cl. at 391–93.

78/ Richmond Am. Homes, 75 Fed. Cl. at 391.

79/ Richmond Am. Homes, 75 Fed. Cl. at 390.

80/ Richmond Am. Homes, 75 Fed. Cl. 376.

81/ 31 U.S.C.A. § 1304.

82/ Comp. Gen. Dec. B-224653, 66 Comp. Gen. 157, 160 (1986) ("[In enacting the judgment fund,] it was never the intent of [Congress] to shift the source of funds for those types of judgments which could be paid from agency funds.").

83/ 31 U.S.C.A. § 1304(a).

84/ 31 U.S.C.A. § 1304(a).

85/ Comp. Gen. Dec. B-224653, 66 Comp. Gen. 157, 160 (1986).

86/ Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act, Comp. Gen. Dec. B-253179, 73 Comp. Gen. 46, 49–50 (1993).

87/ Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act, Comp. Gen. Dec. B-253179, 73 Comp. Gen. 46, 48 (1993) (citing 42 U.S.C.A. §§ 9607(g), 9620(a)(1)).

88/ Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act, Comp. Gen. Dec. B-253179, 73 Comp. Gen. 46, 49 (1993).

89/ Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act, Comp. Gen. Dec. B-253179, 73 Comp. Gen. 46, 50 (1993).

90/ 41 U.S.C.A. § 612.

91/ 41 U.S.C.A. § 612(c). There is no general requirement that an agency reimburse the judgment fund. Reimbursement is required only if specifically required by statute. Authority of General Services Board of Contract Appeals To Order Reimbursement of the Permanent Judgment Fund for Awards of Bid Protest Costs, 14 Op. Off. Legal Counsel 111 (1990) (nothing in 28 U.S.C.A. § 1304 requires reimbursement of the judgment fund).

92/ Memorandum for Donald B. Ayer, Deputy Att'y Gen., from J. Michael Luttig, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Department of Energy Request To Use the Judgment Fund for Settlement of Fernald Litigation (Dec. 18, 1989).

93/ Id.; 42 U.S.C.A. § 2210(j).

94/ OLC Memorandum, supra note 92.

95/ 42 U.S.C.A. § 9601 et seq.

96/ U.S. Dep't of the Treasury, Financial Report of the United States Government (2008), available at http://www.gao.gov/financial/fy2008/08frusg.pdf.

97/ Environmental Protection Agency, NPL Site Totals by Status and Milestone as of April 20, 2009, at http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm.

98/ Regional Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 703 (6th Cir. 2006) (citing 42 U.S.C.A. § 9607); see also Carson Harbor Vill., Ltd. v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2005) (same).

99/ 42 U.S.C.A. § 9607(a).

100/ United States v. Olin Corp., 107 F. 3d 1506, 1514 (11th Cir. 1997) ("An essential purpose of CERCLA is to place the ultimate responsibility for the cleanup of hazardous waste on 'those responsible….'").

101/ 42 U.S.C.A. §§ 9606, 9607.

102/ 42 U.S.C.A. §§ 9607, 9613(f)(1).

103/ See, e.g., Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998) (collecting cases).

104/ Cooper Indus., Inc. v. Aviall Servs., Inc. 543 U.S. 157 (2004).

105/ Cooper, 543 U.S. at 169–70.

106/ See Atlantic Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006); see also Metropolitan Water Reclamation Dist. of Greater Chicago v. North Am. Galvanizing & Coatings, Inc., 473 F.3d 824 (7th Cir. 2007); E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2006); Consolidated Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90 (2d Cir. 2005).

107/ E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2006).

108/ Atlantic Research Corp. v. United States, 551 U.S. 128 (2007).

109/ Atlantic Research, 459 F.3d 827.

110/ Atlantic Research, 551 U.S. 128.

111/ See, e.g., Western Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 692–93 (9th Cir. 2002) (holding that equitable defenses are not available at liability stage but can be considered in allocation). Recently, the Supreme Court issued an opinion on the standard of proof required to prove an apportionment of harms under CERCLA. See Burlington Northern & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).

112/ See Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir. 1995) ("Once liability is established, the focus shifts to allocation."); Foster v. United States, 130 F. Supp. 2d 68, 77 (D.D.C. 2001) ("Once liability has been established, however, courts consider a number of factors in making contribution allocations…."); AlliedSignal, Inc. v. Amcast Int'l Corp., 177 F. Supp. 2d 713, 745 (D. Ohio 2001) ("Having concluded that the Defendant is liable under CERCLA, the Court now turns to the issue of equitable allocation….").

113/ With the passage of the National Industrial Reserve Act of 1948, Pub. L. No. 80-883, 62 Stats. 1225 (1948), Congress sought to "provide a comprehensive and continuous program for the future safety and for the defense of the United States" by establishing a "national industrial reserve."

114/ 42 U.S.C.A. § 9601(9).

115/ See, e.g., FAR 45.102.

116/ See Cibinic & Nash, Administration of Government Contracts 619 (3d ed. 1995).

117/ See, e.g., Elf Atochem N. Am., Inc. v. United States, 868 F. Supp. 707, 709–11 (E.D. Pa. 1994) (describing both term "facility" and what constitutes a "disposal"); Rospatch Jessco Corp. v. Chrysler Corp., 962 F. Supp. 998, 1007–08 (W.D. Mich. 1995) (acknowledging Government ownership of equipment but unable to determine whether there was a release of hazardous waste from the equipment to support Government liability).

118/ See 42 U.S.C.A. § 9601(20).

119/ Raytheon Aircraft Co. v. United States, 556 F. Supp. 2d 1265 (D. Kan. 2008).

120/ Raytheon, 556 F. Supp. at 1281.

121/ See 42 U.S.C.A. § 9601(20).

122/ FMC Corp. v. United States, 29 F.3d 833 (3d Cir. 1994) (en banc).

123/ FMC Corp., 29 F.3d. at 843.

124/ United States v. Bestfoods, 524 U.S. 51, 66 (1998).

125/ Bestfoods, 524 U.S. at 52.

126/ Bestfoods, 524 U.S. at 72.

127/ Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1127 (D. Idaho 2003).

128/ See United States v. Township of Brighton, 153 F.3d 307, 315 (6th Cir. 1998) (identifying FMC as the benchmark case for Government-operator liability and finding it "instructive" in the court's application of the Bestfoods standard); see also Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1129 (D. Idaho 2003) (applying FMC). But see City of Moses Lake v. United States, 458 F. Supp. 2d 1198, 1226 (E.D. Wash. 2006); Miami-Dade County, Fla. v. United States, 345 F. Supp. 2d 1319, 1341–42 (S.D. Fla. 2004) (questioning applicability of FMC after Bestfoods).

129/ See 42 U.S.C.A. § 9607(a)(3).

130/ Burlington Northern & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).

131/ Burlington Northern, 129 S. Ct. at 1878.

132/ Burlington Northern, 129 S. Ct. at 1878.

133/ Burlington Northern, 129 S. Ct. at 1879.

134/ Burlington Northern, 129 S. Ct. at 1879.

135/ Burlington Northern, 129 S. Ct. at 1879.

136/ United States v. Vertac Chem. Corp., 46 F.3d 803, 811 (8th Cir. 1995) (Government not liable as an operator or arranger for production of Agent Orange during Vietnam conflict at contractor plant).

137/ United States v. R.W. Meyer, Inc., 932 F.2d 568, 572 (6th Cir. 1991).

138/ United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993).

139/ See R.W. Meyer, 932 F.2d at 571–74; Gould, Inc. v. A&M Battery & Tire Serv., 987 F. Supp. 353, 367–68 (M.D. Pa. 1997).

140/ United States v. Shell Oil Co., 13 F. Supp. 2d 1018, 1020 (C.D. Cal. 1998), aff'd in part and rev'd in part, 294 F.3d 1045 (9th Cir. 2002).

141/ United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

142/ See, e.g., AlliedSignal, Inc. v. Amcast Int'l, Corp., 177 F. Supp. 2d 713, 749–51 (S.D. Ohio 2001) ("[T]he Court is not able to conclude, based upon the evidence presented at trial, what percentage of those hazardous substances is attributable to each of the parties.").

143/ See, e.g., Redwing Carriers v. Saraland Apts., 94 F.3d 1489, 1498–1503 (11th Cir. 1996).

144/ Compare Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 195 F.3d 953, 958 (7th Cir. 1999) ("blameworthiness is relevant to an equitable allocation of joint costs"), with Shell Oil Co., 13 F. Supp. 2d at 1020 ("This is a case in which allocating 'fault' as such is inappropriate. No one was at fault. Each party did what was necessary to achieve a common, paramount goal: victory in World War II.").

145/ Cadillac Fairview/California, Inc. v. Dow Chem. Co., 299 F.3d 1019 (9th Cir. 2002); United States v. Shell Oil Co., 294 F.3d 1045 (9th Cir. 2002).

146/ Cadillac Fairview, 299 F.3d at 1029.

147/ Cadillac Fairview, 299 F.3d at 1029 (quoting FMC Corp. v. United States, 29 F.3d 833, 846 (3d Cir. 1994) (en banc)).

148/ Shell Oil Co., 294 F.3d at 1051.

149/ Shell Oil Co., 294 F.3d at 1050.

150/ Shell Oil Co., 294 F.3d at 1050.

151/ United States v. Shell Oil Co., 13 F. Supp. 2d 1018, 1023 (C.D. Cal. 1998).

152/ Shell Oil Co., 13 F. Supp. 2d at 1023.

153/ Shell Oil Co., 13 F. Supp. 2d at 1022.

154/ Shell Oil Co., 13 F. Supp. 2d at 1027.

155/ Shell Oil Co., 294 F.3d 1045.

156/ Cadillac Fairview/California, Inc. v. Dow Chem. Co., 299 F.3d 1019, 1021 (9th Cir. 2002).

157/ Cadillac Fairview, 299 F.3d at 1022.

158/ Cadillac Fairview, 299 F.3d at 1023.

159/ Cadillac Fairview, 299 F.3d at 1029.

160/ See Atlantic Research Corp. v. United States, 551 U.S. 128 (2007); Cooper Indus., Inc. v. Aviall Serv., 543 U.S. 157 (2004).

161/ Atlantic Research, 551 U.S. 128.

162/ Raytheon Aircraft Co. v. United States, No. 05-2328, 2007 WL 4300221, at *1 (D. Kan. Dec. 8, 2007).

163/ "Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter." 42 U.S.C.A. § 9614(b).

164/ Raytheon Aircraft Co., 2007 WL 4300221, at *2 (granting Raytheon's motion to strike the Government's affirmative defense).

165/ See, e.g., Quarles Petroleum Co. v. United States, 213 Ct. Cl. 15, 22 (1977) ("To incur means to become liable for or subject to; it does not mean to actually pay for."). Several courts have relied on Quarles to interpret the word "incur" similarly in CERCLA. See, e.g., Jacksonville Elec. Auth. v. Eppinger & Russell Co., No. 388CV873J20HTS, 2005 WL 3533163 (M.D. Fla. Dec. 21, 2005); Karras v. Teledyne Indus., Inc., 191 F. Supp. 2d 1162 (S.D. Cal. 2002); Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., No. 94-0752, 1996 WL 557592 (E.D. Pa. Oct. 1, 1996).

166/ See DCAA Contract Audit Manual § 7-2120.14(b) (Dec. 31, 2008).

167/ U.S. Army Corps of Engineers, Program Summary: Defense Environmental Restoration Program for Formerly Used Defense Sites (Apr. 2008).

168/ Dep't of the Army, U.S. Army Corps of Engineers, Formerly Used Defense Sites (FUDS) Program Policy § 3-1.4.1 (May 2004).

169/ Id.

170/ Id. § 3-1.4.2.

BRIEFING PAPERS