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GOVERNMENT OWNED-CONTRACTOR OPERATED MUNITIONS FACILITIES: ARE THEY APPROPRIATE IN THE AGE OF STRICT ENVIRONMENTAL COMPLIANCE AND LIABILITY?

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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38TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
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GOVERNMENT OWNED-CONTRACTOR OPERATED MUNITIONS FACILITIES: ARE THEY APPROPRIATE IN THE AGE OF STRICT ENVIRONMENTAL COMPLIANCE AND LIABILITY?

by Captain Mark J. Connor

ABSTRACT: This thesis describes the government owned-contractor operated (GOCO) contractual arrangement used to operate the vast majority of the Army's munitions facilities and examines the effects of federal and state environmental laws on those GOCO facilities. Currently, both the Army and its contractors operating the GOCO munitions facilities are under attack by federal and state regulators who seek to compel environmental cleanups or compliance with regulatory schemes. This thesis concludes that while the GOCO concept should be retained as a means of operating the Army's munitions facilities, contractual modifications are necessary to clearly delineate responsibility for environmental compliance and to allocate the risks associated with strict environmental compliance and liability. In addition, a mechanism must be devised to insure that Congress imposes environmental requirements on GOCO facilities only to the extent that adequate funding is provided to meet those requirements.

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I. INTRODUCTION

> [W]e find in these contracts [at GOCO munitions plants] a reflection of the fundamental policy of the government to refrain, as much as possible, from doing its own manufacturing and to use, as much as possible [in the production of munitions], the experience in mass production and genius for organization that had made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war production plants . . . . We relied upon that system as the foundation of the general industrial supremacy upon which ultimate victory [in World War II] might depend.[1]

Government owned-contractor operated (GOCO) munitions facilities have been the primary supplier of the nation's military munitions since shortly after the outbreak of World War II. Increasingly, however, this unique partnership of government and private industry is under attack.

Perhaps the greatest challenge facing both the Army and private contractors involved in GOCO munitions production has resulted from the growth of the modern environmental movement, whose birth is frequently attributed to the 1962 publication of Rachel Carson's Silent Spring. In 1970, Congress reacted to the growing public demand for protection of the environment by passing two major pieces of environmental legislation: the amendments to the Clean Air Act[2] and the National Environmental Policy Act.[3] Since then, Congress has passed an additional 37 major and minor

pieces of environmental legislation,[4] which have spawned an explosion of regulatory implementing guidance.[5]

Despite the plethora of laws and regulations, environmental cleanup has proven to be an elusive goal. Both the time and money necessary to achieve effective cleanups have been routinely underestimated, fueling a growing sense of frustration on the part of the public and the Congress.

Further feeding this sense of frustration has been the appearance that federal facilities, particularly those belonging to the Department of Defense (DOD) and the Department of Energy (DOE), have used the principles of sovereign immunity and federalism as shields protecting them from compliance with federal and state environmental laws and regulations.

Moreover, many legislators and environmentalists are outraged that the contractors whose operations have caused the contamination found at GOCO facilities are not being held financially responsible for the costs of cleanup. This outrage has surfaced during Congressional hearings on environmental cleanups at federal facilities, as can be discerned from the following acerbic excerpt:

> I'm from Muskogee, OK. Mr and Mrs. Smith live on 14th Street in Muskogee, OK. What they are going to read tomorrow about Tucson is this. They are going to read that Hughes Aircraft improperly disposed of hazardous waste [at the Air Force's GOCO Plant #4] that they [Hughes] were under contract to dispose of] with the Air Force. But the Air Force

> has decided that they [the Air Force] is [sic] going to pay for it [the cost of the cleanup required as a result of Hughes' improper disposal]. Not only are they going to pay for it, they're going to pay them [Hughes] a profit for cleaning it up. And so, Hughes Aircraft is not being slapped on the wrist, is not being held accountable like Mr. and Mrs. Smith on 14th Street may be if they dump something [hazardous] in their backyard . . . . And what am I going to tell them why [sic] there are two sets of standards, one for government contractors and one for the public? What am I going to tell them? What do you want me to tell them?[6]

This article examines whether the GOCO contractual arrangement is still appropriate at Army munitions plants in an era of strict environmental compliance given the strong currents of Congressional and public frustration with the pace and cost of environmental compliance and cleanup.

First, the historical rationale behind the GOCO relationship will be examined in detail. Next, the contractual structure of the GOCO relationship will be analyzed. Then, the applicability of federal and state environmental statutes to the Army's munitions plants will be discussed. Because of their broad impact on GOCO munitions facilities, particular attention will he given to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[7] and the Resource Conservation and Recovery Act (RCRA).[8]

Finally, the article will explore alternatives and modifications to the current GOCO contractual

relationship and suggest amendments to existing environmental statutes and procurement regulations that apply to Army munitions facilities.

II. THE GOCO CONCEPT

A. HISTORY AND RATIONALE OF THE GOCO CONCEPT

At the outset of World War II, the notion that the United States would be the arsenal of democracy for munitions production was, at best, wishful thinking.

During the 1930's, small arms ammunition manufacturing for the Department of War was conducted solely at Frankfurt Arsenal.[9] While a number of commercial firms in the United States manufactured sporting ammunition, there was no peacetime market for incendiary, tracer, or armor piercing ammunition, so civilian industry lacked even a basic understanding of how to manufacture these military staples. Moreover, deterioration of stockpiles from World War I production and shipments to Great Britain had depleted total reserves of small arms munitions to less than 400 million rounds.[10]

The situation for larger caliber munitions was even more distressing. On May 1, 1940, the nation's stockpile of large caliber ammunition included only 46,000 37mm antiaircraft rounds, 75,000 37mm tank and anti-tank rounds, 11,928 five hundred pound bombs and 4,336 one thousand pound bombs.[11] As Secretary of War Stinson was to remark in 1943, "[w]e didn't have enough

powder [for large caliber munitions in 1940] in the whole United State's to last the men we now have overseas for anything like a day's fighting."[12] The fact that only the Frankfurt and Picatinny Arsenals were capable of producing new artillery munitions made the situation even more desperate.[13]

The cure to this highly unsatisfactory situation was the unprecedented creation of a GOCO munitions industry, whereby the government would own the production facilities and equipment and a contractor would manage and actually operate the production facility pursuant to one or more contracts with the government.[14] In July 1940, the Ordnance Department signed its first GOCO contract with the Dupont company for manufacture of smokeless powder at what was later called the Indiana Ordnance Works.[15] By 1944, seventy-two GOCO facilities were operating, twelve of which were devoted primarily to the manufacture of small arms ammunition.[16]

From these plants, a virtual avalanche of munitions flowed. By the close of the war, over 41 billion rounds of small arms ammunition and one billion rounds of larger munitions were produced in GOCO facilities.[17]

After World War II, a debate raged in Congress over what to do with the GOCO facilities. In 1948, Congress finally passed legislation that authorized the military departments to maintain a reserve of industrial facilities for purposes of manufacturing wartime military requirements.[18] The decision to retain a substantial number of the GOCO facilities proved to

be wise as a number of the plants were placed back in full production to support the armed forces in the Korean and Vietnam conflicts.

Currently, the Army has 27 industrial facilities that are dedicated to munitions production.[19] Sixteen of the munitions facilities are considered to be in active production.[20] Of the active facilities, 14 are operated as GOCO's.[21]

Most of the GOCO munitions facilities in use today were originally designed in the 1940's and operated extensively through the 1960's. Because these periods pre-dated heightened sensitivity to environmental concerns, environmental problems abound at GOCO munitions facilities today.

Disposal practices used in the past have left many of the GOCO facilities with serious soil and groundwater contamination problems. Contaminants found at the facilities include radiologic materials, volatile organic compounds, heavy metals, and explosive compounds; some are known or suspected carcinogens.[22]

The National Priorities List (NPL) is a congressionally mandated listing of those sites nationwide that the Environmental Protection Agency (EPA) has determined present the greatest threat to the public health and welfare or to the environment.[23] Currently, the NPL contains nine Army GOCO munitions plants.[24] While no reliable estimate for the ultimate cost is available, by the close of fiscal year 1989, over $130,000,000 had been spent by the Army in cleanup related activities at these nine facilities.[25] This

amount does not include any money spent on facility modernization necessary to achieve compliance with current environmental regulatory standards.

From its inception, the GOCO concept has provided a tradeoff for munitions plant contractor-operators. In return for a lower level of profit than might otherwise be expected, the contractors received virtual immunization from risks resulting from munitions manufacturing operations.[26] For example, the contract governing operation of the St. Louis Army Ammunition Plant (AAP) during World War II stated in relevant part that:

> It is the understanding of the parties hereto, and the intention of this contract, that all work . . . is to be performed at the expense and risk of the Government and that the Government shall indemnify and hold the Contractor harmless against any loss, expense, damage or liability of any kind whatsoever arising out of or in connection with the performance of the work under this [contract], 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 the Contractor or of other representatives having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they would normally exercise in the conduct of the Contractor's business.[27]

The obvious risks that were associated with the manufacture of explosives in 1940, catastrophic fire and explosion, still exist today. In 1990, however, the Army and its contractors also face the risks of

liability for the costs of environmental compliance, environmental cleanup, and toxic torts. The magnitude of these new risks is daunting.

Between 1983 and March 1989, nine DOD contractors at GOCO facilities were assessed fines totaling in excess of $1,500,000 for non-compliance with RCRA.[28] Moreover, during 1988, state agencies and the EPA had assessed penalties against private parties for violations at a single facility in amounts as high as $8,950,000.[29] In all likelihood, regulators will increasingly seek to fine contractors operating GOCO facilities as a means of compelling environmental compliance. Support for this conclusion is found in two EPA internal memorandums. The first, a January 25, 1988, memorandum from EPA's Assistant Administrator, Office of Solid Waste and Emergency Response, urged all ten EPA regions to use all RCRA enforcement mechanisms, including penalty assessments, whenever the contractor is responsible for overall operations or hazardous waste management.[30] The second, a September 8, 1988, memorandum to all EPA regions from the EPA's Director, Office of Waste Programs Enforcement, commended two of the regions for recent initiatives in taking enforcement actions and assessing penalties against operating contractors at GOCO facilities.[31]

The risk of civil actions alleging that the United States and its GOCO facility contractor are liable for CERCLA response[32] costs, personal injury, and property damages is also very real.

For example, in Werlein v. United States, an action brought primarily under CERCLA and traditional tort theories, it is alleged that response costs, personal injury, and property damage have resulted from exposure to toxic chemicals used and disposed of on the Twin Cities Army Ammunition Plant (TCAAP).[33] Ninety-three individual plaintiffs and one municipality seek nearly $100,000,000 from the defendants, one of which is the TCAAP's operating contractor.[34]

Regardless of the eventual outcome in Werlein, environmental litigation surrounding the TCAAP has already proven very expensive. In 1988, to settle a companion case to Werlein,[35] the United States agreed to pay the City of New Brighton, Minnesota, over $9,000,000 for CERCLA response costs expended by the city.[36] In addition, the United States agreed to pay for the construction of a municipal water treatment system expected to cost in excess of $4,000,000 and also pay for the operation of that system until its use is no longer required to meet federal and state regulatory safe drinking water standards.[37]

While the risks associated with operation of GOCO munitions facilities have increased, the Army and its contractors' abilities to allocate these risks have actually decreased.

Insuring against the costs of fines has never been possible. Five years ago, however, a contractor could at least obtain insurance against the risks associated with environmental torts or cleanup costs, albeit in limited amounts and at rates from 5 to 10 times in

excess of the rates for policies without such coverage.[38] Moreover, the cost of this insurance was reimbursable by the government.[39]

Recently, however, contractors have found that the insurance for environmental tort or cleanup costs is unavailable at any price. As the operating contractor at the Army's Radford AAP noted, "[t]his lack of insurance is not limited to releases of materials that are toxic, nuclear, or hazardous, but extends to the environmental consequences of the releases of all chemicals, constituents, wastes, or materials."[40]

Environmental problems notwithstanding, GOCO munitions facilities remain a bulwark of the nation's defense. For example, one facility alone, the Lake City AAP, has produced an average of 800,000,000 rounds of small arms ammunition each year since 1984.[41]

B. GOCO CONTRACTUAL PROVISIONS

At active Army munitions plants, the GOCO arrangement is the product of two contractual instruments. The first is the facilities contract; the second is the production contract.

Both facilities and production contracts contain standard clauses affecting the scope of a contractor's liability for operating the facility. For the most part, the financial protection to the contractors provided under these standard contractual clauses does not extend to the costs of complying with federal and state environmental laws and regulations. Instead,

these clauses are more clearly directed towards dealing with the issue of liability for torts, environmental and otherwise, with respect to third persons. To the extent that any of these clauses provide financial protection to the contractor, they are conditioned on the contractor's management not engaging in willful misconduct or demonstrating a lack of good faith.[42]

1. THE FACILITIES CONTRACT

The Federal Acquisition Regulations (FAR)[43] recognizes three different types of facilities contracts.[44] Through the facilities contract, the government provides the contractor with facilities to be used in providing services or producing products under one or more production contracts. Sometimes the facilities are provided at no cost to the government with the contractor being responsible for all maintenance. At other times, when a cost type contract is being used, the contractor is obligated to maintain the facility at the government's expense.

There are standard clauses in facilities contracts dealing specifically with environmental protection through pollution control or abatement relating to the Clean Air Act (CAA) and Clean Water Act (CWA). These clauses, however, do no more than state a general governmental goal of improving the nation's environment and require the contractor to use its best efforts to meet CAA and CWA standards.[45]

Several other standard FAR clauses, however, indirectly bear on the respective responsibility of the government and the facility contractor to meet applicable environmental regulatory standards.

Under the FAR, the government does not warrant the condition or suitability of the facilities for the purposes of the contractor's use.[46] Instead, the contractor must inform the contracting officer, in writing, within 30 days of receipt of the facilities, of any defects that render the facilities unsuitable for the contractor's intended use.[47] The contracting officer then is supposed to direct the contractor to either repair, modify or return the defective facility at government expense.[48]

There are no FAR provisions that deal explicitly with facilities that become, in effect, defective after the initial 30 day period as a result of changing environmental standards. Modifications of the plant, to include rearrangement of moveable equipment, in order to meet environmental standards requires the advance written permission of the contracting officer.[49] Moreover, if removal of such modifications would damage the facilities, the contractor cannot make the alterations even at his own expense.[50] Thus, the contractor whose government-owned facility develops environmental compliance problems during the term of the facilities contract is effectively barred from modifying the facility to achieve compliance without the contracting officer's consent.

This lack of control used to be of only limited concern to government contractors because of the interplay between the "Liability for Facilities,"[51] "Insurance-Liability to Third Persons,"[52] and "Indemnification of the Government"[53] clauses. Prior to promulgation of the FAR in 1984, these three clauses were standard in virtually all facilities contracts.

The Liability for Facilities clause provides that the contractor "shall not be liable for any loss or destruction of, or damage to, the facilities or for expenses incidental to such loss, destruction, or damage."[54] It has remained basically unchanged for at least twenty years and remains a fixture of government facilities contracts.

Prior to 1984, the Insurance-Liability to Third Persons clause provided that the contractor "shall be reimbursed for certain liabilities to third person not compensated by insurance or otherwise without regard to and as an exception to the limitation of costs or limitation of funds clause in the contract."[55] With the promulgation of the FAR in 1984, this clause was amended to provide reimbursement "subject to the availability of appropriated funds at the time a contingency occurs."[56] This amendment was necessary to comply with a 1982 Comptroller General decision, which held that the then existing clause violated the Anti-Deficiency Act[57] and the Adequacy of Appropriations Act[58] because it purported to commit the Government to an indefinite liability that could exceed available appropriations.[59] As amended, this clause is also found

in all government facilities contracts.

Before the promulgation of the FAR, the Indemnification of the Government clause included language by which the contractor agreed to indemnify the government and hold it harmless against claims or injury to persons or damage to property of the contractor or others arising from the contractor's possession of government facilities, except as provided in the Insurance-Liability to Third Persons Clause."[60] With the promulgation of the FAR, the language of the Indemnification of the Government clause has been merged into the Government Property clause, except that the language "as provided in the Insurance-Liability to Third Persons Clause" has been deleted.[61] As amended, the Government Property clause also is standard in government facilities contracts.

As a result of the changes in language, the current Insurance-Liability to Third Person and Government Property clauses cannot be harmonized. In the Insurance-Liability to Third Persons clause, the contractor is indemnified by the government, subject to the availability of appropriated funds, as to "others" for bodily injury arising from performance of the contract. In the Government Property clause, the contractor purports to indemnify the Government for liabilities to "others" arising from the contractor's use or possession of the facilities. While the indemnification in the Government Property clause appears broader in scope than the indemnification in the Insurance-Liability to Third Persons clause, there

is no clear rule as to which of the clauses has priority over the other.

2. PRODUCTION CONTRACTS

Through the production contract, the government contracts for production of one or more types of goods at the facility. Generally, two major types of production contracts are used in government contracting; fixed price and cost-type.

At the Army's active GOCO munitions facilities, however, a fixed price production contract is simply too risky for the contractor to be used. In large part this is because in a fixed price contract the contractor must factor the entire cost of environmental compliance into his bid. This is particularly true if the contractor is using facilities provided to him at no cost to the government. Under that scenario, a contractor using a fixed price contract can easily be ruined by factors beyond his control. For example, the passage of new Federal statutes or regulations could easily result in increased costs for environmental compliance. The contractor would be barred from any additional recovery, however, by operation of the "sovereign act doctrine."[82]

As a result, the use of cost-reimbursable contracts, with provision for some type of award fee, is the norm at active Army GOCO munitions facilities. In cost reimbursable production contracts, the contractor has two avenues of recovering the costs of

environmental compliance. First, he can seek to have the costs included in his overhead costs as an indirect cost of production. Alternately, he can seek to have the costs determined to be reasonable,[63] allowable,[64] and allocable[65] costs of performing the contract. Currently, none of the provisions in the FAR cost principles deal directly with the issue of allowability of environmental costs.

Significantly, the costs of fines and penalties for failure to comply with applicable laws and regulations are not generally allowable.[66] The exception to that rule occurs when the fine or penalty is incurred as a result of specific contractual provisions or written instructions from the contracting officer.[67] As a result, a contractor will be reimbursed for fines levied by environmental regulatory agencies only under unusual circumstances. From 1983 through March of 1989, for example, the EPA and the states assessed fines and penalties in nine cases against DOD contractors for violations of RCRA.[68] None of those fines or penalties paid by contractors, however, were reimbursed by DOD.[69]

Reimbursement for costs incurred as a result of regulatory agency mandated cleanup actions is yet another matter. Under CERCLA and RCRA, for example, a contractor can be ordered to engage in an environmental cleanup both on and off the government facility without regard to whether or not the contractor violated any laws or regulations.[70] Whether such costs would be allocable and reasonable, particularly if the

cleanup was being conducted off the government facility, is unclear.

III. APPLICABILITY OF ENVIRONMENTAL LAWS AND REGULATIONS TO GOCO FACILITIES

> I will insist that in the future federal facilities meet or exceed environmental standards. The government should live within the laws it imposes on others. [From a May 1988 campaign speech by then Vice President George Bush][71]

In making this promise to force federal facilities to comply with environmental laws, then-candidate Bush summarized one of the fundamental goals of all environmental legislation passed by Congress since 1970. The Army and its contractors at GOCO munitions facilities are clearly subject to federal environmental law, absent limited presidential exemptions.[72] Enforcement of these federal laws against the Army and other federal agencies, however, has proven to be problematic.

To the extent Congress has waived the sovereign immunity[73] of the United States and no presidential exemption applies, the Army is also subject to state environmental law. Contrary to popular belief, enforcement of state environmental laws against contractors at GOCO facilities may also depend on a Congressional waiver of sovereign immunity.[74]

The above described principles apply generally to all federal and state environmental laws. The impact

that a waiver of sovereign immunity has on a federal agency varies significantly, depending in large part on the type of facilities the federal agency maintains and the nature of the particular environmental law.

Neither CERCLA or RCRA, for example, recognize the biblical precept that "[f]athers may not be put to death for their sons, nor sons for their fathers; each man is to be put to death for his own guilt."[75] Instead, under CERCLA and RCRA, current owners and operators are potentially liable not only for releases or threatened releases occurring during their ownership and operation but also for releases that occurred prior to their ownership or period of operation. Furthermore, an owner's or operator's exercise of due care and non-negligent behavior is of no importance.

Due to the severity of their regulatory schemes, and because they have the broadest impact on the Army's GOCO munitions facilities of all environmental laws, the provisions of RCRA and CERCLA are described in greater detail below.

A. THE STATUTORY SCHEME OF RCRA

The Resource Conservation and Recovery Act (RCRA) was originally enacted in 1976 as an amendment to the Solid Waste Disposal Act. The RCRA established a comprehensive management system and imposed requirements for the generation, transportation, storage, treatment and disposal of hazardous wastes.[76] These requirements are detailed in regulations

promulgated and administered by EPA. States may administer their own RCRA programs if authorized to do so by EPA.[77]

RCRA applies to generators[78] and transporters[79] of hazardous waste and to "owners and operators of hazardous waste, treatment, storage and disposal facilities."[80] A mandatory permitting system is used for regulation of owners and operators of the hazardous waste, treatment, storage and disposal facilities.[81]

Significantly, RCRA does not define the term "operator." Instead, as a matter of policy, the EPA has defined an operator at a GOCO facility as the person "responsible or partially responsible for the operation, management, or oversight of hazardous waste activities at the facility."[82] This policy recognizes that in some cases both the federal agency and the contractor will qualify as an "operator."[83] In addition, the policy states as a general rule that an agency's contractor at a GOCO facility will be an "operator" and should be required to sign the permit application.[84]

RCRA was most recently amended in 1984. At that time, Sections 3004(u) and 3004(v) were added.[85] Prior to these amendments, RCRA's regulatory scheme was primarily directed towards preventing pollution. The enactment of sections 3004(u) and 3004(v), however, moved RCRA into the area of environmental cleanup, which had been the exclusive domain of CERCLA since 1980.

Section 3004(u) requires the EPA or a state with an authorized program to include "corrective action" requirements in all RCRA permits issued after November 8, 1984. Through these corrective action requirements, the cleanup of "releases of hazardous waste or constituents from any solid waste[86] management unit at a treatment, storage, or disposal facility seeking a permit . . . , regardless of the time the waste was placed in the unit," is dealt with.[87]

The term "facility" is not defined by RCRA. The EPA has interpreted it by administrative rule for 3004(u) purposes, however, to mean the treatment, storage, or disposal facility and surrounding contiguous geographic area under the ownership or control of the permit holder.[88] Therefore, a RCRA permit holder can be required by the term of his permit to correct the results of prior hazardous waste operations anywhere within the contiguous boundaries of the facility regardless of his lack of involvement in those operations. Since an Army GOCO munitions facility can consist of over 144,000 acres,[89] the potential liability assumed by a RCRA permit holder at a GOCO facility can be staggering.

Section 3004(v) also represents a significant expansion of RCRA. Under this section, the EPA can order owners and operators of landfills, surface impoundments, and waste piles in which liquids or hazardous wastes were placed to engage in corrective action beyond the facility boundary "where necessary to protect human health and the environment."[90]

Violation of RCRA requirements can result in a variety of actions being taken by EPA or an authorized state in which the facility is located. An administrative civil penalty can be assessed and a civil suit can be filed against a violator to compel compliance through assessment of penalties and imposition of injunctive relief.[91] Criminal penalties can be imposed against "persons"[92] who engage in knowing violations of substantive requirements.[93]

Moreover, RCRA section 7003 permits civil suits to compel or restrain action regarding solid or hazardous wastes when "the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."[94] Subject to these "imminent endangerment suits" is "any person . . . who has contributed or is contributing to such handling, storage, treatment, or disposal" of the solid or hazardous wastes.[95] Section 7003 has been interpreted to impose strict liability on those who are subject to its provisions.[96]

In cases of imminent endangerment, the EPA Administrator also is empowered to issue administrative orders to the extent necessary to "protect human health and the environment."[97] Violations of these orders can result in judicially assessed fines of $5,000 per day.[98]

Individuals can also seek to enforce RCRA through the mechanism of a "citizen suit."[99] As a result, when either EPA or an authorized state fail to diligently enforce violations of RCRA permits, standards,

regulations, conditions, requirements, prohibitions, or orders by means of a civil or criminal action, an individual may seek enforcement through means of a civil suit.[100] Such a suit can seek injunctive relief, assessment of civil penalties, or both.[101] Prior to filing such a suit, however, an individual is required to provide 60 days notice to EPA and the state in which the violation is alleged to have occurred.[102]

In addition, individuals can seek injunctive relief in cases of alleged imminent and substantial endangerment.[103] Such suits are prohibited, however, if either the EPA or the state concerned is diligently pursuing judicial action to remedy the situation.[104] In addition, citizen suits are not allowed if either the EPA or state concerned has commenced a removal action or has incurred costs to initiate and is diligently pursuing a remedial investigation and feasibility study (RI/FS) pursuant to CERCLA section 104.[105]

B. THE STATUTORY SCHEME OF CERCLA

In late 1980, Congress passed CERCLA to meet the perceived threat to the country's environment resulting from an estimated 30,000-50,000 improperly managed hazardous waste sites that existed nationwide.[106]

Six years later, Congress passed the Superfund Amendments and Reauthorization Act[107] which "provide[d] mandatory schedules for the completion of various phases of response activities, established detailed cleanup standards and generally strengthen[ed] existing

authority to affect the Superfund sites."[108] Currently, money for the CERCLA cleanups conducted by the EPA comes from the Hazardous Substance Superfund (Superfund).[109] Superfund consists primarily of general tax revenues and taxes imposed on the manufacture of chemicals and generators of hazardous wastes.[110] The fund is replenished with amounts recovered by EPA from parties responsible for the release of hazardous wastes at sites where Superfund is used to finance the cleanup.[111]

Where RCRA is commonly thought of as a "cradle to grave" mechanism for safely managing hazardous wastes from generation through disposal, CERCLA's focus is more narrowly directed towards cleaning up "releases"[112] of "hazardous substances, pollutants, or contaminants"[113] that already have occurred. Often these releases began decades ago.

Under CERCLA, strict,[114] joint and several[115] pecuniary liability can be imposed on four classes of persons[116] for recovery of response costs,[117] natural resource damages,[118] and the costs of any necessary health assessments or studies that are incurred as a result of a release or threatened release of hazardous substances. These classes consist of: (1) the owner and operator[119] of a vessel or facility; (2) any person who at the time of disposal of any hazardous substance owned or operated the facility where the hazardous substances were disposed of; (3) any person who by contract, agreement or otherwise arranged for the disposal or treatment of hazardous substances; and (4)

any person who accepts or accepted a hazardous substances for transport to disposal or treatment facilities.[120]

Through CERCLA, the EPA and the states can recover response costs from responsible persons if the costs were incurred in a manner not inconsistent with the National Contingency Plan (NCP).[121] Private parties can also recover "necessary" response costs from responsible persons so long as the costs incurred were consistent with the NCP.[122] Section 106 of CERCLA also allows the President[123] to issue administrative orders "as may be necessary to protect public health and welfare and the environment."[124] Violation of these "106 Orders" can result in judicially assessed fines of up to $25,000 per day of non-compliance.[125]

Unlike RCRA, CERCLA has no provision allowing delegation of CERCLA authority over federal facilities by EPA to the states.[126] According to CERCLA section 120, only those federal facilities not on the NPL are subject to direct state regulation concerning response actions, to include enforcement.[127] Cleanups of federal facilities on the NPL, however, generally are required to be conducted in a manner satisfying those promulgated state standards that are "legally applicable or appropriate and relevant"[128] to the issues presented by each facility's cleanup.

Finally, CERCLA section 310 authorizes any person[129] to file a "citizen suit" in federal district court against any other person, including the United States, "who is alleged to be in violation of any

[CERCLA] standard, regulation, condition, requirement, or order."[130] Such an action can seek injunctive relief and civil penalties.[131] Citizen suits cannot be commenced without giving the EPA, the state in which the alleged violation occurred, and the alleged violator, 60 days notice of the alleged violation.[132] Moreover, such an action is prohibited if the EPA has commenced and is diligently prosecuting an action under CERCLA or RCRA which would, if successful, compel compliance and remedy the deficiency complained of in the citizen suit.[133]

C. THE CERCLA - RCRA OVERLAP

Since the passage of RCRA 3004(u), the potential for overlapping state and EPA authority in regulating the cleanup of a federal facility on the NPL has existed. Resolution of the issues resulting from such an overlap is made particularly difficult by the language in CERCLA Section 120(i) which states that "[n]othing in this section shall affect or impair the obligation of any department, agency, or instrumentality [of the federal government] to comply with any requirement of the Solid Waste Disposal Act [RCRA] . . . (including corrective action requirements)."[134]

The issues that can result from the CERCLA-RCRA overlap are not merely of academic interest at a GOCO facility. Once 3004(u) corrective action authority has been delegated by EPA, states can seek to directly

control the cleanup of federal facilities on the NPL outside the CERCLA section 120 process, and without the requirement that CERCLA cleanups be "cost effective."[135] Perhaps even worse, the Army and its contractor can be caught in the middle of a struggle between EPA and a state over which regulating body, state or federal, will oversee the cleanup, since each regulating body may have its own preference in selecting a remedial scheme.[136]

Currently, nine Army GOCO munitions facilities are on the NPL.[137] As of January 31, 1990, RCRA 3004(u) authority had been delegated by EPA to four states: Georgia,[138] Minnesota,[139] Colorado,[140] and Utah.[141] Five other states are awaiting final EPA action on their applications: North Dakota, Idaho, Vermont, Michigan, and South Dakota.[142]

Recognizing the potential problem, EPA has attempted to address the matter through administrative rule making. Citing language in CERCLA governing "inconsistent response actions,"[143] EPA has attempted to preempt the exercise of state RCRA authority at facilities on the NPL where the RI/FS process under CERCLA has commenced.[144] While this approach may ultimately prevail, it has yet to be tested in the courts. Certainly, language in the Colorado v. United States opinion suggests that this approach will encounter judicial resistance.[145]

IV. ENFORCEMENT OF ENVIRONMENTAL LAWS AT FEDERAL GOCO FACILITIES

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.[146]

Absent voluntary compliance, the regulatory agencies' ability to enforce environmental laws and regulations against non-compliant parties is critical. While Congress has conveyed an impressive array of enforcement mechanisms to the EPA, the states, and private citizens, attempts to utilize these mechanisms directly against non-complying federal agencies have often been frustrated by principles of federalism.

A. ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS

The EPA is the executive agency with overall responsibility for developing programs to implement federal environmental statutes. By law, however, enforcement of these statutes in court is the responsibility of the United States Department of Justice (DOJ).[147] This splitting of authority has, in some circumstances, frustrated EPA's goal "that Federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities."[148]

The principal source of frustration for EPA, however, has been DOJ's "unitary executive doctrine."[149] The genesis of this doctrine was first apparent in 1983. At that time, DOJ notified Congress[150] that it was DOJ policy that executive agencies resolve their disputes internally through use of Executive Order 12146, including those involving RCRA and CERCLA.[151] DOJ amplified this position in 1985, informing Congress that no case "provides any support for the conclusion that a court may adjudicate a RCRA . . . enforcement action brought by EPA against the Department of Energy (or indeed against any other Executive Branch Agency, whose head serves at the pleasure of the President)."[152]

The doctrine's theory was fully fleshed out in 1987 Congressional hearings. At that time, F. Henry Habicht II, Assistant Attorney General for DOJ's Lands and Natural Resources Division, testified that EPA can neither sue nor unilaterally issue administrative orders to federal facilities because:

> [T]he president has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibilities under Article II, even though Executive branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered to comply with an administrative order <u>without the prior opportunity to contest the order within the executive Branch</u>.[153] (Emphasis in original.)

EPA has responded to the unitary executive doctrine[154] by establishing a Federal Facilities Dispute Resolution Process (dispute process).[155] Basically, this dispute process offers federal agencies the opportunity to challenge the terms of an EPA proposed order through various levels of EPA's regional and national bureaucracy.[156]

If the dispute cannot be resolved between EPA and the concerned agency, the dispute process requires utilization of Executive Order 12088[157] for those disputes revolving primarily around funding and scheduling issues.[158] The provisions of Executive Order 12146[159] are used if the dispute involves differing legal interpretations relating to environmental compliance.[160]

This dispute process applies generally to all administrative orders or compliance orders that EPA could contemplate issuing to a federal agency. The only exception currently[161] existing is CERCLA Section 106(a) orders, which can be simply issued by EPA to other federal agencies with the concurrence of the DOJ.[162] This authority to issue CERCLA 106(a) orders to other federal agencies without consultation with those agencies was delegated to the EPA Administrator by Executive Order 12580.[163]

Even where EPA is finally able to issue an administrative order to a federal agency, however, in general it lacks the ability to enforce the order. As result of the unitary executive doctrine, the EPA cannot persuade DOJ prosecute civil judicial actions

against federal agencies under any circumstance. Nor can it currently[164] assess civil fines or penalties against federal agencies[165] except for violations of Interagency Agreements (IAGs) reached under CERCLA section 120.[166]

EPA has responded to this enforceability problem with a two part strategy.

First, it has looked to states and citizens to bring suits to enforce compliance agreements entered into by the subject agency and EPA.[167] Congress has included "citizen suit" provisions in virtually all federal environmental statutes.[168] The scope of relief allowed under these provisions generally includes the assessment of civil penalties, injunctive relief and attorneys fees and costs.[169]

With the exception of citizen suits brought under the "imminent endangerment provision" of RCRA,[170] however, penalties and fines cannot be assessed for violations rectified prior to suit.[171] Moreover, most private citizens lack the financial resources to take a non-complying federal agency to court. As one state attorney general put it, "if a state feels like it's wrestling a 500-pound gorilla when it takes on one of these Federal facilities without the assistance of U.S. EPA, I would submit to you that there are very few citizens or citizen groups . . . that are going to come close to having the resources to do this type of thing."[172]

The second part of EPA's strategy is a "policy to pursue the full range of its enforcement authorities

against the [GOCO facility's] contractor operator . . . in appropriate circumstances."[173] This policy, announced in November 1988, was quickly put in effect. By May 1989, EPA had issued four RCRA 3008(a)[174] compliance orders to government contractors at GOCO facilities in which EPA alleged violation of various RCRA hazardous waste management provisions.[175]

From the regulator's viewpoint, this approach certainly has merit. By proceeding against the contractor at a federal facility, EPA avoids entanglement in the unitary executive doctrine, which fetters its enforcement efforts.

A blind application of the policy, however, could easily run afoul of the contractor's contract with the federal agency. Such a situation would occur if EPA sought to compel environmental compliance in a manner either specifically not allowed by or beyond the scope of the contract's terms.[176] That such problems are not merely theoretical, is illustrated by two recent cases.

In 1987, the DOJ filed suit against General Dynamics Corporation (General Dynamics), the operating contractor of the Air Force's GOCO Plant #4, based on EPA allegations that aircraft coating materials used by General Dynamics resulted in air emissions violating the Clean Air Act (CAA).[177] In a motion to dismiss the action, General Dynamics argued that the coating materials and the process used to apply them were required by the terms of its contract with the Air Force.[178]

Significantly, the court appeared to recognize the possibility that the terms of the contract with the Air Force could have prevented General Dynamics from achieving air emission control requirements. The court's analysis on this point was cut short, however, because it found that the Air Force had allocated $2.3 million dollars under the contract for the purpose of installing air emission control equipment, which General Dynamics had declined to install.[179]

More recently, Rockwell International Corporation (Rockwell), the operating contractor for the DOE's GOCO Rocky Flats Plant, filed suit against the United States.[180] In that case, Rockwell sought declaratory and injunctive relief to prevent either federal or state authorities from pursuing civil or criminal sanctions against Rockwell or its employees for actions taken in good faith pursuant to Rockwell's contract with DOE to operate the Rocky Flats Plant.[181] Rockwell alleged that its performance under its contract with the DOE violated certain statutes and regulations relating to the treatment and/or disposal of certain types of purported waste materials, resulting in Rockwell's exposure to criminal prosecution for operating the plant and civil liability for breach of contract if it fails to operate the plant.[182]

While the court recognized that Rockwell "appear[ed] to be exposed to a dilemma,"[183] it ultimately denied Rockwell's motion for relief. The court's denial appeared to be heavily influenced by its finding that Rockwell had failed to exhaust its

remedies under the dispute resolution clause of the contract.[184]

B. ENFORCEMENT OF STATES' ENVIRONMENTAL LAWS

While enforcement is sometimes problematic, it is at least clear that GOCO facilities are subject to federal environmental laws. In many instances, however, the same can not be said for state law.

Fundamental principles of sovereign immunity provide that the United States can be sued only as it "consents to suit."[185] Thus, absent "specific congressional action" that makes such consent, or waiver of immunity, "clear and unambiguous," states cannot regulate federal facilities.[186]

Not until the CAA Amendments of 1970 did Congress pass environmental legislation that contained a waiver of sovereign immunity.[187] Since then, however, each piece of environmental legislation passed by Congress has included a waiver of sovereign immunity.

After the Supreme Court's decision in Hancock v. Train,[188] amendments to the Solid Waste Disposal Act (SWDA),[189] CAA,[190] Federal Water Pollution Control Act (CWA),[191] and the Safe Drinking Water Act (SDWA)[192] quickly were passed. In reaction to the Court's "invitation"[193] in Hancock to clarify its intent, Congress included new and broader waivers of sovereign immunity in these amendments.

These amendments largely settled the issue of whether federal facilities are required to obtain permits under state laws implementing RCRA, CAA, CWA, and SDWA by expressly making federal agencies subject to states' permit requirements.[194]

Federal agencies' liability for state fines and penalties resulting from their facilities non-compliance with state environmental regulatory requirements has remained generally unclear, however. Only where the penalties have resulted from discharge of air pollutants at federal facilities in violation of state laws regulating air pollution have courts uniformly allowed states to assess penalties against federal agencies,[195] because of the waiver of sovereign immunity peculiar to the CAA.[196]

On the other hand, courts have been evenly split as to whether the waiver of sovereign immunity in the CWA[197] permits states to assess fines or penalties against federal agencies for violation of state water pollution control and abatement statutes.[198] Similarly, courts have been divided on whether the waiver of sovereign immunity in the RCRA[199] allows states to assess civil fines and penalties.[200]

Congress has taken note of this situation and taken some action to clarify its intent regarding the applicability of state fines and penalties to federal facilities. Recently, it enacted the Medical Waste Tracking Act of 1988 (MWTA).[201] The language of the waiver of sovereign immunity in the MWTA is both clear and unambiguous. In relevant part, it reads as

follows:

> The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to all administrative orders, civil, criminal, and administrative penalties and other sanctions, including injunctive relief, fines, and imprisonment. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such order, penalty, or other sanction. For purposes of enforcing any such substantive or procedural requirement . . . against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States.[202]

Congress has also recently considered various bills that would provide RCRA with a clear and unambiguous waiver of sovereign immunity that would subject federal agencies to state fines and penalties.

The most recent Congressional effort in this area is H.R. 1056, the Federal Facilities Compliance Act. Among other[203] changes, the bill would amend the waiver of sovereign immunity in RCRA so that it would be identical to the waiver used in the MWTA.

Thus, states not only would be able to impose administrative and judicial civil sanctions against non-complying federal agencies, but they also would be able to impose criminal penalties on federal agencies for violations of RCRA.[204] As one state's attorney general said with considerable understatement, "[t]he

bill presently being considered [H.R. 1056] goes a long way towards ensuring that Federal facilities will be treated in the same manner under RCRA as private facilities . . . ."[205]

H.R. 1056 was supported by all 50 states' attorney generals[206] and also by EPA.[207] Its passage was opposed by DOJ, DOD, and DOE.[208] Ultimately, however, H.R. 1056 was passed by the House on July 19, 1989, by a vote of 380 to 39.[209]

On May 31, 1989, Senate Majority Leader Mitchell introduced S. 1140, which is companion legislation to H.R. 1056.[210] S. 1140 is virtually[211] identical to H.R. 1056 in its treatment of federal facilities. A vote on S. 1140 is still pending.

Should the provisions of H.R. 1056 or S. 1140 ultimately become law, states would have unprecedented power to apply state law to regulate operations involving hazardous wastes at all federal facilities. The effect on DOD facilities could be tremendous. As one critic noted:

> Ohio Representative Dennis Eckart's bill [H.R. 1056] would waive the federal sovereign immunity clause under the Solid Waste Disposal Act, thereby inviting every legal yahoo and politician in the country to sue the Defense Department for not instantly cleaning up waste sites. Fines and penalties will run into the tens of millions of dollars.[212]

Absent the enactment of H.R. 1056, S. 1140, or similar legislation, states will likely step up enforcement actions against contractors at GOCO facilities. Contractors at Army GOCO munitions facilities stand a fair chance of avoiding this surrogate liability, however. They can argue that their activities are performed pursuant to contract with the Army in fulfillment of a federal function, thus shielding the contractors with sovereign immunity to the same extent that the Army is shielded.

Support for this theory can be found in a series of cases stretching back to 1940, beginning with Yearsley v. W.A. Ross Construction Co.[213] In Yearsley, the Supreme Court held that a public works contractor was not liable for the performance of its federal contract because it acted essentially as an agent of the government and was entitled to the same immunity available to the government.[214] While the holding in Yearsley has never been adopted in a case involving a state enforcement action of an environmental statute, it did find application in at least one case involving nuisance, the common law predecessor to modern environmental enforcement actions.

In Green v. ICI America, Inc.,[215] the plaintiff sought to recover damages for the creation and maintenance of a nuisance. The defendant in the case, the operating contractor at the Army's Volunteer AAP, a GOCO munitions facility, admitted that normal operation of the plant required the emission of visible and odoriferous smoke and vapors.

The court found that the contractor was shielded by sovereign immunity, holding, "where the act, or failure to act, which causes an injury is one which the contractor was employed to do, and the injury results not from the negligent manner of doing the work but from the performance thereof or failure to perform it at all, the contractor is entitled to share the immunity from liability which the public enjoys."[216]

The only court directly addressing the issue of whether a contractor at a GOCO facility is shielded by sovereign immunity from fines imposed for violations of state environmental requirements has found, however, that the contractor was not protected. In United States v. Pennsylvania Envtl. Hearing Bd.,[217] the court considered whether the operating contractor of the Scranton AAP could be fined by the State of Pennsylvania for the discharge of 1.5 million gallons of untreated waste water into a tributary of the Lackawanna River. Relying on the Supreme Court's rationale in Powell v. United States Cartridge Co.,[218] the court held that because the contractor was an independent contractor, it did not qualify as a "department, agency, or instrumentality" under Section 313 of the CWA,[219] and was therefore not immune from the state's assessment of civil penalties.[220] In reaching this decision, the court considered Hancock v. Train,[221] but it ultimately dismissed Hancock as being only "marginally relevant" and "superceded by statute."[222]

Recently, however, new life was breathed into the argument that operating contractors at GOCO facilities

can be shielded by sovereign immunity as a result of the Supreme Court's decision in Goodyear Atomic Corp. v. Miller.[223] In Goodyear Atomic, the issue was whether or not Ohio's workers compensation law applied to the activities of an operating contractor at a DOE GOCO nuclear facility. In sharp contrast with the decision in United States v. Pennsylvania Envtl. Hearing Bd., the Supreme Court stated that "Hancock thus establishes that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is performed by a private contractor, unless Congress clearly authorizes such regulation."[224] (Emphasis added).

As a result of Goodyear Atomic, the holding in Pennsylvania Envtl. Hearing Bd. is of doubtful further significance. Future cases deciding whether or not a contractor is shielded by sovereign immunity will likely revolve not around the status of the contractor, but instead on the nature of the function performed by the contractor's activities. At least at those GOCO munitions facilities where all production is for the benefit of the government,[225] the operating contractors should have an excellent argument that their activities constitute the type of federal function that Goodyear Atomic accords the protection of sovereign immunity.

Any success that contractors have in gaining protection through sovereign immunity is likely to be short lived, however. Congress is clearly in the mood to restrict the application of sovereign immunity in the environmental area. Should a significant number of

contractors be afforded immunity from state enforcement actions, Congress will almost certainly take the hint given by the Court in Hancock and pass additional legislation to clearly and unambiguously remove such protection.

V. METHODS OF DEALING WITH THE ENVIRONMENTAL CHALLENGE AT GOCO MUNITIONS FACILITIES

> The environmental movement is inescapably political, despite the scientific and technical nature of the solution to its policy problems. Its focus is on government action on many fronts; it involves conflicts and controversies over what should be done, how it should be done, and who should do it; it requires difficult choices as to both social ends and means; it deals with essential goals and purposes. And no easy calculus is available to tell us which choices to make.[226]

The era of strict environmental enforcement and liability clearly poses a challenge to the continued vitality of the GOCO concept at Army munitions facilities. The Army can, however, chose to meet the environmental challenge in a number of ways.

Options available include providing total indemnification for its GOCO contractors, privatizing munitions production by selling the munitions facilities to private industry, and convincing Congress that GOCO facilities should not be subject to broad waivers of sovereign immunity in environmental statutes.

This section discusses each of those possible "fixes." Each is accompanied by distinct advantages and disadvantages. Ultimately, however, the feasibility of each option depends on Congress' willingness to make difficult decisions involving the often competing national priorities of protecting the environment and providing a strong national defense at a reasonable price.

A. USE OF PUBLIC LAW 85-804

As previously described, a 1982 Comptroller General opinion severely limited the Army's ability to indemnify GOCO munitions plant contractor-operators.[227] The current FAR provision dealing with contractor indemnification, the "Insurance - Liability to Third Persons" clause, subjects the applicability of its coverage to "availability of appropriated funds" at the time the contingency occurs.[228] Moreover, the clause purports to cover only "property damage and personal injury" suffered by third parties.[229]

Fines assessed by the EPA and state agencies against a contractor are not covered by the clause. It is not clear, however, whether cleanup costs incurred as a result of a successful CERCLA response cost action against the contractor fall within the meaning of "damages to property" of third parties. The term "property," as it applies to third parties, is not defined by the FAR. Courts addressing the issue of what constitutes "property" in insurance litigation

involving environmental cleanups have been split. For example, one court has gone so far as to find that property damages occur when "the environment has been adversely affected by the pollution to the extent of requiring governmental action or expenditure."[230] Another court, however, has characterized CERCLA response costs as economic losses instead of damage to tangible property.[231]

Of course, a contractor also can argue that fines and response costs are recoverable under its contract, assuming it is operating under a cost type contract. As previously mentioned, however, DOD policy is that fines assessed against contractors are recoverable costs only in unusual circumstances.[232] Additionally, the contractor would have to demonstrate, among other requirements,[233] that the costs incurred in performing a cleanup were allocable against the current contract.[234] Such a showing would be almost impossible to make if the cleanup was required to be undertaken off the facility[235] or if the actions that resulted in the need for the cleanup were performed prior to the contract period in which the claim for costs is made.[236]

As a result of these uncertainties, and to provide contractors with protection from catastrophic harm and insure there willingness to continue to operate GOCO munitions facilities, the Army has turned to the National Defense-Contracts Act.[237] [hereinafter PL 85-804].

In relevant part, PL 85-804 provides that:

> The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modifications of contracts, whenever he deems that such action would facilitate the national defense.[238]

Thus, use of PL 85-804 allows the Army to provide indemnity[239] to its contractors without regard to the limitations imposed by the Anti-Deficiency Act.[240]

There are, of course, certain statutory prerequisites to the use of PL 85-804. First, if use of PL 85-804 could obligate the United States to pay in excess of $50,000, the head of the agency or his deputy is required to make a determination that its use is necessary to facilitate the national defense.[241] Second, any use of the authority that could obligate the United States to pay more than $25,000,000 is not supposed to be exercised unless both the Senate and House Armed Services Committee have had an opportunity to veto use of the authority.[242]

Third, PL 85-804 is effective only during periods of national emergency declared by Congress or the President and for six months following the termination of the period, or such shorter periods as designated by concurrent Congressional resolution.[243]

Finally, indemnification provided under PL 85-804 will not protect against non-subrogated claims by the United States against the contractor that result from willful misconduct or lack of good faith on the part of the contractor's officers or directors.[244]

Executive Order 10789,[245] which implements[246] PL 85-804, also contains certain restrictions. The most important of these is that the amount of indemnification must be limited to amounts previously appropriated and authorized unless the claim or loss arises or results from risks defined by the contract as being unusually hazardous or nuclear in nature.

Following the Comptroller General's 1982 decision which effectively held that the indemnification purported to be provided by DAR 7-203.22 was of no effect,[247] the push to use PL 85-804 to indemnify GOCO munitions contractors began to gain momentum. Clearly, the munitions contracts facilitate the national defense. What constitutes "unusually hazardous" activities has proven more difficult to define, however.

In 1984, Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management, testified before Congress that "unusually hazardous" as used in DOD's indemnification agreements meant risks "generally . . . associated with nuclear-powered vessels, nuclear-armed guided missiles, experimental work with nuclear energy, handling of explosives, or performance in hazardous areas."[248] In essence, this definition assigned a common, everyday meaning to the

term "unusually hazardous."

Such a definition, however, would not cover the activities by contractors at GOCO munitions facilities faced with the handling, storing, and disposing of materials such as chlorinated solvents. Many of these materials are hazardous within the meaning of environmental statutes, but are routinely used by industries with no connection to the national defense effort. As a result, the Army has expanded the definition of "unusually hazardous" in PL 85-804 determinations made to cover contractor activities at GOCO munitions plants.

On May 31, 1985, the Secretary of the Army made a PL 85-804 determination to cover contractor activities at both the Lake City and Newport AAPs.[249] In that action, "unusually hazardous" activities was defined to encompass both sudden and non-sudden environmental damages, including:

> exposure to toxic chemicals or other hazardous materials arising from the receiving, handling, storage, transportation, loading, assembling, packing, and testing of such chemicals or materials and thus damages arising out of the use, disposal, or spillage of such toxic chemicals and other hazardous materials are covered, including environmental damages.[250]

Under this clause, the contractor is presumably indemnified even if the environmental damage is the result of long term (non-sudden) negligent practices of the contractor.

Moreover, the toxic chemicals and hazardous materials whose release into the environment cause the damage are not required to be used for the purpose of assembling or manufacturing munitions for the United States under the contractor's production contract. In other words, to the extent that these hazardous and toxic materials might be used to support assembling or manufacturing items for third parties (i.e., foreign sales or other DOD contractors) the contractors at Lake City and Newport were still covered by the indemnification.[251]

In 1987, the Secretary of the Army extended indemnification through the PL 85-804 process to the contractor-operator of the Mississippi AAP.[252] This determination was different in two significant ways from the determinations that had been made previously for the Lake City and Newport AAPs.

First, it limited coverage for releases of toxic or hazardous materials to those used in production of munitions for the United States under a production contract.[253] Second, to the extent it provided indemnification in the case of a non-sudden release, the release could not be the result of the contractor's negligence.[254]

The scope of indemnification was further refined in 1988 with the determination to provide indemnification to the contractor operator of the Iowa AAP.[255] Under the Iowa AAP determination, intentional acts of misconduct by the contractor that resulted in releases of hazardous or toxic materials explicitly were

excluded in cases of non-sudden releases.[256] Additionally, for the first time, sudden and non-sudden releases were defined, the difference between the two being whether or not the release was repeated or continuous in nature.[257]

Finally, in 1989, the Secretary of the Army signed a PL 85-804 determination that provided indemnity for activities of the contractor-operator of the Radford AAP.[258] The Radford determination is especially significant because it is intended to serve as the model for all PL 85-804 determinations for the remaining contractor operated munitions plants. To this end, the U.S. Army Armament, Munitions and Chemical Command (AMCCOM) sent letters on January 9, 1990, to all remaining GOCO munitions plant contractors informing them of "the extent to which the Department of the Army is willing to indemnify contractor operators of the AAPs."[259]

Pursuant to the provisions of the Radford determination, contractors are indemnified for the risk of release of hazardous toxic materials used in connection with the manufacture or assembly of munitions under contract with the United States. They can also be indemnified when using the toxic or hazardous materials in performance of third-party contracts when written approval the contracting officer is received.[260]

The Radford determination continues the practice of previous determinations in distinguishing between sudden and non-sudden releases. Generally, the

"continuous and repeated" distinction between sudden and non-sudden releases first established in the Iowa AAP determination is preserved. In the Radford determination, however, "intentional and knowing" releases will always be considered non-sudden in nature.[261]

Significantly, the Radford determination provides for the first time that in the case of non-sudden releases:

> [T]he Contractor will not be indemnified if the government can demonstrate that said release was the result of non-compliance (with the intent or knowledge of the Contractor's principal officials) with environmental laws or regulations applicable at the time of the release, unless such compliance was caused by the design or condition of Government-furnished equipment or facilities, or the result of the Contractor's compliance with specific terms and conditions of the contractor written instructions from the Contracting Officer.[262]

This language effectively broadens the scope of the indemnity provided in the Mississippi AAP determination by limiting exclusions to instances where a non-sudden release is caused by the contractor's failure, with the knowledge or intent of the contractor's "principal officers,"[263] to comply with environmental laws or regulations. In the past, courts have interpreted similar clauses very narrowly and refused to impute knowledge of lower level employees to senior company officials, even where the contractor's

conduct was alleged to be fraudulent.[264] Thus, absent a policy or high level decision to knowingly engage in conduct that violates environmental regulatory requirements, the contractor would probably be protected by the terms of the Radford determination.[265]

The Radford determination is also the first to address the issue of the availability of indemnification to pay for fines or penalties assessed against a contractor. As signed by the Secretary of the Army, the determination provided that "[n]ot withstanding any other provision of this clause, the Government shall under no circumstance indemnify the Contractor against criminal fines or penalties, nor does the Government agree to indemnify the Contractor against the costs of defending, settling, or otherwise participating in any criminal actions."[266] (Emphasis added). While this language clearly settles the issue of contractor indemnification for criminal fines and penalties, the issue of contractor indemnification for civil fines and penalties is highlighted by omission.

Failure to address contractor indemnification for civil fines and penalties is particularly puzzling because of the contractor's position during the negotiations leading to the Radford determination that "civil fines and penalties for pollution abatement and environmental regulations are reimbursable."[267] While this remains a likely area of dispute in the future, the Army presumably will maintain the position that fines and penalties will be reimbursed only in unusual circumstances, consistent with the FAR's penalty

provision.[268]

In sum, PL 85-804 has proven to be a valuable tool for apportioning some of the types of environmental liability the Army or its operating contractors might reasonably expect to incur. It is not a cure-all, however.

From the contractors perspective, PL 85-804 still leaves unanswered the question of payment of fines and penalties assessed by regulatory agencies.

Nor can the Army be entirely satisfied. Current PL 85-804 determinations provide little incentive for contractors to ensure that lower level employees, whose actions are most likely to result in a release of hazardous or toxic substances, follow environmental laws and regulations and exercise non-negligent conduct.

At present, the Army does not mandate that environmental compliance be an evaluation criterion for determining award-fees[269] for GOCO facility contractors.[270] Even when the award-fee criteria do include consideration of environmental compliance, the evaluation standards used and the relative weights assigned to each criterion have not uniformly encouraged excellent environmental performance. One Army GOCO contractor, for example, was recently identified as being eligible to collect 91% of the available award-fee despite cited environmental management deficiencies and EPA issuance of a compliance order with a proposed penalty of $86,500 against the contractor.[271]

Moreover, the Army must be concerned by the extremes to which it has stretched the definition of "unusually hazardous" in order to include potential environmental liabilities within Pl 85-804 determinations.

With the exception of certain explosive components of munitions [e.g., trinitrotoluene (TNT) and RDX] and munitions that require radioactive materials (such as depleted uranium), the vast majority of hazardous or toxic substances used by contractors at Army GOCO munitions facilities (i.e., solvents and heavy metals) are commonly used throughout American industry. Given the mood of Congress and the country's fiscal problems, continued imaginative use of the term "unusually hazardous" is likely to result in congressional action limiting DOD's use of PL 85-804 authority to indemnify contractors against the same environmental risks they encounter when producing items for consumers other than the federal government.

B. DIVESTITURE

Since the early 1970's, it has been DOD policy to return government owned industrial facilities to the private sector whenever possible, consistent with the interests of national defense.[272]

Despite this policy encouraging divestiture, it also remains DOD's policy to retain ownership of all industrial facilities that produce lethal munitions.[273] Congressional activity may require DOD to rethink its

position, however. In discussing the problem of environmental compliance at GOCO facilities, the House Armed Service Committee recently stated:

> Current environmental law does not provide for any consideration of industrial base or mobilization base requirements . . . . It is also well known that the existing defense industrial base is seriously underutilized and woefully undercapitalized. Environmental compliance requirements may provide the catalyst to develop a scaled down infrastructure that can meet environmental compliance requirements.[274]

The Army's divestiture of GOCO munitions facilities has the simplistic appeal of appearing to solve the thorny problems of accountability for current environmental compliance and environmental cleanup required by past operation and disposal activities.

In reality, however, divestiture of the Army's GOCO munitions plants would solve only a portion of the problems facing the Army and its contractors. Moreover, it would actually exacerbate other problems.

Critics of divestiture have called the Air Force's efforts to divest its GOCO operations an attempt to "dodge" responsibility for environmental cleanups.[275] Contrary to these critics' belief, divestiture of GOCO facilities would not allow either the Air Force or the Army to escape financial responsibility for any environmental cleanup required at a divested facility.

Pursuant to CERCLA sec. 120(h), federal agencies transferring real property owned by the United States to third parties are required to include in the deed

transferring the property a description of the type and quantity of the hazardous substances stored, released, or disposed of on the property, and also a description of what, if any, remedial action was taken.[276] The deed must also contain a covenant warranting that all remedial action necessary to protect human health and the environment has been taken prior to the transfer, and that if additional remedial action is necessary it will be conducted by the United States.[277] Therefore, as a result of CERCLA's requirements, and the contaminated state of the GOCO munitions facilities,[278] divestiture of the Army's GOCO munitions plants could not be accomplished quickly.

Additionally, sale of the munitions facilities would be immediately expensive for the Army. Sale of the plants selected for divestiture must be accomplished by the General Services Administration (GSA).[279] In general, funds realized from GSA's sale of property are required to be deposited in the general treasury of the United States.[280] As an exception to this general rule, GSA can allow certain expenses to be deducted from the sales proceeds and reimbursed to the agency seeking disposal.[281] GSA's regulations, however, do not currently recognize environmental cleanup costs as deductible expenses.[282] Thus divestiture would cause an immediate and non-recoverable drain of Army resources.

Moreover, divestiture would not necessarily resolve the issue of responsibility for future environmental compliance, as illustrated by a recent

court decision. In United States v. Aceto Agricultural Chemicals Corp., the United States and the State of Iowa sought to recover response costs incurred under CERCLA and RCRA in the cleanup of the Aidex Corporation's pesticide formulation facility in Mills County, Iowa.[283]

Because Aidex was bankrupt, the plaintiffs sought their response costs from eight pesticide manufactures who had hired Aidex to formulate their technical grade pesticides into commercial grade pesticides. The regulators sought to impose liability on the eight defendants based on allegations that the pesticide manufactures had "contributed to" the handling, storage, treatment or disposal of hazardous waste within the meaning of RCRA section 7003,[284] and had also "arranged for" the disposal of hazardous substances within the meaning of CERCLA section 9607(a)(3).[285]

In seeking to have the case dismissed, the defendants argued that they had "contracted with Aidex for the processing of a valuable product, not the disposal of a waste, and that Aidex alone controlled the processes used in formulating their technical grade pesticides into commercial grade pesticides, as well as any waste disposal that resulted therefrom."[286]

Finding RCRA and CERCLA to be remedial statutes that should be "liberally construed,"[287] the court declined to grant the defendants' motion to dismiss. In so holding, the court identified several key factors that distinguished the case from others in which courts had not imposed liability when a useful hazardous

substance had been sold to another party who incorporated the substance into a product that was later disposed of.[288]

First, the court found that the defendants in Aceto retained title at all times to the pesticide that was reformulated at the Aidex facility.[289] Second, the court found that Aidex was manufacturing a product for the defendants and was not manufacturing a product for its own use.[290] Finally, the court found that generation of wastes is an inherent part of the pesticide manufacturing process, and that the wastes are disposed of contemporaneously with the manufacturing of the product which the defendants contracted for.[291]

Currently, many hazardous substances used in the production of munitions at the Army's GOCO facilities, ranging from heavy metals to high explosives and radiologic materials, are provided on occasion to the contractor by the government.[292] Pursuant to the FAR, title to these government furnished materials remains in the government.[293]

Thus, even if divestiture of the GOCO munitions plants were to occur, the practice of providing government-owned materials could lead to continued government liability under the Aceto rationale for response costs incurred to clean up wastes generated by the contractor's manufacture of munitions for the Army. Moreover, because of CERCLA section 120(e)(1),[294] any attempts by the Army to contractually reapportion this possible liability for environmental cleanups would be

effectively limited to the net worth of the contractor.

In summation, under CERCLA, the Army is liable into the millennium for environmental problems resulting from past hazardous waste disposal practices at the GOCO munitions facilities. Pursuant to the rationale of Aceto, the Army could also be liable for future environmental problems resulting from the contractors use of materials provided by the Army even if the Army divests itself of the GOCO facilities.

As a result, divestiture would only be clearly beneficial to the extent it would define the party responsible under the environmental statutes for paying fines and penalties resulting from non-complying operations at the facilities. Undoubtedly, however, the cost to the Army for this relatively slight benefit would be increased procurement costs, because contractors would make capital improvements and hire more experienced and competent operating personnel in order to maximize the ability of their facilities to comply with state and federal environmental requirements.[295] These capital and personnel costs would, of course, ultimately be charged to the Army as either direct costs or overhead in future production contracts.

C. NARROWING WAIVERS OF SOVEREIGN IMMUNITY

Even as a majority of Congress continues to vote to broaden the waivers of sovereign immunity found in environmental statutes,[296] concern is rising in some

quarters that "[a]ttempting to treat a major military installation without considering its missions and mode of operation could result in [environmental] regulatory decisions that are not in the national interest."[297]

One Congressman recently summed up the situation facing the Army and its contractors at GOCO munitions facilities. He accurately noted that there are no truly national environmental standards or requirements, no prioritization of RCRA requirements in terms of their impact on human health and the environment, no prioritization among the requirements of the various environmental laws, and no sensitivity to cost and impact on the ability of the military to carry out its national security mission.[298]

Of course, each environmental statute does provide that the President can exempt a federal agency's facilities from compliance with environmental statutes under certain circumstances. These exemptions can be granted if doing so would be in the "paramount interests of the United States,"[299] or when it is "necessary to protect the national security interests of the United States."[300] Alternatively, lack of appropriated funds to achieve compliance can be used as grounds for a presidential exemption, but only if "the President shall have specifically requested such an appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation."[301]

To date, however, only one Presidential exemption has been granted. In that instance, President Reagan,

finding an exemption to be in the "paramount interests of the United States," exempted federal agencies from compliance with portions of the CAA, the FWPCA, the Noise Control Act,[302] and RCRA at Ft. Allen in Puerto Rico, in order to allow Haitian refugees to be housed on Ft. Allen.[303]

Given the current political climate, and the fact that the sole exemption was granted only after protracted litigation,[304] further exemptions based on the "paramount interests of the United States" are likely to be granted in only the most extreme of circumstances. As one congressional committee recently noted, however, "extreme circumstances is not a workable or appropriate criterion" given the national security mission of DOD installations.[305]

Because of the way environmental activities at DOD installations are funded, it is even more unlikely that the President could cite a lack of appropriated funds as the rationale for granting an exemption.

Currently, funding for environmental compliance and cleanup at Army installations comes from three sources; the Defense Environmental Restoration Account (DERA),[306] which serves as a sort of Superfund for DOD installations; the military construction account; and the operation and maintenance account. With the exception of DERA funds, whose use is limited to funding response and remedial activities taken pursuant to CERCLA under the Defense Environmental Restoration Program (DERP),[307] DOD has not clearly identified funds required to meet environmental compliance

requirements.[308] As a result, the requirement to "specifically request appropriations" often cannot be satisfied, even though it is estimated that total unfunded requirements associated with DOD environmental compliance currently range from $5-10 billion.[309]

In light of the unlikeliness of receiving a presidential exemption, and recognizing that it faces increasing budgetary constraints, DOD has engaged in several recent initiatives to prioritize environmental cleanups of DOD facilities.

The first is the development of the Defense Priority Model (DPM). Planned for implementation during fiscal year 1990, the DPM "is a waste site scoring system that evaluates relative risk based on information gathered during the Preliminary Assessment/Site Inspection and the Remedial Investigation/Feasibility Study."[310] Through the use of risk assessment, DPM is intended to "help assure that sites are addressed on a 'worst first' basis nationwide with the funding available from the Defense Environmental Restoration Account."[311]

Of course, states seeking to enforce their own environmental compliance requirements on DOD installations are not bound by the priority that the DPM assigns to installations in their territory. To deal with this problem, DOD has offered states incentives for entering into a "DOD and State Memorandum of Agreement" (DSMOA).[312] In return for being guaranteed the greater of 1% of the money expected to be spent out of the DERP within their state

or $50,000, states are required to agree that the DPM "is needed and provides a reasonable basis for allocating funds among sites in the interest of a national worst first cleanup program."[313] States are also required to "make every effort to abide by the priorities developed thereunder [the DPM]."[314]

Unfortunately, the utility of the DPM and DSMOAs in dealing with the problems arising from environmental compliance at Army GOCO munitions facilities is limited in three significant ways.

First, the DPM and DSMOAs are designed to deal primarily with CERCLA-style cleanups of hazardous waste sites that have resulted from historical operations. Neither the DPM or DSMOAs are designed to deal with current compliance problems. Thus, problems associated with responsibility for fines and penalties, resulting from environmental non-compliance, are not addressed.

Second, participation in DSMOA's, with the resulting acceptance of the DPM, is voluntary. Currently, only three states, Delaware, Illinois, and Mississippi, have executed DSMOAs.[315] Two other states, South Dakota and Washington, have decided they will not sign DSMOAs.[316] Negotiations with twenty-six other states are still ongoing.[317]

Finally, as currently formulated, DSMOAs are agreements between the states and DOD. They do not prevent a state from taking action against a GOCO contractor if the state is dissatisfied with the cleanup priority assigned to a particular facility's cleanup by DPM.

Thus, while they represent steps in the right direction, use of the DPM and DSMOAs are only incomplete means of dealing with environmental compliance problems posed by too many competing priorities and not enough money at DOD facilities in general and at GOCO facilities in particular.

Assuming that the Congress is not willing to provide the Army with a blank check to remedy existing hazardous waste problems and ensure that its GOCO munitions facilities are able to comply with current environmental requirements, congressional action is necessary. Two options are available to Congress. It can restrict the waivers of sovereign immunity in environmental statutes as they apply to federal agencies, or it can broaden the scope and alter the requirements for obtaining an exemption to the requirements of the statutes.

Restricting the waivers of sovereign immunity in environmental statutes as they apply to all, or even to a specified class of a federal agency's facilities, is probably not good public policy. Absent legitimate reasons to the contrary, all federal facilities, including GOCO facilities, should be required to comply with federal and state environmental requirements. In any event, trying to reassert sovereign immunity to avoid complying with environmental requirements is not possible in the current political climate.

On the other hand, broadening the scope and adjusting the requirements of presidential exemptions from environmental statutory requirements does

represent responsible public policy since exemptions would be applied on a case by case basis. Moreover, there is a sizeable element in Congress that realizes that Congress must engage in some action that "prioritizes environmental requirements, is fiscally realistic, and takes into account national security considerations."[318] Otherwise, chaos will reign as each state pursues its own environmental compliance enforcement agenda against federal facilities within its territory.

VI. RECOMMENDATIONS

A. USE OF PL 85-804

The use of PL 85-804 to indemnify GOCO facility contractors serves a valid purpose and should be continued, albeit in a modified manner.

As currently written, the PL 85-804 determinations are overly broad in their definition of what constitutes an "unusually hazardous risk." Non-sudden releases of commonly used toxic or hazardous substances (e.g., chlorinated solvents) resulting from the negligent behavior of contractor's employees acting within the scope of their employment should not be covered by indemnification. The risks associated with these non-sudden events involving common industrial materials can be minimized through a contractor's effective training, supervision, and management of its personnel and the government's facility. Moreover,

these same risks are borne every day by the contractor at its own facilities.

Use of PL 85-804 must also be coupled with financial incentives for contractors to prevent non-sudden or negligent releases of toxic, hazardous, or radioactive substances. To this end, the indemnity provided by PL 85-804 should include a deductible, consisting of at least 25% of the contractor's yearly base fee.[319] The contractor would have to pay the deductible if an otherwise indemnifiable release, either sudden or non-sudden, resulted from the contractor's employees negligence or failure to follow environmental regulatory standards. In addition, the award fee criteria of the Army's GOCO munitions facilities contracts should be modified so that at least 25% of the available award fee is based on compliance with environmental requirements.[320]

B. DIVESTITURE OF GOCO MUNITIONS PLANTS

While there may be other sound reasons for the Army's divestiture of GOCO munitions plants, divestiture should not be used as a means to deal with environmental compliance problems at the munitions facilities.

As a result of CERCLA, hazardous waste problems already existing at GOCO munitions facilities prior to divestiture will remain the responsibility of the Army forever. Moreover, to the extent that future hazardous waste problems can be attributed to government-owned

materials provided to the contractor, courts can still hold the Army responsible for any required cleanup under the provisions of CERCLA and RCRA.

Finally, while divestiture would clearly shift the responsibility of everyday compliance (manifesting, labeling, etc.) to contractors, the Army's policy against reimbursing fines and penalties for environmental non-compliance has effectively already achieved this result. To the extent that future compliance requires capital improvements to the contractor's facility, the Army will wind up paying for the improvements anyway through direct or indirect procurement costs.

C. NARROWING WAIVERS OF SOVEREIGN IMMUNITY FOR GOCO MUNITIONS FACILITIES

The Army, together with the other Services, should persuade DOD to propose legislation modifying the scope and requirements for gaining presidential exemptions from compliance with environmental statutes.

In the future, year by year exemptions should be granted based on the current "paramount interest of the United States" standard. Alternately, exemptions should be granted based on a determination by the Secretary of Defense that an exemption is necessary after comparing the amount of funds appropriated by Congress for the DERA with the priorities for environmental compliance and restoration established by the DPM.

Of course, for such legislation prioritizing environmental compliance and restoration to be effective, several other changes would also have to occur. First, all funding for both environmental compliance and restoration would have to be funneled through the DERA, instead of the current situation where some money comes from DERA, some from military construction, and some from operation and maintenance.

In addition, the scope and use of the DPM should be expanded. DPM should be used to not only determine the relative risks to human health and the environment from existing hazardous contamination, but also to assess the relative risks associated with failure to implement changes in procedures or to make capital improvements required by new or existing environmental laws or regulations.

This risk-based assessment would be used to augment the already existing A-106 Pollution Abatement Planning Process[321] (A-106 process). The A-106 process requires federal agencies to submit an annual plan detailing the need for prevention, control and abatement of pollution through the EPA to the Office of Management and Budget. Used together, an enhanced DPM and the A-106 process would allow projects to be assembled in a rank order of environmental merit. The resulting list would then be presented to Congress as part of DOD's annual budget submission. Congress could then examine this list and determine to what extent it is willing to provide funding. Facilities whose projects or initiatives were left unfunded would then

be eligible for a presidential exemption.

VII. CONCLUSION

Because of ignorance of the past effects of waste disposal practices on the environment and years of insufficient capital investment in GOCO facilities, Army munitions plants entered the age of strict environmental compliance as environmental eyesores. Moreover, the historical culture of DOD encouraged an attitude that the national security mission obviated the need to comply with environmental laws and regulations.

While DOD recently has made strides in identifying and remedying environmental deficiencies, Congress and the states seem to have taken the view that DOD's efforts are, at best, too little too late. As a result, Congress has been increasingly willing to waive sovereign immunity in environmental statutes, thereby exposing federal agencies to state-imposed civil fines and penalties. In addition, both the EPA and the states have increasingly recognized that environmental statutes may permit enforcement of environmental requirements directly against the non-complying facility's operating contractor, regardless of whether the contractor has the contractual authority to remedy the violation.

Commenting implicitly on DOD's attitude of the past and explicitly on the current situation facing DOD, one Congressman aptly noted:

> Sometimes you have to hit a mule across the head with a two[-]by[-]four to get its attention . . . . Once you have its attention, [however,] it is not very useful to keep hitting it with two[-]by[-]four. Otherwise, the poor beast will not be able to do our bidding. This is important because this "mule" is charged with the defense of this nation and its vital interests. We are not going to have the luxury of worrying about generations unborn if we cannot protect the current generation and our way of life."[322]

The Army's GOCO munitions facilities continue to play a vital role in the nation's defense. In order to insure the survival of this "unique partnership" of government and industry, however, the Army and its operating contractors must strive to adapt the GOCO contractual agreement to fairly and effectively allocate the risks created by the age of strict environmental compliance. In addition, Congress must insure that environmental requirements are imposed on government facilities, including GOCO munitions facilities, only to the extent that sufficient funding is provided to meet those requirements.

ENDNOTES

1. Powell v. United States Cartridge Co., 339 U.S. 497, 506 (1950).

2. 42 U.S.C. secs. 7401-7642 (1982).

3. 42 U.S.C. secs. 4321-4370a (1982).

4. National Defense Authorization Act For Fiscal Years 1990-1991: Report of the House of Representatives Armed Services Committee on H.R. 2461, 101st Cong., 1st Sess. 238 (1989) [hereinafter Report on H.R. 2461].

5. Id. at 239. Between 1970 and 1987, the number of pages in the Code of Federal Regulations devoted to implementing regulations for federal environmental statutes increased from approximately 500 to approximately 9,700.

6. Hearings on Hazardous Waste Problems at Department of Defense Facilities Before the Environment, Energy, and Natural Resources Subcomm. of the House Comm. on Government Operations, 100th Cong., 2nd Sess. 91 (1987) (statement of Rep. Mike Synar).

7. 42 U.S.C. secs. 9601-9657 (1982 & Supp. IV 1986).

8. 42 U.S.C. secs. 6901-6991i (1982 & Supp. II 1984).

9. H. Thomson & L. Mayo, U.S. Army in World War II: The Ordnance Department: Procurement and Supply 191 (1960).

10. Id. at 190.

11. Military Establishment Appropriations Bill for 1941: Hearings on H.R. 9209 Before the Subcomm. of the Senate Comm. on Appropriations, 76th Cong., 3d sess. 423 (1940).

12. Thomson & Mayo, supra note 9, at 104.

13. Id.

14. In United States Cartridge Co. v. Powell, 174 F.2d 718, 726 (8th Cir. 1949), the court noted the uniqueness of the GOCO concept, stating:

> The scheme, which is involved in the present situation, of producing munitions in government owned plants, "through the agency of selected qualified commercial manufacturers," on the basis of cost plus a fixed fee for carrying

> on the operations, with title to both the materials used [and] the products manufactured resting at all times in the United States, was admittedly a novel and revolutionary set-up in the field of American industrial life.

15. Thompson & Mayo, supra note 9, at 32.

16. Id. at 105, 200.

17. Id. at 105, 188.

18. National Industrial Reserve Act of 1948, Pub. L. No. 80-883. 62 Stat. 1225 (1948).

19. U.S. Army Armament, Munitions and Chemical Command, Pam. 5-1, AMCCOM Facts, pp. 86-88 (1 Oct. 89) [hereinafter AMCCOM Pam. 5-1].

20. Id. at 85. An "active plant" is one that has ongoing munitions production operations ordered by AMCCOM.

21. Id. at 38-70.

22. A compilation of environmental surveys conducted for all Army installations, including GOCO munitions

facilities, included in the Army's Installation Restoration Program is available from the United States Army Toxic and Hazardous Materials Agency, Aberdeen Proving Grounds, Md.

23. 42 U.S.C. sec. 9605(a)(8)(B) (1982).

24. See Oil and Hazardous Substance Pollution and Contingency Plan [hereinafter NCP], 40 C.F.R. Part 300, Appendix B (1989); National Priorities List for Uncontrolled Hazardous Waste Sites: Final Federal Facility Site Update, 54 Fed. Reg. 10512 (1989); National Priorities List for Uncontrolled Hazardous Waste Sites, 55 Fed. Reg. 6154 (1990). Eight GOCO facilities are listed on the NPL by name; Milan Army Ammunition Plant (AAP); Cornhusker AAP; Alabama AAP; Joliet AAP; Lake City AAP; Lone Star AAP; Riverbank AAP; and the Louisiana AAP. The Twin Cities AAP is part of the New Brighton-Arden Hills NPL site.

25. Department of Defense, Defense Environmental Restoration Program, Annual Report to Congress For Fiscal Year 1989 B-2 (February 1990) [hereinafter DERA FY 1989 Report].

26. See e.g., Letter from S. Maynard Turk, Vice-President and General Counsel of Hercules Inc. to Brian Boyle, Assistant to the General Counsel, Department of the Army (Oct. 16, 1989) [hereinafter Turk Letter].

This letter set out Hercules Inc.'s position regarding the need for indemnification under PL 85-804 to cover its operation of the Radford AAP. In the letter, Mr. Turk stated, "Hercules does operate commercial propellant facilities similar to RAAP, and at those facilities accepts without insurance the risk of environmental releases. However, Hercules performs such operations at its own plants, and does so at a far greater rate of return in exchange for the assumption of that risk." (Emphasis added).

27. United States v. United States Cartridge Co., 95 F. Supp. 389, 392 n.7 (E.D. Mo. 1950).

28. United States General Accounting Office, Hazardous Waste - Contractors Should Be Accountable for Environmental Performance 18 (1989) [hereinafter GAO Report].

29. Hearings on H.R. 1056 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 96 (1989) [hereinafter Hearings on H.R. 1056].

30. GAO Report, supra note 28, at 23.

31. Id.

32. 42 U.S.C. sec. 9601(25) (Supp. IV 1986). ("The term . . . `response' means remove, removal, remedy, and remedial action, all such terms (including the terms `removal' and `remedial action') include enforcement actions related thereto.")

33. Werlein v. United States, No. 3-84-996 (D. Minn. filed July 13, 1984).

34. Id. In 1989, as a partial settlement of Werlein, the United States paid the Village of St. Anthony $3,000,000 in exchange for St. Anthony's release of the United States and the TCAAP's operating contractor, Federal-Hoffman, Inc.

35. New Brighton v. United States, No. 3-84-1110 (D. Minn. filed July 13, 1984).

36. Litigation Settlement Agreement Between the United States and the City of New Brighton (August 8, 1988).

37. Id.

38. See Olin Corporation, Olin Proposal to Solicitation DAAA09-84-R-0120, Vol. IV, Part 2, 12-1 (Jan. 21, 1985). In its successful proposal for operation of the Lake City AAP, Olin stated it canvassed eighteen leading insurance companies. The

only company which would insure Olin against potential environmental liability quoted Olin a premium of $2,500,000 for coverage not to exceed $20,000,000 per occurrence, with a $5,000,000 per occurrence deductible.

39. Fed. Acquisition Reg. 52.228-7(c) (1 Apr. 1984) [hereinafter FAR].

40. Turk Letter, supra note 26.

41. U.S.Army Armament, Munitions and Chemical Command, Installation Profile: Lake City AAP 8 (FY 1989).

42. See e.g., FAR 52.228-7(e)(3). Other FAR clauses that protect the contractor financially contain similar restrictions.

43. 48 C.F.R., ch. 1 (1988).

44. The "facilities acquisition" contract contemplates the acquisition, construction and installation of facilities; the "facilities use" contract provides for the use, maintenance, accountability and disposition of government furnished property; and, the "consolidated facilities" contract is a combination of the two described previously. See FAR 45.302.

45. See FAR 23.103, 52.223-1, and 52.223-2.

46. FAR 52.245-7(l)(1), 52.245-10(h)(1), and 52.245-11(j)(1).

47. FAR 52.245-7(l)(2), 52.245-10(h)(2), and 52.245-11(j)(2).

48. Id.

49. FAR 52.245-7(d)(6), 52.245-11(c)(3).

50. FAR 52.245-7(d)(7), 52.245-11(c)(4).

51. FAR 52.245-8.

52. FAR 52.228-7.

53. Defense Acquisition Reg. 7-702.20 [hereinafter DAR].

54. FAR 52.245-8(b). Liabilities resulting from willful misconduct or bad faith are not covered. Neither are liabilities which are covered by insurance. See FAR 52.245-8(c).

55. DAR 7-203.22.

56. FAR 52.228-7(d).

57. 31 U.S.C. Sec. 1341 (1982).

58. 41 U.S.C. Sec. 11 (1982).

59. Assumption by Government of Contractor Liability to Third Persons, Comp. Gen. Dec. B-201072 (May 2, 1982).

60. DAR 7-702.20 (1976).

61. FAR 52.245-11(i).

62. See Horowitz v. United States, 267 U.S. 458 (1925); Overhead Electric Co., ASBCA 25656, 85-2 BCA Par. 18026.

63. FAR 31.201-3.

64. FAR 31.201-2.

65. FAR 31.201-4.

66. FAR 31.205-15

67. Id.

68. GAO Report, supra note 28, at 18. As of March 1989, nine DOD contractors at GOCO facilities had been assessed fines. Out of the six cases resolved, contractors paid or agreed to pay fines totaling $913,000, with another $600,00 to be paid if the contractors did not comply with the settlement agreements.

69. Id.

70. See infra text at Sections III.A. & III.B.

71. Morrison, Managing Military Waste, Government Executive, November 1989, at 30-31.

72. See infra notes 299-301 and accompanying text.

73. In all environmental statutes, Congress has, to varying degrees, actually waived both federal supremacy and sovereign immunity. The waiver of federal supremacy allows states to impose their own environmental regulatory and enforcement schemes on federal entities. The waiver of sovereign immunity allows states enforce their regulatory schemes and any federal regulatory scheme against federal entities in court. Because of the close inter-relationship of the

concepts, and for simplicity's sake, references in this article to waivers of sovereign immunity should also be considered to include corresponding waivers of federal supremacy.

74. See infra notes 223-224 and accompanying text.

75. Deuteronomy 24:16

76. 42 U.S.C. sec. 6903(5) (1984). Under RCRA, the term "hazardous waste" means:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating illness: or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id.

77. 42 U.S.C. Sec. 6926(b) (Supp. II 1984).

78. 42 U.S.C. sec. 6922 (1982 & Supp. II 1984).

79. 42 U.S.C. sec. 6923 (1982 & Supp. II 1984).

80. 42 U.S.C. sec. 6924 (1982 & Supp. II 1984).

81. 42 U.S.C. sec. 6925 (1982 & Supp. II 1984).

82. Memorandum, Office of Solid Waste and Emergency Response, United States Environmental Protection Agency, 24 Jun. 1987, subject: Determination of Operator at Government-Owned Contractor-Operated Facilities.

83. Id.

84. Id.

85. 42 U.S.C. secs. 6924(u), 6924(v) (Supp. II 1984).

86. RCRA defines solid waste to include "solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations." See 42 U.S.C. sec. 6903(27) (1982).

87. Id.

88. 40 C.F.R. 260.10 (1989).

89. Hawthorne AAP is comprised of 144,394 acres. The average for all 25 GOCO munitions facilities is 14,701 acres. AMCCOM PAM 5-1, supra note 19, at 47-70.

90. 42 U.S.C. sec. 6924(v) (Supp. II 1984).

91. 42 U.S.C. Sec. 6928(a) (Supp. II 1984).

92. "The term `person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. 6903(15) (1982).

93. 42 U.S.C. sec. 6928(d) (Supp. II 1984).

94. 42 U.S.C. sec. 6973(a) (Supp. II 1984).

95. Id.

96. See United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 737-742 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987).

97. 42 U.S.C. sec. 6973(a) (Supp. II 1984).

98. 42 U.S.C. sec. 6973(b) (1982).

99. 42 U.S.C. sec. 6972 (1982 & Supp. II 1984).

100. 42 U.S.C. sec. 6972(a)(1)(A) (Supp. II 1984).

101. 42 U.S.C. sec. 6972(a) (Supp. II 1984).

102. 42 U.S.C. sec. 6972(b)(2) (Supp.II 1984).

103. 42 U.S.C. sec. 6972(1)(B) (Supp. II 1984).

104. 42 U.S.C. sec. 6972(b)(2)(B) (Supp. II 1984).

105. 42 U.S.C. sec. 9604 (1982 & Supp. IV 1986).

106. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 895 (S.D. Ohio 1983).

107. Pub. L. No. 99-499, 100 Stat. 1614 (codified at 10 U.S.C. secs. 2701-2710 (Supp. IV 1986) and 26 U.S.C. sec. 9507 (Supp. IV 1986); amending and adding various provisions to 42 U.S.C. secs. 9601-9675 (Supp. IV 1986)).

108. United States Environmental Protection Agency, Office of Federal Activities, Federal Facilities

Compliance Strategy Appendix A-18 (Nov. 1988) [hereinafter Strategy].

109. 26 U.S.C. sec. 9507 (Supp. IV. 1986).

110. 26 U.S.C. secs. 9507(a)(1), 9507(b)(1) (Supp. IV 1986).

111. 26 U.S.C. sec. 9507(b)(2) (Supp. IV 1986).

112. "The term release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." 42 U.S.C. 9601(22) (Supp. IV 1986).

113. 42 U.S.C. sec. 9601(14) (Supp. IV 1986).

114. Under CERCLA, liability "shall be construed to be the standard of liability which obtains under section 1321 of Title 33" [Section 311 of the Clean Water Act of 1977, 33 U.S.C. sec. 1321 (1982)]. 42 U.S.C. sec. 9601(32) (Supp. IV 1986). CWA section 311 has been consistently held by courts to impose strict liability. See e.g., New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

115. Most courts have held that CERCLA liability is joint and several. See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 732 n.3 (8th Cir. 1986); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-810 (S.D. Ohio 1983).

116. 42 U.S.C. sec. 9601(21) (Supp. IV 1986). A "person" under CERCLA is defined identical to the definition of "person" found in RCRA. See supra note 92.

117. See supra note 32.

118. 42 U.S.C. sec. 9601(16) (Supp. IV 1986).

119. Unlike RCRA, CERCLA defines the term "operator" at 42 U.S.C. sec. 9601(20)(A) (Supp. IV 1986). That definition, "any person . . . operating such facility," is of no practical assistance, however, in defining the degree of operational control necessary to be considered an operator.

120. See 42 U.S.C. sec. 9607(a) (Supp. IV 1986).

121. 42 U.S.C. sec 9607(4)(A). The National Contingency Plan (NCP) is a reference to the National Oil and Hazardous Substances Pollution and Contingency

Plan, 40 C.F.R. Part 300 (1989). A revised NCP has recently been promulgated by EPA. The revised NCP will take effect on April 9, 1990. See 55 Fed. Reg. 8666 (1990).

122. 42 U.S.C. sec. 9607(a)(4)(B) (Supp. IV 1986).

123. This authority has been delegated to the EPA Administrator. See Executive Order No. 12580, 52 Fed. Reg. 2923 (1987).

124. 42 U.S.C. sec. 9606(a) (1982).

125. 42 U.S.C. sec. 9606(b)(1) (Supp. IV 1986).

126. As of June 1988, 18 states had CERCLA style statutes that were distinctly separate from the state RCRA program (if any). See Clean Sites Inc., A Report On State Hazardous Waste Laws (1989).

127. 42 U.S.C. sec. 9620(a)(4) (Supp. IV 1986). But see 42 U.S.C. sec. 9620(i) (Supp. IV 1986); also discussion in section III.C. of this article, infra.

128. 42 U.S.C. sec. 9621(d) (Supp. IV 1986).

129. CERCLA defines "person" to include states. See 42 U.S.C. sec. 9601(21) (Supp. IV 1986).

130. 42 U.S.C. sec. 9659(a)(1) (Supp. IV 1986).

131. 42 U.S.C. sec. 9659(c) (Supp. IV 1986).

132. 42 U.S.C. sec. 9659(d)(1) (Supp. IV 1986).

133. 42 U.S.C. sec. 9659(d)(2) (Supp. IV 1986).

134. 42 U.S.C. sec. 9620(i) (Supp. IV 1986).

135. 42 U.S.C. sec. 9621(a) (Supp. IV 1986).

136. See e.g., Colorado v. United States Department of the Army, 707 F. Supp. 1562 (D. Colo. 1988). In this case, Colorado successfully argued that its state RCRA requirements took precedence over a CERCLA based EPA remedial action. The cleanup site involved in the case was Basin F, a non-NPL enclave and an alleged RCRA regulated solid waste management unit, at the NPL listed Rocky Mountain Arsenal. Less than a month after the court's decision, EPA added Basin F to the NPL. See 54 Fed. Reg. 10512 (1989). The United States has subsequently petitioned for re-consideration of the court's decision.

137. See note 23, supra.

138. See 51 Fed. Reg. 31,618 (1986).

139. See 54 Fed. Reg. 16,361 (1989).

140. See 54 Fed. Reg. 20,847 (1989).

141. See 54 Fed. Reg. 7417 (1989).

142. Hearings Before the Subcomm. of the Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works, 100th Cong., 2d Sess., 182 (1988) (statement of J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, EPA).

143. 42 U.S.C. sec. 9622(e)(6) (Supp. IV 1986) provides that "[w]hen either the President or a potentially responsible party pursuant to an administrative order or consent decree under this Act has initiated a remedial investigation and feasibility study (RI/FS) for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." The President's authority has been delegated to the

Administrator of EPA. Exec. Ord. 12580, 52 Fed. Reg. 2923 (1987).

144. 54 Fed. Reg. 10,520 (1989).

145. In that case, the court found that "[n]othing in the cited statutes [CERCLA and RCRA] indicates that a CERCLA action should take precedence over a RCRA enforcement action. On the contrary, it appears that CERCLA was intended to operate independently of RCRA, and that the statutory schemes are not mutually exclusive." Colorado v. United States, 707 F. Supp. 1562, 1569 (D. Colo. 1988).

146. The Federalist No. 15, at 159 (A. Hamilton) (B. Wright ed. 1962).

147. 28 U.S.C. sec. 516 (1982).

148. Strategy, supra note 108. (The quote comes from the introduction to the Strategy written by former EPA Administrator Lee M. Thomas.)

149. This doctrine's name has apparently been derived from language in Meyers v. United States, 272 U.S. 52 (1926). In Meyers, the Court stated that the President must supervise his executive officers to insure "that unitary and uniform execution of the laws which Article

II of the Constitution evidently contemplated in vesting general executive power in the President alone." Id. at 55 (emphasis added). This language from Meyers was cited in the Habicht testimony. See Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 206-207 (1987). Meyers was also cited in the McConnell letter, infra, note 150, passim.

150. Letter from Robert A. McConnell, Assistant Attorney General for Legislative Affairs, to John Dingell, Chairman House Subcommittee on Oversight and Investigations (Oct. 11, 1983), reprinted in Strategy, supra note 108, at Appendix H.

151. Executive Order No. 12146, 44 Fed. Reg. 42,657 (1979), reprinted at 28 U.S.C. sec. 509 (1982). In relevant part, this order provides that:

> Whenever two or more Executive agencies whose heads serve at the pleasure of the president are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General, prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

152. Letter dated 20 December 1985 from Assistant Attorney General Bolton to Committee Chairman Dingel, cited in Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 10 (1987).

153. Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 210 (1987).

154. The continued vitality of the unitary executive doctrine is in some doubt. Detractors have noted that in a fairly recent case, one federal executive agency, the Department of Commerce (represented by DOJ) sued another, the Federal Energy Regulatory Agency (represented by its agency general counsel), to enforce provisions of an environmental law (NEPA). See Confederated Tribes and Bands v. Federal Energy Regulatory Commission, 746 F.2d 466 (9th Cir. 1984), cited in Hearings Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works, 100th Cong., 2nd Sess. 152 (1988). Even F. Henry Habicht II has acknowledged that he finds it conceivable that in the future EPA would take another federal agency to court for failure to comply with an administrative order. See Hearings on the Nomination of F. Henry Habicht II to be Deputy

Administrator of the Environmental Protection Agency Before the Senate Comm. on Environment and Public Works, 101st Cong., 1st Sess. 9 (1989).

155. Strategy, supra note 108, at VI-10, VI-11.

156. Id.

157. Executive Order No. 12088, 43 Fed. Reg. 47,707 (1978). Under Executive Order 12088:

> The [EPA] Administrator shall make every effort to resolve conflicts regarding such violation [of pollution control standards] between Executive agencies . . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

158. Strategy, supra note 108, at VI-11.

159. Executive Order No. 12146, 44 Fed. Reg. 42,657 (1979), reprinted at 28 U.S.C. sec. 509 (1982).

160. Strategy, supra note 108, at VI-11.

161. The House of Representatives has passed legislation that would allow the EPA to unilaterally impose RCRA administrative orders against federal

agencies. See H.R. 1056, 101st Cong., 1st Sess., 135 Cong. Rec. H3893 (daily ed. July 19, 1989).

162. Executive Order 12580, 52 Fed. Reg. 2923 (1987).

163. Id.

164. The House of Representatives has passed legislation that would allow the EPA to assess administrative penalties against other federal agencies for violations of RCRA. See H.R. 1056, 101st Cong., 1st Sess., 135 Cong. Rec. H3893 (daily ed. July 19, 1989). Similar legislation is pending in the Senate. See S. 1140, 101st Cong. Rec., 135 Cong. Rec. S6330 (daily ed. May 31, 1989).

165. Strategy, supra, note 108, at xii.

166. Id. CERCLA section 120(e)(2)(a) requires that within 180 days of completion of the remedial investigation/feasibility study (RI/FS), EPA and the federal agency concerned enter into an IAG for the purpose of expediting the completion of any necessary remedial action at the subject federal facility. 42 U.S.C. sec. 9620(e)(2) (Supp. IV 1986). EPA has pursued a policy, however, of attempting to negotiate IAGs with federal agency before the RI/FS is completed. An early agreement theoretically allows EPA to assess

penalties from federal agencies for failure to meet RI/FS deadlines pursuant to CERCLA section 109(a)(1)(e). 42 U.S.C. sec. 9609(a)(1)(e) (Supp. IV 1986). It also exposes federal agencies to the possibility of suit from states or private citizens seeking to enforce the deadlines pursuant to CERCLA section 310. 42 U.S.C. sec. 9659(a)(1) (Supp. IV. 1986).

167. Strategy, supra note 108, at VII-3.

168. See 42 U.S.C. sec. 9659 (Supp. IV 1986) (CERCLA); 42 U.S.C. sec. 6972 (Supp. II 1984) (RCRA); 42 U.S.C. sec. 1365 (1982) (FWPCA); 42 U.S.C. sec. 7604 (Supp. V 1987) (CAA); 42 U.S.C. sec. 2619 (Supp. IV 1986) (Toxic Substances Control Act).

169. This assumes there has been a waiver of sovereign immunity by the United States. See text infra section IV. B., at 33-34.

170. See 42 U.S.C. secs. 6972(a)(1)(B), 6972(a)(2) (Supp. II 1984). These provisions allow civil penalties to be assessed against the United States for "past and present" handling, storage, treatment, transportation of hazardous or solid waste that may present an "imminent and substantial endangerment" to health or to the environment. While the conduct

complained of can have occurred in the past, the language of these sections clearly suggests that the imminent threat must be continuing.

171. Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987).

172. Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 151 (1987) (statement of Ohio Attorney General Celebrezze).

173. Strategy, supra note 108, at VI-14. What constitutes "appropriate circumstances" is not defined. EPA is, however, in the process of developing a GOCO Enforcement Strategy which is expected to provide that definition.

174. 42 U.S.C. sec. 6928(a) (Supp. II 1984). Through the use of 3008(a) orders, EPA can assess civil penalties for past or current violations of RCRA hazardous waste management requirements and order compliance with those requirements, either immediately or within a specified time period.

175. Hearings Before the Environmental Restoration Panel of the House Armed Services Comm., 101st Cong.,

1st Sess. __ (1989) (statement of Bruce Diamond, Director of the EPA's Hazardous Waste Program Enforcement Office). The contractors involved were the operators of the Ravenna AAP, Air Force Plant #4, and DOE's Fernald facility. Id.

176. See generally discussion, infra at Section II.B.1. (explanation of standard GOCO facilities' FAR contract provisions).

177. United States v. General Dynamics Corp., No. CA4 84 312K, 18 Envtl. L. R. (Envtl L. Inst.) 21297 (N.D. Tex. June 9, 1988) (order denying defendant's motion to dismiss).

178. Id.

179. Id.

180. Rockwell International Corp. v. United States, 723 F. Supp. 176 (D.D.C. 1989).

181. Id. at 177.

182. Id.

183. Id.

184. Id. at 178-179.

185. Block v. North Dakota, 461 U.S. 273, 287 (1983).

186. Hancock v. Train, 426 U.S. 167, 179 (1976).

187. CAA Amendments of 1970, Pub. L. No. 91-604, Sec. 118, 84 Stat. 1678 (current version codified at 42 U.S.C. Sec. 7418(a) (1982)).

188. Hancock, 426 U.S. 167.

189. Resource Conservation and Recovery Act, Pub. L. No. 94-580, sec. 2, 90 Stat. 2821 (1976) (codified as amended at 42 U.S.C. sec. 6961 (1982)).

190. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 118, 91 Stat. 711 (codified at 42 U.S.C. sec. 7418 (1982)).

191. Federal Water Pollution Control Act Amendments of 1977, Pub. L. 95-217, secs. 60, 61(a), 91 Stat. 1597, 1598 (codified at 42 U.S.C. sec. 1323 (1982)).

192. Safe Drinking Water Act Amendments of 1977, Pub. L. 95-190, sec. 8(a), 91 Stat. 1396, (codified at 42 U.S.C. sec. 300j-6(a) (1982)).

193. "Should . . . [waiver] . . . be the desire of Congress, it need only amend the act to make its intention manifest." Hancock v. Train, 426 U.S. 167, 198 (1976).

194. See e.g., 42 U.S.C. sec. 6961 (1982) ("Each . . . agency . . . shall be subject to, and comply with, all . . . State . . . requirements, both substantive and procedural (including any requirements for permits . . . .")).

195. See Alabama v. Veterans Administration, 648 F.Supp. 1208 (M.D. Ala. 1986); Ohio v. Department of the Air Force, No. C-2-86-0179 (S.D. Ohio, Mar. 7, 1987).

196. 42 U.S.C. sec. 7418(a) provides:

> Each . . . agency . . . of the federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants . . . shall be subject to and comply with, all Federal, State and interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any other non-governmental entity." (Emphasis added).

197. 33 U.S.C. sec. 1323(a) (1982). The waiver of sovereign immunity in the CWA is in large part a mirror of the waiver contained in the CAA. See supra note 172. Unlike the CAA waiver, however, the CWA waiver also states that "the United States shall be liable only for those civil penalties arising under federal law or imposed by a state or local court to enforce an order or the process of such court."

198. See California v. Department of the Navy, 845 F.2d 222 (9th Cir. 1988); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) (cases holding no waiver); but see Metropolitan Sanitary District of Greater Chicago v. Department of the Navy, 722 F. Supp. 1565 (N.D. Ill. 1989); Ohio v. United States Department of Energy, 689 F. Supp. 760 (S.D. Ohio 1988) (cases holding there is a waiver).

199. See 42 U.S.C. sec. 6961. The section does not explicitly mention civil fines or penalties. It does mention sanctions, but only in the context of judicial contempt proceedings: "Each . . . Agency . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any . . . provisions for injunctive relief and such sanctions as me be imposed by a court to enforce such relief) . . . ." Id. (Emphasis added).

200. See United States v. Washington, 872 F.2d 874 (9th Cir. 1988); Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) (cases where no waiver was found); but see Maine v. Department of the Navy, 702 F. Supp. 322 (D. Me. 1988); Ohio v. United States Department of Energy, 689 F. Supp. 760 (S.D. Ohio 1988) (cases where waiver was found).

201. Pub. L. 100-582, 102 Stat. 2953 (1988) (to be codified at 42 U.S.C. sec. 6992 (1988)).

202. 42 U.S.C.A. sec. 6992e.(a) (West Supp. 1989).

203. H.R. 1056 would also significantly broaden EPA's ability to enforce RCRA against other federal agencies. See supra notes 150-154 and accompanying text.

204. DOJ noted that not only was a waiver subjecting federal agencies to state criminal prosecutions unprecedented, it was also unnecessary (since individual federal employees were subject to criminal prosecution under RCRA and agencies were subject to injunctive relief) and unworkable (since you can hardly imprison a federal agency). See Hearings on H.R. 1056, supra note 29, at 115-116 (statement of DOJ's Donald Carr, Acting Assistant Attorney General, Lands and Natural Resources Division). Mr. Carr's assertion,

however, that H.R. 1056's waiver of sovereign immunity is unprecedented in subjecting a federal agency to state criminal sanctions was not accurate. See supra note 202 and accompanying text.

205. Hearings on H.R. 1056, supra note 29, at 46 (statement of Colorado Attorney General Duanne Woodard).

206. See 135 Cong. Rec. H3895 (daily ed. July 19, 1989).

207. EPA's support was gained after the bill had been amended to make it clear that federal employees could not be held individually liable for civil fines and penalties under RCRA. See 135 Cong. Rec. H3894 (daily ed. July 19, 1989). Originally, EPA had officially opposed passage of H.R. 1056. That opposition was tepid, however. In Congressional hearings on H.R. 1056, the EPA's Jonathan Z. Cannon, Acting Assistant Administrator, Office of Solid Waste and Emergency Response, testified that while the official position of EPA was to oppose passage, "[t]he position my office has taken in internal discussions within my agency and with other Federal agencies is that H.R. 1056 would offer useful provisions to improve or to encourage compliance on the part of Federal Facilities under RCRA." Hearings on H.R. 1056, supra note 29, at 130.

208. Hearings on H.R. 1056, supra note 29, passim.

209. 135 Cong. Rec. H3895 (daily ed. July 19, 1989).

210. S. 1140 , 101st Cong. 1st Sess., 135 Cong. Rec. S6330 (daily ed. May 31, 1989).

211. Unlike H.R. 1056, S. 1140 would not subject federal agencies to criminal penalties. In addition, while S. 1140 would allow the Administrator of EPA to take administrative enforcement actions against federal agencies, EPA could still not issue administrative orders to federal agencies until they had an opportunity to confer with the EPA Administrator, a requirement not found in H.R. 1056.

212. A Routine Outrage, Wall St. J., July 19, 1989, at A-14, col. 1, reprinted in 135 Cong. Rec. H3890 (daily ed. July 19, 1989) (statement of Rep. Ray).

213. Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940).

214. Id. at 21-22.

215. Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973) (Green does not cite Yearsley. Other court's, however, have recognized that Green is simply

a restatement of the holding in Yearsley. See e.g., Schrader v. Hercules, Inc., 489 F. Supp. 159 (1980)).

216. Green v. ICI America, Inc., 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973).

217. United States v. Pennsylvania Envtl. Hearing Bd., 584 F.2d 1273 (3rd Cir. 1978).

218. Powell v. United States Cartridge Co., 339 U.S. 497 (1950). In Powell, the issue before the Court was whether the United States Cartridge Company, the operating contractor of a GOCO munitions facility, was exempt from the provisions of the Fair Labor Standards Act, 29 U.S.C. sec. 201 et seq., since the law did not apply to federal agencies or instrumentalities. The Court held that United States Cartridge was not a federal agent or instrumentality because it was an independent contractor.

219. 33 U.S.C. sec. 1323 (1982) (CWA's waiver of sovereign immunity provision).

220. This decision illustrates the central weakness of Yearsley, which speaks in terms of contractors acting as the "agent" of the government. Currently, all of the Army's contracts for its GOCO munitions facilities state that the contractor is an independent contractor

and is not an agent of the United States. As a result, courts would be understandably reluctant to use an agency rationale to cloak a contractor in sovereign immunity.

221. Hancock v. Train, 426 U.S. 167 (1976). In Hancock, one of the installations which was the subject of the decision was the Paducah Gaseous Diffusion Plant, a DOE GOCO nuclear production facility. In striking down a requirement by the State of Kentucky that the DOE facility obtain state air emissions program permit, the court stated that the "federal function must be left free of [state] regulation" absent clear congressional authorization to the contrary. Id. at 35, citing Mayo v. United States, 39 U.S. 441, 447 (1943).

222. United States v. Pennsylvania Envtl. Hearing Bd. 584 F.2d 1273, 1280 n.22 (3rd Cir. 1978).

223. Goodyear Atomic Corp. v. Miller, ___ U.S. ___, 100 L Ed 2d 158 (1988).

224. Id. at 169.

225. Some contractors at GOCO munitions facilities use the facilities to engage in manufacturing for third-party DOD suppliers or to manufacture items for export.

These activities generate additional profits for the contractor. They also reduce total costs to the government through savings realized from increased equipment utilization rates, greater economies of scale, and payments received from the contractor for use of the facilities. In 1986, for example, Olin Corporation, the operating contractor at the Lake City AAP, generated $1,650,000.00 in sales of products produced at Lake City to other DOD suppliers. See Olin Defense Systems Group, Lake City Army Ammunition Plant (1986) (contractor's information brochure).

226. N. Wengert, The Political Allocation of Benefits and Burdens: Economic Externalities and Due Process in Environmental Protection 1 (1976).

227. See supra note 59 and accompanying text.

228. FAR 52.228-7(d).

229. Id.

230. Kipin Industries Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, (1987).

231. Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325 (4th Cir. 1986).

232. See supra notes 66-69 and accompanying text.

233. Namely that they were "allowable" and "reasonable." See FAR 31.201-2, 31.201-3.

234. FAR 31.201-4.

235. Because contamination can leach through the ground and enter groundwater, it is not unusual for the contamination to migrate off the facility. At TCAAP, for example, volatile organic compounds (chlorinated solvents) disposed of in the past on TCAAP have migrated through the groundwater and affected the water supplies of the City of New Brighton, Minnesota, and the Village of St. Anthony, Minnesota. These municipalities are located 2.5 and 4.5 miles downgradient from TCAAP, respectively. See DERA FY 1989 Report, supra note 25, at B-91.

236. Potentially, a contractor could also make a claim against a previous contract if the fine or costs were allocable to it and final payment under the previous contract had not yet been made.

237. 50 U.S.C.A. secs. 1431-35 (West Supp. 1989).

238. Id. at sec. 1431.

239. PL 85-804 does not actually use the word "indemnity." Legislative history, however, makes it clear that indemnification is one of the major reasons for the enactment of the legislation. See H.R. Rep. No. 2232, 85th Cong., 2d Sess. 4 (1958); also S. Rep. No. 2281, 85th Cong., 2nd Sess. (1958), reprinted in 1958 U.S. Code Cong. & Admin. News 4043, 4045.

240. See 31 U.S.C. sec. 1341(a)(1)(B) (1982), which provides that the prohibitions of contracting before or in excess of appropriations are not applicable if otherwise permitted by law.

241. 50 U.S.C.A. sec. 1431 (West Supp. 1989). Executive Order 10789 allows delegation of this authority to heads of the military departments. 23 Fed. Reg. 8897 (1958), reprinted at 50 U.S.C.A. sec. 1431 (West Supp. 1989).

242. Since Immigration and Naturalization Service v. Chada, 462 U.S. 919 (1983), statutory provisions providing for a legislative veto are presumably ineffective. The Army continues to have an obligation to notify Congress as to each use of authority under PL 85-804 which could subject the United States to obligate funds in excess of $50,000 dollars, however. See Executive Order 10789, 23 Fed. Reg. 8897 (1958).

243. 50 U.S.C.A. sec. 1435 (West Supp. 1989). The state of emergency declared by President Truman on December 16, 1950, is still in effect with regard to exercise of authority under PL 85-804. See Presidential Proclamation No. 2914, 15 Fed. Reg. 9029 (1950); also 50 U.S.C.A. sec. 1601 (West Supp. 1989).

244. 50 U.S.C. sec. 1431(I)(1A)(b)(2) (West Supp. 1989).

245. 23 Fed. Reg. 8897 (1958), reprinted at 50 U.S.C.A. sec. 1431 (West Supp. 1989).

246. See also FAR 50.403 (this section implements PL 85-804 by providing specific and detailed procedures to be used in processing requests for indemnification clauses in government contracts).

247. See supra note 59 and accompanying text.

248. Hearings on H.R. 4083, Government Contractors Product Liability Act of 1983 and H.R. 4199, Contractor Liability and Indemnification Act Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., 98th Cong., 2d Sess. 45 (1984).

249. Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804

to Include and Indemnification Clause In Contracts for Lake City and Newport Army Ammunition Plants, 31 May 1985.

250. Id.

251. In 1986, for example, the Olin Corporation used facilities at Lake City AAP to generate sales exceeding $1,650,000 to other DOD suppliers, including Aerojet, Honeywell, and Ford Aerospace. See Olin Defense Systems Group, Lake City Army Ammunition Plant (1986) (contractor's information brochure).

252. Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include and Indemnification Clause in a Contract for Mississippi Army Ammunition Plant, 26 Oct. 1987.

253. Id.

254. Id.

255. Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include an Indemnification Clause in a Contract for the Iowa Army Ammunition Plant, 1 Apr. 1988.

256. Id.

257. Id. ("In this clause, non-sudden release means a release [of toxic, nuclear, or hazardous chemicals or materials] which takes place over time and involves continuous or repeated exposure. Sudden release means a release which is not repeated or continuous in nature.")

258. Memorandum of Decision, Office of the Secretary of the Army, subject: Authority under 50 U.S.C. secs. 1431-1435 (Pub. L. 85-804) to Include an Indemnification Clause in a Contract With Hercules Incorporated, 30 Oct. 1989 (reprinted in its entirety at Appendix A) [hereinafter Radford Determination].

259. See e.g., Letter from Theodore Hornsby, Jr., Chief, GOCO Division, AMCCOM, to Lt. Gen Eugene T. Ambrosio (retired), President, Day and Zimmerman, Inc. (9 Jan. 1990) (discussing the possibility of the Army's providing indemnification pursuant to PL 85-804 to Day and Zimmerman, Inc., the contractor operator of the Kansas and Lone Star AAPs).

260. Radford Determination, supra note 258.

261. Id.

262. Id.

263. The FAR does not use or define the term principal officer. For purposes of the Liability for the Facilities clause, however, it defines "contractor managerial personnel" to be:

> [T]he Contractors directors, officers, managers, superintendents or equivalent representatives who have supervision of -
>
> (1) All or substantially all of the contractor's business;
>
> (2) All or substantially all of the contractor's operations at any one plant or a separate location in which the facilities are installed or located; or
>
> (3) A separate and complete major industrial operation in connection with which the facilities are used.

FAR 52.245-8(a).

264. See e.g., United States v. United States Cartridge Co., 198 F.2d 456 (8th Cir. 1952), cert. denied 345 U.S. 910 (1952).

265. Of course, contractors conduct can run afoul of even this generous protection, as recently illustrated by General Dynamics at Air Force Plant #4. See supra notes 177-179 and accompanying text.

266. Radford Determination, supra note 258.

267. Turk Letter, supra note 26.

268. See supra notes 67-68 and accompanying text.

269. At GOCO munitions facilities operated under cost-type contracts, a contractor's profit is typically composed of a base-fee and an award-fee. The base-fee represents a guaranteed minimum profit that the contractor will realize if the contract is not terminated prematurely. The award-fee represents additional profit that the contractor can receive if it performs the contract in a manner which satisfies the award-fee criteria.

270. See Headquarters, Army Munitions & Chemical Command, Cost Plus Award Fee Evaluation Operation Manual (1984).

271. GAO Report, supra note 28, at 32.

272. See Memorandum, Office of the Under Secretary of Defense, 25 Nov. 1986, subject: Government Property in the Possession of Defense Contractors.

273. Memorandum, Headquarters, U.S. Army Materiel Command, 18 Aug. 1989, subject: Retention/Disposition Data for Government-Owned Contractor-Operated (GOCO) Industrial Facilities.

274. See Report on H.R. 2461, supra note 4, at 256.

275. Air Force Pushes Military to Sell "GOCOS" to Dodge Environmental Cleanup, Inside E.P.A. Weekly Report, April 8, 1988, at 1.

276. 42 U.S.C. 9620(h)(3)(A) (Supp. IV 1986).

277. 42 U.S.C. sec. 9620(h)(3)(B) (Supp. IV 1986).

278. See supra note 22 and accompanying text.

279. 40 U.S.C. sec. 484 (1982).

280. 40 U.S.C. sec. 485(2) (1982).

281. 40 U.S.C. secs. 485(a), 485(c) (1982).

282. See 41 C.F.R. sec. 101-47.401-4 (1989).

283. United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989).

284. 42 U.S.C. sec. 6973 (Supp. II 1984).

285. 42 U.S.C. 9607(a)(3) (Supp. IV 1986).

286. Aceto, 872 F.2d at 1376.

287. Id. at 1380.

288. One of the cases cited by the court for this proposition is United States v. Westinghouse Electric Corp., 22 Env't Rep. Cas. (BNA) 1230, 1231-32 (S.D. Ind. 1983). In that case, the court dismissed both RCRA and CERCLA third-party claims brought by Westinghouse against Monsanto. Monsanto had sold Westinghouse PCBs (polychlorinated biphenyls), which are hazardous substances. Westinghouse then used the PCBs in the manufacture of electrical equipment. As a result of the manufacturing process, Westinghouse generated wastes containing PCBs which were later disposed of. This PCB laden waste later became the basis of the suit against Westinghouse by the United States. See Aceto, 872 F.2d at 1382 n.10.

289. Aceto, 872 F.2d at 1382.

290. Id. at 1384.

291. Id. at 1383.

292. There is no clear policy on when government owned property is provided to GOCO contractors for munitions production. Presumably, this practice allows the

government to dispose of surplus materials acquired in other procurements and maintain or broaden its mobilization industrial base by allowing other manufacturers to supply components and raw materials used in munitions manufacture.

293. FAR 52.245-5(c)(1).

294. 42 U.S.C. sec. 9607(e)(1) (Supp. IV 1986). In relevant part, this section provides that:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility from any person who may be liable for a release or threat of release [of hazardous substances] . . . to any other person the liability imposed by this section.

295. See House Report on H.R. 2461, supra note 4, at 255.

296. See supra text, at 34-35.

297. Report on H.R. 2461, supra note 4, at 242.

298. Report on H.R. 1056, supra note 29, at 171-172 (statement of Rep. Ray).

299. See e.g., 42 U.S.C. sec. 7418 (1982).

300. See e.g., 42 U.S.C. sec. 9620(j) (Supp. IV 1986).

301. See e.g., 42 U.S.C. sec. 6961 (Supp. II 1984).

302. Noise Control Act of 1972, 42 U.S.C. secs. 4901-4918 (1982).

303. Exec. Order No. 12327, 46 Fed. Reg. 48,893 (1981).

304. See Colon v. Carter, 507 F. Supp. 1026 (D. P.R. 1980); Puerto Rico v. Muskie, 507 F. Supp. 1035 (D. P.R. 1980).

305. Report on H.R. 2461, supra note 4, at 242.

306. See 10 U.S.C. sec. 2703 (Supp. IV 1986).

307. 10 U.S.C. sec. 2701(a)(2) (Supp. IV 1986).

308. See Report on H.R. 2461, supra note 4, at 245.

309. Id. at 246.

310. 54 Fed. Reg. 43,104 (1989).

311. Id.

312. 54 Fed. Reg. 31,358 (1989).

313. Id.

314. Id.

315. Telephone interview with Debbie Swichkow, Environmental Protection Specialist, Hazardous Waste Section, Office of the Assistant Secretary of Defense (Environment) (Mar. 21, 1990).

316. Id.

317. Id.

318. See Report on H.R. 2461, supra note 4, at 260.

319. See supra note 269.

320. Id. By way of contrast, the DOE recently announced that it was modifying its award fee criteria so that not less than 51% of the available award-fee would be based on compliance with environmental,

safety, and health requirements. See GAO Report, supra note 28, at 27.

321. Office of Management and Budget Circular No. A-106, subject: Reporting Requirements in Connection with the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities (December 31, 1974).

322. Report on H.R. 1056, supra note 29, at 175-176 (statement of Rep. Ray).