

# Environmental Law Institute

## CERCLA and DoD

### Who Pays for Superfund Cleanups at DoD- Owned Sites?

---

RIDGWAY M. HALL, JR.

*VICE CHAIR*

*CHESAPEAKE LEGAL ALLIANCE*

FEBRUARY 13, 2019



# The Problem

---

Millions of Tons of Hazardous Substances Spilled  
or Disposed of at DoD Facilities over Many Decades

Soil and Groundwater Contamination Pose Threats

Groundwater has Frequently Migrated off-site

Some Contractors who Caused Problem are Defunct

Investigation and Remediation Costs Run From Tens of Millions to  
over \$1 Billion

# CERCLA Liability

---

**Section 107:** Strict, Joint and Several for all costs of investigation and cleanup and natural resource damage.

**PRPs:** Current and former owners of the facility (or site); and waste generators and transporters who sent waste there for storage, recycling or disposal.

**Section 105:** National Contingency Plan (NCP) prescribes procedures for remedial investigations and feasibility studies (RI/FS), remedy selection and remedial action. 40 C.F.R. Part 300.

National Priorities List.

# CERCLA Liability

---

**Section 120:** No sovereign immunity for DoD; DoD must ensure remediation is done at its sites; Creation of Federal Agency Hazardous Waste Compliance Docket;

EPA shares oversight to ensure RI/FS and remedial work are properly done;

Federal Facilities Agreements between EPA and DOD implement this.

Contractors have for decades conducted research, manufacturing, weapons and ammo testing, mining, waste disposal, etc. at DoD sites.

# Who is Responsible for Which Costs?

---

Contractors are often current or past operators, generators, transporters, or occasionally past or part owners.

You can't contract away CERCLA liability, but you can, by contract, allocate costs (who pays for what).

Government Contracts are governed by the Federal Acquisition Regulations (FAR).

Most contracts to provide goods or services are provided under "cost plus" or "fixed price" contracts.

# Check the Contract Language

---

DoD contracts typically assign responsibility for waste management and disposal, and for cleaning up spills.

Contractors are normally required to comply with all applicable laws, including environmental, and are liable for penalties for violations.

Are costs of CERCLA investigations and remediation “allowable [reimbursable] costs”?

Are there indemnities?

Provisions for 3rd party liability for injury to others, or costs of addressing offsite migration?

# Multiple Contractors/PRPs

---

At most DoD facilities, multiple contractors currently on site; many more over many decades.

Defunct Contractors leave “Orphan Shares”.

Possibly off-site generators or transporters who sent waste there.

Since everyone is liable, how to proceed?

# Response Cost Allocation

---

CERCLA recognizes that response costs may be equitably allocated among PRPs, and allows “cost recovery” (Section 107) and “contribution” (Section 113) actions for recovery of costs.

Court may “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” (Section 113(f)(1)).

Courts have identified relevant factors.



# “Gore” Allocation Factors

---

1. Ability of parties to distinguish their wastes
2. Volume of each party's waste
3. Toxicity of each party's waste
4. Degree of involvement in the waste generation, transportation or disposal
5. Degree of care used
6. Degree of cooperation with Gov't on investigation and remedial action

# Other Factors Considered

---

1. Contracts between the parties.
2. DoD's acquiescence in the waste management practices.
3. Benefits received by the owner (DoD) from the contractor's waste-generating activities.
4. Did DoD "pervasively control" the business operations or waste disposal by the contractor?

# PRP Organization & Cost Management

---

First step: PRP Group formation.

To do the RI/FS or not (and let DoD do it and sue)?

If PRPs do it, they will enter an “organization agreement”, hire technical experts and often common counsel.

Set tasks, budget and funding.

Hire a cost allocation consultant.

# Whose Waste will Drive the Remedy?

---

Typically different types of wastes are present,

- e.g., spent solvents, metals, herbicides and PCBs.

Different treatment technologies for different wastes will mean different costs per pound of waste.

Allocator can create a “factors weighting matrix” which takes into account the Gore and other factors for each generator’s waste as well as the difference in per-unit costs of remediation. Can use this to calculate each PRP’s share.

# How Do DoD and EPA Oversee the Work?

---

Typically RI/FS is carried out by PRPs under an administrative consent order, unilateral administrative order, or a settlement agreement.

Remedial actions are typically carried out under a consent decree approved by federal district court, but other forms of agreement can be used.

# Case Study: Areal Apportionment Agreement at Twin Cities Army Ammunition Plant, Minnesota

---

## **Facts:**

- Several contractors currently at site and other absent historic contractors.
- Contractors had disposed of waste where Army specified, but spent solvents and metals sank into groundwater and migrated off site.
- Site remediation needed.

## **Problem:**

- One contractor willing to clean up waste around its 2 buildings without regard to who put it there, but not if joint and several liability for entire site remained.

# Case Study: Areal Apportionment Agreement at Twin Cities Army Ammunition Plant, Minnesota

---

## **Solution:**

- Areal Apportionment Agreement among Contractor, DoD and Justice Dept.
- Contractor cleaned up soil and groundwater around its buildings in exchange for covenant not to sue and “hold harmless” clause from DoD for any other response costs elsewhere at the site.
- This broke the liability bottleneck and was model for others.
- Note: There was separate private litigation for offsite groundwater contamination.

# Other Potential Sources of Liability

---

Violation of federal and state environmental laws.

Suspension, Debarment and Blacklisting for environmental violations is a big problem for Government Contractors.

Common law liability to anyone harmed by release of hazardous substance – trespass, negligence, nuisance, strict liability.

False Claims Act liability for submitting an invoice without disclosing environmental noncompliance or other contract violation.



# How to Limit Contractor Liability?

---

**Contract Language:** Negotiate and draft this carefully.

**Compliance assurance:** Avoid spills, risky discharges and violations with an “EH&S Compliance Assurance Plan” which includes sound management practices and regular audits, preferably by outside parties.

See Frank Friedman, “Practical Guide to Environmental Management” (ELI, 11th ed., 2011).

# How to Limit Contractor Liability?

---

See also, Board of Environmental, Health and Safety Auditor Certifications (BEAC), “Performance and Program Standards for the Professional Practice of Environmental, Health and Safety Auditing” (2008).

Note: BEAC has been acquired by the Institute of Internal Auditors.