DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE
OFFICIAL RECORD

Task Force Procedures

1. Task Force Charter
2. Public Law 101-510, Section 2923 -- Establishing the Task Force
3. Operating Rules for Task Force Meetings
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2. Defense Environmental Restoration Program -- Annual Report to Congress for Fiscal Year 1990
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4. DoD Ammunition and Explosives Safety Standards

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8. Statement of Representative Ray

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3. Robbins Air Force Base Inter-Agency Agreement

4. Report to Congress on Liability, Bonding, and Indemnification Issues for Department of Defense Restoration Program and Hazardous Waste Contracts

5. Information on Defense Environmental Restoration Account's "Worst First" Cleanup Strategy

6. Information on Formerly Used Defense Sites

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3. Statement of Mr. MacKinnon (Office of Economic Adjustment) -- Economic Development and Environmental Requirements

4. President's Economic Adjustment Committee Booklet -- "Resolution of a Community Land Dispute"

5. Presentation by Ms. Jones (Environmental Protection Agency)-- on Resource Conservation and Recovery Act (RCRA) Delegation

6. Presentation by Mr. Oh and Mr. Ciucci (Logistics Management Institute) -- Contracting Improvements

7. Statement of Mr. Gelde (Public Witness)

8. Presentation by Mayor Rubach of Mesa, Arizona -- Resolution of Conference of Mayors on Environmental Mitigation at Closing Military Facilities

9. Statement of Mr. Strock (Task Force Member, Representative of the National Governors Association)

10. EPA Federal Register Notice of Policy Statement for the National Priorities List

Information Requests by Task Force

1. General Services Administration Briefing -- Federal Property Acts
2. State of California Briefing -- Joint Services Regional Environmental Office
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5. Air Force Response to Environmental Response Action Issue

Task Force Correspondence

1. Nomination Letters for Task Force Members
2. Letter from Hazardous Waste Action Coalition (HWAC) to Task Force
3. Letter from Mr. Greer Tidwell, EPA Region IV Administrator, to Task Force
4. Letter from Pacific Studies Center to Task Force
5. Representative Dingell's Letter to EPA

CHARTER OF THE DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

Defense Environmental Response Task Force

In accordance with the provisions of the National Defense Authorization Act for Fiscal Year 1991, Section 2923, a Defense Environmental Response Task Force is hereby ordered as follows:

I. Establishment

There is established the Defense Environmental Response Task Force. The Task Force shall be composed of the following (or their designees):

A. The Secretary of Defense, who shall be chairman of the Task Force

B. The Attorney General

C. The Administrator of the General Services Administration

D. The Administrator of the Environmental Protection Agency

E. The Chief of Engineers, Department of the Army

F. A representative of a State environmental protection agency, appointed by the head of the National Governors Association

G. A representative of a State attorney general's office, appointed by the head of the National Association of Attorney Generals

H. A representative of a public-interest environmental organization, appointed by the Speaker of the House of Representatives.

II. Functions

The Task Force shall study and provide a report to the Secretary of Defense for transmittal to the Congress on the findings and recommendations concerning environmental restoration at military installations closed or realigned under Title II of Public Law 100-526, as authorized under Section 204(a)(3) of that title. The primary objectives of the Task Force shall be to:

1. Determine ways to improve interagency coordination, within existing laws, regulations, and administrative policies, of environmental response actions at military installations (or portions of installations) that are being closed, or are scheduled to be closed, pursuant to Title II of the Defense

Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526); and

2. Determine ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously.

The Task Force may also make recommendations regarding changes to existing laws, regulations and administrative policies.

III. Administration

All Task Force members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the government service (5 United States Codes (U.S.C.) 5701-5707), to the full extent funds are available. The expenses of the Task Force are estimated to be $500,000 and shall be paid from such funds as may be available to the Secretary of Defense. Man-year requirements are estimated to be three. The proponent official is the Assistant Secretary of Defense (Production and Logistics) who will provide administrative support through the Office of the Deputy Assistant Secretary of Defense (Environment).

The Task Force shall be in place as soon as possible and meet as often as necessary (estimate is four meetings). The Task Force's final report shall include findings and recommendations concerning the environmental response actions at military installations closed or realigned under Title II of Public Law 100-526, as authorized under Section 204(a)(3). The Task Force should complete its work by October 5, 1991, and will terminate on November 5,1991.

17 April 1991

SECTION 2923 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1991
Source of Funds for Environmental Restoration at Closing Installations

(a) **Authorization of Appropriations**--There is hereby authorized to be appropriated to the Department of Defense Base Closure Account for fiscal year 1991, in addition to any other funds authorized to be appropriated to that account for that fiscal year, the sum of $100,000,000. Amounts appropriated to that account pursuant to the preceding sentence shall be available only for activities for the purpose of environmental restoration at military installations closed or realigned under title II of Public Law 100-526, as authorized under section 204(a)(3) of that title.

(b) **Exclusive Source of Funding**--(1) Section 207 of Public Law 100-526 is amended by adding at the end the following:

> "(b) Base Closure Account to be Exclusive Source of Funds for Environmental Restoration Projects--No funds appropriated to the Department of Defense may be used for purposes described in Section 204(a)(3) except funds that have been authorized for and appropriated to the Account. The prohibition in the preceding sentence expires upon the termination of the authority of the Secretary to carry out a closure or realignment under this title."

(2) The amendment made by paragraph (1) does not apply with respect to the availability of funds appropriated before the date of the enactment of this Act.

(c) **Task Force Report**--(1) Not later than 12 months after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress a report containing the findings and recommendations of the task force established under paragraph (2) concerning:

> (A) ways to improve interagency coordination, within existing laws, regulations, and administrative policies, of environmental response actions at military installations (or portions of installations) that are being closed, or are scheduled to be closed, pursuant to title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526); and
>
> (B) ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously.

(2) There is hereby established an environmental response task force to make the findings and recommendations, and to prepare the report, required by paragraph (1). The task force shall consist of the following for their designees:

(A) The Secretary of Defense, who shall be chairman of the task force.
(B) The Attorney General.
(C) The Administrator of the General Services Administration.
(D) The Administrator of the Environmental Protection Agency.
(E) The Chief of Engineers, Department of the Army.
(F) A representative of a State environmental protection agency, appointed by the head of the National Governors Association.
(G) A representative of a State attorney general's office, appointed by the head of the National Association of Attorney Generals.
(H) A representative of a public-interest environmental organization, appointed by the Speaker of the House of Representatives.

PROCEDURAL RULES OF THE DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

Rule 1: The Defense Environmental Response Task Force was chartered as a Federal Advisory Committee under Public Law 92-463 and shall comply with this Act.

Rule 2: The Task Force's meeting will be open to the public.

Rule 3: The Task Force will meet at the call of the Chairman or at the request of a majority of members of the Task Force.

Rule 4: The Chairman will designate a member to preside in his absence.

Rule 5: The Chairman (or another Member of the Task Force presiding in the Chairman's absence) shall have the authority to ensure the orderly conduct of the Task Force's business. This power includes, but is not limited to, recognizing members of the Task Force and members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold the floor, determining the order in which Members of the Task force may question witnesses, conducting votes of members of the Task Force, and designating Task Force members for the conduct of public hearings.

Rule 6: A member of the Task Force may designate in writing another member to vote and otherwise act for the first member when he or she will be absent, or vote through his or her designated Alternate.

Rule 7: A simple majority of members shall be necessary to approve the report of the Task Force.

Rule 8: These Rules may be amended by the majority vote of the members of the Task Force serving at that time.

Public Law 92-463
92nd Congress, H. R. 4383
October 6, 1972

An Act

86 STAT. 770

To authorize the establishment of a system governing the creation and operation of advisory committees in the executive branch of the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Advisory Committee Act". Federal Advisory Committee Act.

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

DEFINITIONS

SEC. 3. For the purpose of this Act—

(1) The term "Director" means the Director of the Office of Management and Budget.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

APPLICABILITY

SEC. 4. (a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

Restrictions.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

RESPONSIBILITIES OF CONGRESSIONAL COMMITTEES

Review.

SEC. 5. (a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

Guidelines.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

RESPONSIBILITIES OF THE PRESIDENT

SEC. 6. (a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

Report to Congress.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

Annual report to Congress.

(c) The President shall, not later than March 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

Exclusion.

RESPONSIBILITIES OF THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Committee Management Secretariat. Establishment.

SEC. 7. (a) The Director shall establish and maintain within the Office of Management and Budget a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

Review.

(b) The Director shall, immediately after the enactment of this Act, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether is should be abolished.

Recommendations to President and Congress.

The Director may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Director's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Director shall carry out a similar review annually. Agency heads shall cooperate with the Director in making the reviews required by this subsection.

Agency cooperation.

Performance guidelines.

(c) The Director shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Director shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

Uniform pay guidelines.

(d)(1) The Director, after study and consultation with the Civil Service Commission, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code; and

Travel expenses.

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

80 Stat. 499; 83 Stat. 190.

(2) Nothing in this subsection shall prevent—

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

Expense recommendations.

(e) The Director shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

RESPONSIBILITIES OF AGENCY HEADS

SEC. 8. (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

Advisory Committee Management Control Officer, designation.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

81 Stat. 54.

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

ESTABLISHMENT AND PURPOSE OF ADVISORY COMMITTEES

SEC. 9. (a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Director, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law. Publication in Federal Register.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Director, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information: Charter, filing. Contents.

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress. Copy.

ADVISORY COMMITTEE PROCEDURES

SEC. 10. (a)(1) Each advisory committee meeting shall be open to the public. Meetings.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto. Notice. Publication in Federal Register. Regulations.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist. 81 Stat. 54.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Minutes.

Certification.

advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any advisory committee meeting which the President, or the head of the agency to which the advisory committee reports, determines is concerned with matters listed in section 552(b) of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

81 Stat. 54. Annual report.

Federal officer or employee, attendance.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

AVAILABILITY OF TRANSCRIPTS

SEC. 11. (a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

"Agency proceeding." 80 Stat. 382.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

FISCAL AND ADMINISTRATIVE PROVISIONS

Recordkeeping.

SEC. 12. (a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

Audit.

Agency support services.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

RESPONSIBILITIES OF LIBRARY OF CONGRESS

Reports and background papers.

SEC. 13. Subject to section 552 of title 5, United States Code, the Director shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The

Depository.

Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

TERMINATION OF ADVISORY COMMITTEES

SEC. 14. (a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

Renewal.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

Continuation.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

EFFECTIVE DATE

SEC. 15. Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following the date of enactment.

Approved October 6, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 92-1017 (Comm. on Government Operations) and No. 92-1403 (Comm. of Conference).
SENATE REPORT No. 92-1098 accompanying S. 3529 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 118 (1972):
May 9, considered and passed House.
Sept. 12, considered and passed Senate, amended, in lieu of S. 3529.
Sept. 19, Senate agreed to conference report.
Sept. 20, House agreed to conference report.

ENVIRONMENTAL RESPONSE TASK FORCE
LIST OF MEMBERS

Department of Defense:

Chairman: Thomas E. Baca
Deputy Assistant Secretary of Defense (Environment)

Department of Justice:

Anne Shields
Chief, Policy, Legislation and Special Litigation

General Services Administration:

Earl E. Jones
Commissioner, Federal Property Resources

Environmental Protection Agency:

Christian R. Holmes
Deputy Assistant Administrator for Federal Facilities

Corps of Engineers:

P.J. Offringa
Major General
Assistant Chief of Engineers

National Governors Association:

James Strock
Secretary for Environmental Protection
State of California

National Association of Attorneys General:

Daniel Morales
Attorney General
State of Texas

Speaker of the House of Representatives:

Don Gray
Senior Fellow and Water Program Director
Energy and Environment Studies Institute

Thomas E. Baca
Deputy Assistant Secretary of Defense (Environment)
Department of Defense

Mr. Thomas E. Baca assumed his role as the Deputy Assistant Secretary of Defense (Environment) on August 1, 1990. In this position, he is responsible for the development, management and coordination of environmental programs in the Department of Defense. He directs the Defense Environmental Restoration Program and budget to clean up hazardous waste sites on current and former DoD activities; he is responsible for the overall coordination of the DoD natural resources conservation program and the supervision of the Armed Services Pest Management Board.

Mr. Baca brings a wide range of experience to his present position. He has over twenty-five years of experience i the environmental area. He comes to the federal government from the University of Arizona, where as Associate Vice President for Administrative Services, he supervised several administrative departments. From 1986 to 1989, he was the City Manager for the City of Santa Fe, New Mexico, and from 1982 to 1986 he worked in the private sector as an environmental management consultant. Mr. Baca served as the Director of the Environmental Improvement Division for the state of New Mexico from 1976 to 1982.

Mr. Baca received his Bachelor of Science degree from the University of New Mexico in 1964 and a Master of Public Health from the University of Minnesota. He is active in numerous professional and civil organizations and has served as Chairman of the Section on Environment of the American Public Health Association and as Chairman of the Section on Administration of the National Environmental Health Association.

Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

Richard B. Stewart is Assistant Attorney General for the Environment and Natural Resources Division, United States Department of Justice. Directing a staff of over 300 attorneys, he is responsible for the representation of the United States in litigation across the spectrum of environmental law, from hazardous waste and air pollution to clean water and wetlands, coastal zone protection, biotechnology, pesticides, and resource management on federal lands and the outer continental shelf.

Prior to joining the Justice Department, Mr. Stewart was Byrne Professor of Administrative Law at Harvard Law School, where he has taught since 1971. He has taught and published extensively in the fields of administrative and regulatory law, environmental law, tort law, and federalism. Most recently, his work focused on the development of economic incentives for environmental protection and international and comparative environmental law. He is a graduate of Yale, Oxford, and the Harvard Law School.

Earl E. Jones
Commissioner
Federal Property Resources Service

Earl E. Jones has served as the Commissioner of Federal Property Resources Service (FPRS) for the U.S. General Services Administration (GSA) in Washington, D.C., since April 1984.

FPRS is responsible for managing the Nation's multimillion dollar program for the utilization and disposal of Federal real estate, a program of multibillion dollar potential. Previously, Jones was the Assistant Commissioner of the FPRS, Office of Real Property, from 1979 to 1984. Until transfer of the function to the Department of Defense in 1988, Jones was also responsible for the management and administration of the nation's multibillion dollar stockpile of strategic and critical materials.

Jones joined GSA's real property office in 1962 as a realty trainee and served in a number of positions of progressive responsibility, including the Deputy Director of the Eastern Division from 1971 to 1976, and the Director of the Western Division from 1976 to 1979.

A charter member of the Senior Executive Service established in 1979, among many honors earned during his career, Jones received the Presidential Rank Award of Meritorious Executive in 1983 and the GSA Distinguished Service Award in 1984. He is actively involved in promoting agencywide community based volunteer programs, including GSA's adoption of the Prospect and Buchanan Learning Centers in Washington, D.C. in February 1988 under the Partnership in Education Program, and the establishment of the GSA Agencywide Volunteer Service Corps in 1989. Also, he is a participant in the ongoing D.C. Committee on Public Education project to upgrade the quality of education and school facilities in the District of Columbia.

A former Army captain, Jones was graduated from West Virginia State College with a B.S. degree in business administration in 1955 and attended Graduate School at the American University in Washington, D.C.

Christian Holmes
Deputy Assistant Administrator
for Federal Facilities Enforcement
U.S. Environmental Protection Agency

Mr. Christian Holmes is currently the Deputy Assistant Administrator for Federal Facilities Enforcement for the U.S. Environmental Protection Agency. He is responsible for the EPA's cleanup, enforcement and waste management at all United States Government agencies, particularly Department of Defense installations and Department of Energy nuclear weapons production facilities.

Mr. Holmes has previously served as the Principal Deputy Assistant Administrator, Office of Solid Waste and Emergency Response at the EPA, Director of U.S. Trade & Development Program, Principal Deputy Assistant Secretary of State for Refugee Programs at the Department of State, and Vice President of a Fortune 500 Company.

Mr. Holmes graduated from Wesleyan University in 1968 with a Bachelor of Arts. In 1982, he became one of the first five graduates in the history of the University to receive an Honorary Master of Arts Degree, in Recognition of Public Service Achievements.

Mr. Holmes was also the recipient of the U.S. Army Soldiers Medal for Heroism in 1971, the Arthur S. Flemming Award (given to the top five Federal managers) in 1978, the Presidential Meritorious Service Award (highest performance award to Foreign Service Officers) in 1985 and 1987, and the highest performance award given at the EPA, the Environmental Protection Agency Gold Medal, in 1990.

Major General Peter J. Offringa
Assistant Chief of Engineers
Headquarters, Department of the Army

Major General Peter J. Offringa is currently serving as the Assistant Chief of Engineers, Office of the Chief of Engineers, the Pentagon, Washington, D.C. He has been assigned to this position since February 1988.

As the Assistant Chief of Engineers, General Offringa has responsibility for program development of all military construction , real property maintenance, and Army family housing at Army installations and facilities worldwide. Prior to this assignment, General Offringa served as the Deputy Director for Civil Works in the Office of the Chief of Engineers in Washington, D.C.

General Offringa graduated from the U.S. Military Academy at West Point in 1961 and has earned a master of science degree in Applied Science from the University of California at Davis. He is also a graduate of the U.S. Army Command and General Staff College and the Air Force War College.

He has held numerous responsible command and staff assignments both in the United States and overseas. His command assignments include serving as Commander and Division Engineer, Ohio River Division, U.S. Army Corps of Engineers, Cincinnati, OH; Commander, 130th Engineer Brigade, V Corps, U.S. Army Europe; and Commander, 17th Engineer Battalion, 2nd Armored Division, Fort Hood, Texas.

His staff assignments have included serving as a Senior Fellow at the Executive Seminar in National and International Affairs, Foreign Service Institute, Rosslyn, Virginia; Director of Engineering and Housing, V Corps, U.S. Army Europe; Special Assistant to the Assistant Division Commander (Support), 2nd Armored Division, Ft. Hood, Texas; Staff Management Division, Office of the Chief of Staff, Army, Washington, D.C.; and Staff Officer, Office of the Deputy Chief of Staff for Operations and Plans, Washington, D.C.

Among his military awards are the Legion of Merit, Bronze Star (with 3 Oak Leaf Clusters), Meritorious Service Medal, Air Medal, and the Army Commendation Medal. He is also authorized to wear the Parachutist Badge, Ranger Tab and the Army Staff Identification Badge. He is also a registered professional engineer in the Commonwealth of Pennsylvania.

James M. Strock
Secretary for Environmental Protection
California Office of Environmental Protection

Governor Pete Wilson appointed James M. Strock to be Secretary for Environmental Protection for the State of California on March 4, 1991. This is an interim position, and the Governor intends to nominate him to be Secretary of his proposed "Cal-EPA" later this year.

Most recently Mr. Strock was Assistant Administrator for Enforcement, U.S. Environmental Protection Agency. Appointed by President Bush and confirmed by the Senate in November 1989, he served as EPA's Chief law enforcement official. During his tenure, working under Administrator William K. Reilly, civil and criminal enforcement were at record levels, and he implemented significant reorganization. He placed particular focus upon invigorated federal facility enforcement and criminal enforcement.

Previously he was Acting Director (1989) and General Counsel (1988-89), U.S. Office of Personnel Management; environmental attorney with Davis, Graham & Stubbs, Denver, Colorado (1986-88); Special Counsel, U.S. Senate Environment & Public Works Committee (1985-86); Special Assistant to the Administrator, U.S. EPA (1983-84); Special Consultant to Office of Majority Leader, U.S. Senate (1982-83); Instructor, Department of Government, Harvard (1980-81); Moderator, Producer, Lay It On the Line weekly television program (WDSU-TV, NBC, New Orleans, 1973-74).

Mr. Strock was educated at Harvard College (A.B., 1977-78); Phi Beta Kappa; and New College, Oxford University (Postgraduate, 1981-82; Rotary Scholarship). 1st Lt., USAR-JAGC (1987-).

Mr. Strock is a former Member, Board of Advisors of Toxic Law Reporter (1987-89); Board of Directors of Youth Service America (1988-1989); Adjunct Fellows, Center for Strategic and International Studies (1989). He received the Ross Essay Award of the American Bar Association (1985), and an EPA Special Achievement Award (1984). Mr. Strock is a frequent contributor to professional publications.

Daniel C. Morales
Attorney General
Office of the Attorney General of Texas

Dan Morales took the oath of office as the 48th Attorney General of Texas in January, 1991, at the age of 34.

He promised to be an activist Attorney General, exercising his Constitutional responsibility to defend state law, counsel state leaders, and protect the citizens of Texas.

Morales began his public service career in 1983 as Assistant District Attorney for Bexar County. He served in that capacity until 1985, when he was elected to the first of three terms in the Texas House of Representatives.

During his first term in the House, Morales was selected the "Outstanding Freshman" by the *Dallas Morning News* and received the "Outstanding Leadership Award" from the Texans' War on Drugs.

He received numerous other honors during subsequent terms as a member of the Texas House of Representatives. The *Dallas Morning News* named him one of the state's "Seven Best Legislators." The *San Antonio Express News* twice named Morales "Politician of the Year," and the Greater Dallas Crime Commission twice selected him one of the "Top Ten Legislative Crime-Fighters." He has also received the "Outstanding Service Award" from the Independent Colleges and Universities of Texas.

Morales has served as Chairman of the House Criminal Jurisprudence Committee and as a member of the powerful House Ways and Means Committee.

The Attorney General is an honors graduate of Trinity University, 1978, and Harvard Law School, 1981.

He is a member of the boards of the Texas Lyceum Association, the National Conference of Christians and Jews, and the World Affairs council. He also is a trustee of Southern Methodist University in Dallas and Schreiner College in Herrville.

A native of San Antonio, Morales is an Elder with that city's First Presbyterian Church.

Don Gray
Senior Fellow and Water Program Director
Environmental and Energy Study Institute

Don Gray joined the Environmental and Energy Study Institute as Senior Fellow and Water Program Director on May 9, 1991. Mr. Gray is involved in developing policy alternatives to prevent contamination of groundwater and to promote more efficient use of water resources.

Prior to joining EESI, Mr. Gray served as a professional staff member, chief investigator, and staff director with the House Subcommittee on Environment, Energy and Natural Resources. Mr. Gray was responsible for the conduct of subcommittee's oversight of all programs of the Departments of Energy and the Interior, the U.S. Environmental Protection Agnecy, the Nuclear Regulatory Commission, the Tennessee Valley Authority, the USDA Forest Service, and civil works projects of the U.S. Army Corps of Engineers.

Mr. Gray has also served as an investigator with the House Committee on Government Operations, the Senate Committee on Appropriations, the Senate Permanent Subcommittee on Investigations, and the Senate Committee on Commerce.

Mr. Gray is an honors graduate from the University of North Carolina, and received a masters from Princeton University. He was awarded the Woodrow Wilson National Fellowship, the Princeton University Fellowship, and the American Political Science Association Congressional Staff Fellowship.

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE: ISSUES
Working Draft
June 13, 1991

Congress charged the Defense Environmental Response Task Force with making findings and recommendations on two categories of issues relating to environmental response actions at bases that are being closed: a) ways to improve interagency coordination; and b) ways to consolidate and streamline the practices, policies, and administrative procedures of relevant federal and state agencies in order to expedite response actions. Congress specified that the Task Force make recommendations within existing laws, regulations and administrative policies. The Task Force Charter provides that the Task Force may also recommend changes to those laws, regulations and policies. To assist the Task Force in its deliberations this paper identifies specific issues for potential consideration within the broad framework of the Charter.

ISSUE #1

STATEMENT OF ISSUE

a) **To what extent may facilities on closing bases be used by non-military users while cleanup investigations or other cleanup activities are being undertaken by the Department of Defense (DoD)?**

b) **To what extent may DoD transfer a base in parcels that exclude areas where ongoing remediation is necessary? How should such parcels be delineated?**

c) **To what extent may existing or proposed land uses be a factor in cleanup decisions:**

   i. **if the site is on the National Priorities List (NPL)?**

   ii. **if the site is regulated under the Resource Conservation and Recovery Act (RCRA)? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

d) **To what extent may the practices, policies and procedures for determining allowable uses of the land during and after the completion of remedial action be consolidated and streamlined:**

   i. **if the site is on the NPL?**

   ii. **if the site is regulated under the RCRA? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

BACKGROUND

Statutory Requirements

Environmental Restoration

The Comprehensive Environmental Response, Liability, and Compensation Act ("CERCLA"), 42 U.S.C. §§9601-75, and the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA),

§§42 U.S.C. 6901-6992K, are the principal federal statutes governing the cleanup of defense sites contaminated by hazardous substances. CERCLA §120 specifically addresses the responsibilities of federal agencies. Under CERCLA §120(a), federally owned facilities are subject to and must comply with CERCLA to the same extent as nongovernmental entities. In addition, 10 U.S.C. §2701(a)(2), specifically notes that environmental restoration activities must be conducted consistent with and subject to CERCLA §120. Section 120(a) requires EPA to use the same criteria to evaluate federal sites for the National Priorities List (NPL), the list of highest priority sites under CERCLA, as it does for private sites. EPA interprets §120(a) to mean that the criteria to list federal facilities should not be more exclusionary than the criteria to list non-federal sites. See EPA, Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10525 (Mar. 13, 1989).

CERCLA also establishes certain minimum procedures that must be followed when federal agencies transfer contaminated property. Section 120(h)(3) of CERCLA provides that when the federal government transfers real property on which any hazardous substance was stored for one year or more, or known to have been released, or disposed of, the federal government must provide a covenant in the deed. The covenant must warrant that all remediation necessary to protect human health or the environment with respect to any hazardous substance remaining on the property has been taken before the date of the transfer, and that the United States will take any additional remedial action found to be necessary after the date of transfer.

Some entire bases are listed on the NPL, including five on the 1988 closure list. In other cases, only a discrete site within the base is listed on the NPL. There are

contaminated sites on other bases, that are not listed on the NPL. CERCLA §120(a)(4) requires response actions on non-NPL sites to comply with state laws to the extent that state laws apply equally to response actions at non-federal facilities. Some bases contain facilities currently regulated under RCRA or state hazardous waste regulatory programs (or both); these facilities will need to be closed in accordance with those statutes. HSWA requires a treatment, storage, or disposal facility (TSDF) that has released hazardous waste into the environment to undertake "corrective action" to clean up the release. Where a base, or portion of a base, is both listed on the NPL and subject to state-delegated RCRA authorities, conflicts may arise regarding a particular proposed remedial action.

Transfer of Land

Other statutory authorities also apply to real estate owned by military departments that must be considered in the context of transferring land at a base that is being closed. Section 204(c) of the Base Closure Act, for example, reiterates that the National Environmental Policy Act (NEPA) applies to the actual closure or realignment of a facility and the transfer of functions of that facility to another military installation. Other statutes impose procedural requirements; 10 U.S.C. §2662(a), for example, provides that the Secretary of a military department may not enter into certain real estate transactions, including leases and other transfers of property where the value exceeds $200,000, until 30 days after he has submitted a report of the facts surrounding the transaction to Congress. Title 10 of the United States Code, §2668(a), authorizes the Secretary of a military department to grant easements for roads, oil pipelines, utility substations, and other purposes including "any ... purpose that he considers advisable."

Under the Base Closure Act and the Federal Property and Administrative Services Act, a federal agency receiving property from another federal agency must pay the estimated fair market value for available facilities. See Federal Property and Administrative Services Act, 40 U.S.C. §571 et seq.; Section 204(b) of the Base Closure Act, Pub. L. 100-526, 102 Stat. 2627; Federal Property Management Regulations, 41 C.F.R. §§101-42 to -49. Exceptions to this general rule are allowed for intra-DoD transfers of real property and if the Administrator of the General Services Administration and the Director of the Office of Management and Budget both agree. 41 C.F.R. §101-47.203-7. Regulations implementing this exception allow no-cost transfers for certain specified purposes including public parks and recreation areas; historic monuments; public health or educational purposes; public airports; and wildlife conservation. Id. In addition, the McKinney Act, 42 U.S.C. § 11411, requires DoD to give non-profit organizations that assist the homeless priority in leasing unutilized and underutilized property.

Section 204(b) of the Base Closure Act requires the Secretary of the military department contemplating a property transfer to consult with state and local governments to consider any plan for the use of the property that the local community may have. Pub. L. 100-526, 102 Stat. 2627. States and local governments are generally given priority over private individuals in acquiring surplus federal property. 41 C.F.R. §101-47.203-7.

Issues Surrounding Transfers and Conveyances

Some bases identified for closure contain facilities that are in demand for non-military use. DoD may desire to lease, or otherwise transfer use of, such facilities to non-military users before the base is closed. In some cases the facility may be within an "area

of concern" identified by DoD as needing either investigation to determine the need for environmental restoration or actual restoration. The U.S. Environmental Protection Agency (EPA) and state environmental regulatory agencies will have different interests in the site depending on the state of knowledge about the site, the regulatory posture at the site, and the stage of the investigation or restoration. It may be necessary to limit or restrict the non-military use in order to ensure that it does not interfere with the ongoing investigation or cleanup. Differing controls or limitations on interim use of facilities may be appropriate during the phases of investigation and restoration.

The procedures for determining interim and final uses of the affected land are likely to differ depending on whether the cleanup is conducted under CERCLA, RCRA, or some other framework. In addition, the intended interim or final use of the land may or may not be a valid consideration in determining cleanup standards, depending on which of these statutes governs the cleanup decision. The extent to which planned land uses affect cleanup decisions is likely to be highly controversial. If higher levels of residual contamination are allowed after cleanup because, for example, the planned use is industrial, measures must be taken to ensure that future changes in land use do not expose the public to unacceptable risks from the residual contamination.

Contamination on many bases is limited to relatively small discrete areas. One issue raised in such cases is whether the uncontaminated areas may be transferred as separate parcels, with the Department retaining the contaminated areas until remedial action is completed.

A corollary issue is how to define a contaminated area, particularly where groundwater may be contaminated and the extent of that contamination (i.e., size, direction of flow, and speed of the plume) is unknown. It may be difficult to determine precisely the boundaries of an "area of concern" prior to completion of cleanup. Another related question is whether, and under what circumstances, DoD may transfer uncontaminated surface above contaminated groundwater, or contaminated surface above contaminated groundwater for which surface remediation is complete. Also, the issue of defining and transferring uncontaminated areas is complicated by the fact that activities during the remedial design and remedial action could reveal that contamination extends to an area that had already been transferred by easement, lease, or some other land use transfer mechanism.

Restrictions such as prohibitions on well drilling or other subsurface activity (if subsurface contamination is an issue) may be appropriate. DoD could also sell or otherwise transfer parcels of property with a right of entry for monitoring or with other use restrictions. How restrictions are implemented will be critical to the protection of public health and safety, success of the cleanup, and resolution of future conflicts between the military department and its transferees. Restrictions on use are effective if they are made a part of the deed and "run with the land" so that later owners cannot extinguish or ignore them. Such restrictions also decrease the marketability of the land, making it more difficult to obtain purchasers. Lenders may be hesitant to lend money to purchase land which has had use restrictions placed on it.

Impediments to transfer resulting from threats of liability under CERCLA §§106 and 107 cannot be ignored. Potential transferees (including lessees) of property from DoD could be considered "owners or operators" of a CERCLA site liable for the costs of response at the site. At Pease Air Force Base in New Hampshire, this problem was resolved by legislation providing complete indemnification to the State of New Hampshire and lenders for any liability associated with releases caused by the Air Force at the base. Indemnification will likely be a recurring issue, since agencies do not have the authority to indemnify a purchaser themselves.

DoD has noted that bases may not be "nearly as valuable to the private sector" as they are to DoD. (See Statement of James F. Boatright, Deputy Assistant Secretary of the Air Force, before the Defense Base Closure and Realignment Commission, at 3 (May 10, 1991)). Moreover, the commercial real estate market is still in a slump, id. at 4, which will likely impede any large-scale transfers of property for some time. Factors that could affect the value of a particular piece of property at a military installation include:

(1) impact of closure on local economy
(2) ability of local market to absorb a large tract of land in a short time period
(3) age and possible negative value of improvements on land
(4) availability of public benefit conveyances
(5) set asides for wetlands, critical habitats, or contaminated areas

Id. at 9.

Other factors that may affect land values include the degree of encroachment of non-military uses upon the base (e.g., military flight paths, weapons uses, training needs that affect local communities); the condition of the base facilities and its improvements; the facility's suitability for other uses without significant expenditures; and the value of existing improvements that can add to a property's marketability.

OPTIONS

a) Identify the circumstances in which, and the criteria and restrictions under which, facilities on closing bases may be leased or otherwise transferred for use by non-military users while cleanup investigations or other cleanup activities are being undertaken.

b) Clarify applicable statutes, regulations and policies to indicate that portions of bases for which there is no contamination or likelihood of contamination may be transferred independent of contaminated parcels.

c) Identify the differences in the policies, practices and procedures for determining allowable uses of land during and after cleanup when the site is on the NPL, a RCRA regulated site, or neither. Reconcile those differences.

d) Reconcile and combine oversight and regulatory responsibilities under CERCLA and RCRA at bases being closed or realigned.

e) Identify and develop criteria for the use of innovative real estate transactions.

f) Identify and develop criteria for the use of conservation easements or other protections for ecological resources for certain properties being sold or transferred.

g) Develop a policy to govern the use of parcels within an "area of concern" during the time investigation and remediation is ongoing, including provisions regarding access rights, compliance with applicable health and safety plans, and subsequent transfers.

ISSUE #2

STATEMENT OF ISSUE

a) **To what extent may the practices, policies and procedures for determining cleanup standards be consolidated and streamlined:**

   i. **if the site is on the NPL?**

   ii. **if the site is regulated under the RCRA? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

b) **To what extent may the practices, policies and procedures for executing the cleanup be consolidated and streamlined?**

   i. **if the site is on the NPL?**

   ii. **if the site is regulated under the RCRA? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

BACKGROUND

The roles and responsibilities of state environmental regulatory agencies and EPA vary depending on whether a site is on the NPL, is regulated under RCRA, or neither. Each of these three legal categories provide distinct opportunities for consolidating and streamlining the cleanup process. In particular, the procedures for determining the cleanup standards for an NPL site will likely differ from the procedures for determining the cleanup standards for a TSDF regulated by a state that has received RCRA corrective action authorization from EPA. Similarly, the procedures for implementing a remedial action at an NPL site differ from the procedures for carrying out a corrective action at a TSDF in a state that has a fully delegated RCRA/HSWA hazardous waste regulatory program. Moreover, the procedures for determining and implementing cleanup decisions at non-NPL, non-RCRA sites may differ from both of these systems.

Two sections of CERCLA are directly applicable to the questions of determining and implementing cleanup standards at federal facilities. Section 121 of CERCLA, addressing cleanup standards, is the primary statutory authority for determining cleanup standards at all sites listed on the NPL. Section 121 delineates the nature of the remedy to be chosen and requires that a chosen remedy protect human health and the environment. Section 121 also provides that legally applicable or relevant and appropriate more stringent state standards (ARARs) may apply in determining the proper level of cleanup.

As already noted, CERCLA §120 specifically addresses the responsibilities of federal agencies for cleanup of hazardous substances. CERCLA §120(a) requires federally owned facilities to comply with CERCLA to the same extent as nongovernmental entities. CERCLA §120(e)(2) provides that for federal sites that are listed on the NPL, EPA plays a significant role in remedy selection. The section directs the federal agency concerned to enter into an IAG with EPA for the "expeditious completion . . . of all necessary remedial actions" at the facility. Executive Order 12580 specifies the procedures to be followed prior to the selection of the remedy by EPA. Exec. Order 12580, §10, 52 Fed. Reg. 2923, 2928 (1987).

For federal sites not on the NPL, CERCLA §120(a)(4) mandates that state laws concerning response actions apply. Arguably, all of the procedures contained in the NCP may apply even to federal sites not on the NPL. Section 120(a)(4) raises the possibility that §121 guidelines on state standards must be followed even for those federal facilities listed on the NPL.

Section 120(i) of CERCLA states that nothing in CERCLA §120 "shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." Section 120(i) states only that corrective action authorities apply to federal facilities; it does not specify the extent to which those authorities, found in RCRA §3004(u), will apply if CERCLA response activities are being conducted at the same time as corrective action activities at a federal facility.

OPTIONS

a) Identify the differences in practices, policies and procedures for determining cleanup standards under CERCLA, RCRA and other applicable laws, including state laws; reconcile those differences.

b) Identify the differences in practices, policies and procedures for executing cleanups under CERCLA, RCRA and other applicable laws, including state laws; reconcile those differences.

c) Interpret CERCLA §120(i) in conjunction with §121 so that RCRA §3004(u) requirements do not delay CERCLA cleanup actions.

d) Reconcile and combine oversight and regulatory responsibilities under CERCLA and RCRA at bases being closed or realigned.

ISSUE #3

STATEMENT OF ISSUE

Are there sites for which remediation is not technologically feasible, or for which the cost of remediation is simply prohibitive? If so, what uses, if any, can be made of such sites, and what mechanisms are needed to protect the public in perpetuity from the risks associated with such sites?

BACKGROUND

This issue most frequently arises at military installations or former military installations that are contaminated by munitions residue. There are many such sites around the country with some degree of contamination. Two installations scheduled for closure under the 1988 Base Closure Commission report, Jefferson Proving Ground and Fort George G. Meade, have significant amounts of munitions residue. For example, at Jefferson Proving Ground alone, it is estimated that more than 23 million rounds of munitions have been fired, and over 1.5 million rounds remain as high-explosive duds.

Munitions residue that contaminates military installations exists in many forms. The simplest form is the inert fragmentation/casing which remains after the high explosive fill has detonated. On the other end of the spectrum are munitions containing high explosives that malfunction (duds) and may be on the surface or (most probably) many feet underground. Some munitions have been recovered as deep as 30 feet beneath the surface. With the proper stimulus, these duds may detonate. In addition to these two types of munitions are many other practice/training devices that may or may not contain an explosive charge.

The regulatory status of unexploded ordnance under RCRA and CERCLA is not clear. In fact, there are differing interpretations among EPA and the States of RCRA storage, treatment and disposal requirements for the manufacture, testing, handling and disposal of ordnance, munitions, and other weapons. DoD is currently pursuing an amendment to the U.S. Senate Federal Facilities Compliance Bill (S. 596) that would allow the development of alternative regulations to address the RCRA issue.

Not every military installation, or part of an installation, creates a munitions contaminated area to the same degree. For example, several bases may all use one bombing range. At other bases, only small arms ammunition may have ever been used. Therefore, the scope of contamination may not be easy to determine, and a records search by the services may be needed in order to determine the location and extent of unexploded ordnance. However, records may be inaccurate or non-existent, especially for actions that occurred years ago.

The feasibility and cost of remediation depends on the future intended use of the property and the level of cleanup necessary for the intended use. Surface clearing may be adequate for pastures or wildlife preserves. (Surface clearing has been proposed at Ft. Meade where munitions contaminated property is being considered for use by the Department of the Interior as a wildlife refuge. However, strict controls on human access will also be required.) DoD safety standards do not permit custody transfer of lands contaminated with explosives that may endanger the public, when the contamination cannot be remediated with existing technology and resources. Cleanup of the same property for residential or commercial use may be prohibitively costly, if not technologically infeasible.

This is because more land must be excavated to recover dud munitions buried beneath the surface that may be detonated by construction and excavation. Clearing land of ordnance not only requires specialized equipment, it can also be very dangerous and extremely labor intensive.

Where adequate clean-up for residential or commercial use is not feasible, DoD needs mechanisms to protect the public from residual risks on sites which are transferred. First, past land use (and potential hazards) must be clearly identified to future owners. Second, restrictions on future land use must be clearly identified to future owners and somehow retained with title for all subsequent transactions. Restrictions should be commensurate with the residual unexploded ordnance hazard.

Even with restrictions on future use, liability questions remain. DoD is still liable for cleanup resulting from DoD activities prior to transfer. In cases where public access is restricted, what happens if there are trespassers or access is required for legitimate reasons, e.g., firefighting? Can DoD ensure that it will not be liable for contamination created by future users?

Remediation costs are proportional to the depth of cleanup. This variability of cost is best illustrated by the estimated remediation costs for Jefferson Proving Ground (95 square miles near Madison, Indiana) according to various levels of cleanup.

ESTIMATED COSTS FOR VARYING LEVELS OF EXPLOSIVE REMEDIATION

(Estimates provided by Jefferson Proving Ground)

CLEANUP LEVEL	COSTS
Surface Cleanup	$550 Million
Restricted Cleanup	
3 Feet Deep	$2.8 Billion
6 Feet Deep	$3.8 Billion
10 Feet Deep	$5.0 Billion
Unrestricted Cleanup (Technology for unrestricted cleanup is currently not available)	>$5.0 Billion

Special Concerns and Considerations

Present DoD policy requires that plans for leasing, transferring or disposing of DoD real property where ammunition or explosives exists, or is suspected to exist, be submitted to the DoD Explosives Safety Board for review and approval. DoD regulations (DoD 6055.9-510) specify that contaminated property cannot be transferred until "rendered innocuous."

Restricting a cleanup to surface contamination may not ensure that the surface remains uncontaminated over time. Freezing and thawing of the soil and other physical factors may result in subsurface ordnance migrating to the surface. Therefore continuing remediation may be necessary, since all remediation tends to be temporary in lands which have been heavily contaminated by penetrating ordnance like aircraft bombs and artillery.

The location of buried ordnance may not be known. Therefore, it may be difficult to certify that "clean" sites are in fact really clean. This has occurred at Jefferson Proving Ground where large amounts of World War II munitions were found in the course of excavating a supposedly clean area.

Ordnance cleanup is inherently dangerous. The need to characterize and remediate a site may conflict with requirements to minimize health and safety risks to cleanup personnel.

In addition to lack of technologies to remediate the site, technologies may also not be available for conducting investigations of the site. For example, detectors may not be capable of detecting ordnance buried deep beneath the surface or in wetlands.

The excavation required for a complete cleanup would likely generate significant undesirable environmental impacts. Removing 10+ feet of soil over a large area would generate impacts similar to strip mining. However, in areas heavily contaminated by penetrating ordnance, even this level of cleanup might yield temporary results, as ordnance items later work their way to the surface.

In most cases, installations contaminated with high explosive munitions residue will not be suitable for commercial or residential use, not only because of the cost or lack of cleanup technologies, but also because it may be impossible to guarantee that a site is in fact "clean."

OPTIONS

a) Separate highly-contaminated areas from "clean" areas (known as "parceling"), so that part of the land that experienced little or no contamination might be easily cleaned, verified and released.

b) Perform surface cleanups sufficient to allow activities where both cleanup and human access and exposure is limited, e.g., wildlife refuges or certain types of industrial activities not involving construction or excavation.

c) Establish mechanisms to protect the public in perpetuity from residual risks at sites where remediation is at a lesser level.

d) Retain title in DoD and designate the area as a wildlife refuge, bird sanctuary or similar use not involving public access.

e) Use funds from the Base Closure Account to research and develop technology for explosive ordnance disposal.

ISSUE #4

STATEMENT OF ISSUE

To what extent can overlapping or duplicative regulatory responsibilities and functions be combined or delegated to a single regulatory authority?

BACKGROUND

Existing law allows EPA to delegate to states the primary responsibility under RCRA/HSWA for overseeing corrective action at TSDFs, but does not allow similar delegation of responsibility under CERCLA to oversee remedial actions at NPL sites. The potential for delegation of corrective action oversight under RCRA is largely unrealized, since few states have met EPA's criteria for authorization.

Although CERCLA does not provide for delegation of that program to individual states, CERCLA §121(f) calls for "substantial and meaningful involvement by each state in initiation, developments and selection of remedial actions to be undertaken in that State." EPA's proposed revisions to the National Contingency Plan (NCP) in 1988 included policy options to allow NPL sites to be "deferred" to states to facilitate more rapid cleanup and to conserve the federal fund. Amidst growing controversy over this proposed expansion of states' role at NPL sites, the EPA Administrator informed a Senate committee in June 1989 that EPA would defer action on this proposal, and the new NCP includes no such option for states. Nevertheless, many states take an active role in federal cleanups of NPL sites, often assuming "state lead" under cooperative agreements with EPA. Most states also now operate their own cleanup programs for remediating non-NPL, non-RCRA sites.

Delegation of the RCRA regulatory program to the states is intended to eliminate duplication of effort by agencies that have overlapping areas of responsibility. The argument is that delegation will expedite cleanups at TSDFs, including those located on bases that will be closed. Delegation of RCRA corrective action authority to more states might expedite cleanups at a significant number of bases subject to closure. When EPA delegates RCRA §3004(u) authority to individual states, it could perhaps adjust the delegated authorities to account for the special circumstances encountered at federal facilities.

OPTIONS

a) Determine why more states have not satisfied the criteria for delegation of RCRA/HSWA corrective action authority. If delegation is being delayed for reasons unrelated to the established criteria, remove those impediments. Assist states to meet the criteria.

b) Consider the benefits of a single environmental agency (federal or state) having regulatory responsibility for all hazardous substance cleanups at closing bases.

c) Authorize delegation to states of authority to oversee cleanup actions at NPL sites where the state demonstrates capability to do so.

d) Reconcile and combine oversight and regulatory responsibilities under CERCLA and RCRA at bases being closed or realigned.

ISSUE #5

STATEMENT OF ISSUE

To what extent may proceeds from property transactions be used to fund cleanups?

BACKGROUND

The 1988 Base Closure Act (P.L. 100-526) authorized closures to begin in January 1990 and end by October 1995. The statute allows DoD to use the proceeds from the sale of land at these closing bases to offset the costs of such closings if the sale occurs by October 1995.

Cleanup of many closing bases will extend beyond five years and final transfer of some portions of those bases, therefore, may not occur until after the five year deadline passes. Moreover, funds currently budgeted for cleanup of contaminated sites at closing bases are insufficient to clean up all such sites. Until fiscal year 1991, cleanup of contaminated sites at bases slated for closure was primarily funded under the Defense Environmental Restoration Account (DERA), DoD's overall account for environmental restoration at all bases. DERA has $1.1 billion authorized for Fiscal Year 1991. In the National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Congress moved all funding for cleanup activities at closing bases from the Defense Environmental Restoration Program (DERP) at active bases to the Base Closure Account, which was provided with $100 million to fund the costs of cleanup at the bases on the 1988 closure list. Congress took this action because of its concern that cleanup at closing bases should not compete with cleanup activities at active bases for DERA funds under DoD's worst-first priority system.

Applying the proceeds from the property transactions to the cleanup of other contaminated sites would supplement the funds appropriated for cleanup and expedite cleanup of all such sites. For example, a trust account might be created with the proceeds from the lease or sale of land at a site, to be used to pay the costs of long-term operation and maintenance of a groundwater pumping and treatment system required as part of the cleanup at that site.

An example of the use of a trust mechanism to fund future clean-up activities is found in the consent decree entered in connection with United States of America v. Stauffer Chemical Company, et al., Civil Action No. 89-0195-Mc, (D. Mass.). Pursuant to the consent decree, the parties allocated responsibility for conducting and paying for cleanup activities and agreed to the establishment of two trust mechanisms and an escrow account through which past and future cleanup activities would be financed.

The defendants responsible for conducting future agreed-upon cleanup activities on the site agreed to establish a trust (the "Remedial Trust") and provide the trust the money necessary to ensure the uninterrupted progress and timely completion of the required cleanup work. These defendants will remain jointly and severally liable for any failure of the Remedial Trust to comply with the terms of the consent decree.

A second category of defendants agreed to establish a second trust (the "Custodial Trust") and to convey to such trust title to their real property interests in the site. Under the terms of the consent decree, the Custodial Trust is responsible for managing the property, which includes:

- implementing land use restrictions that would maintain the integrity and prevent the unauthorized disturbance of the caps and other structures that are to be constructed at the site as part of the cleanup process.
- permitting access to the site for cleanup activities.
- subdividing the property and locating potential purchasers.
- negotiating and executing the sale or transfer of the property.
- arranging for the sale or transfer proceeds to be delivered to the escrow account established by the consent decree (the "Escrow").

If any property included in the site is unsalable, the Custodial Trust is to establish a further trust to hold and operate the property in accordance with a plan developed by EPA in consultation with the Commonwealth of Massachusetts. The Custodial Trust is not to sell any real property included in the site until after certification of completion of the remedial action, except in limited circumstances where future cleanup and control of the property has otherwise been assured by EPA and the Commonwealth.

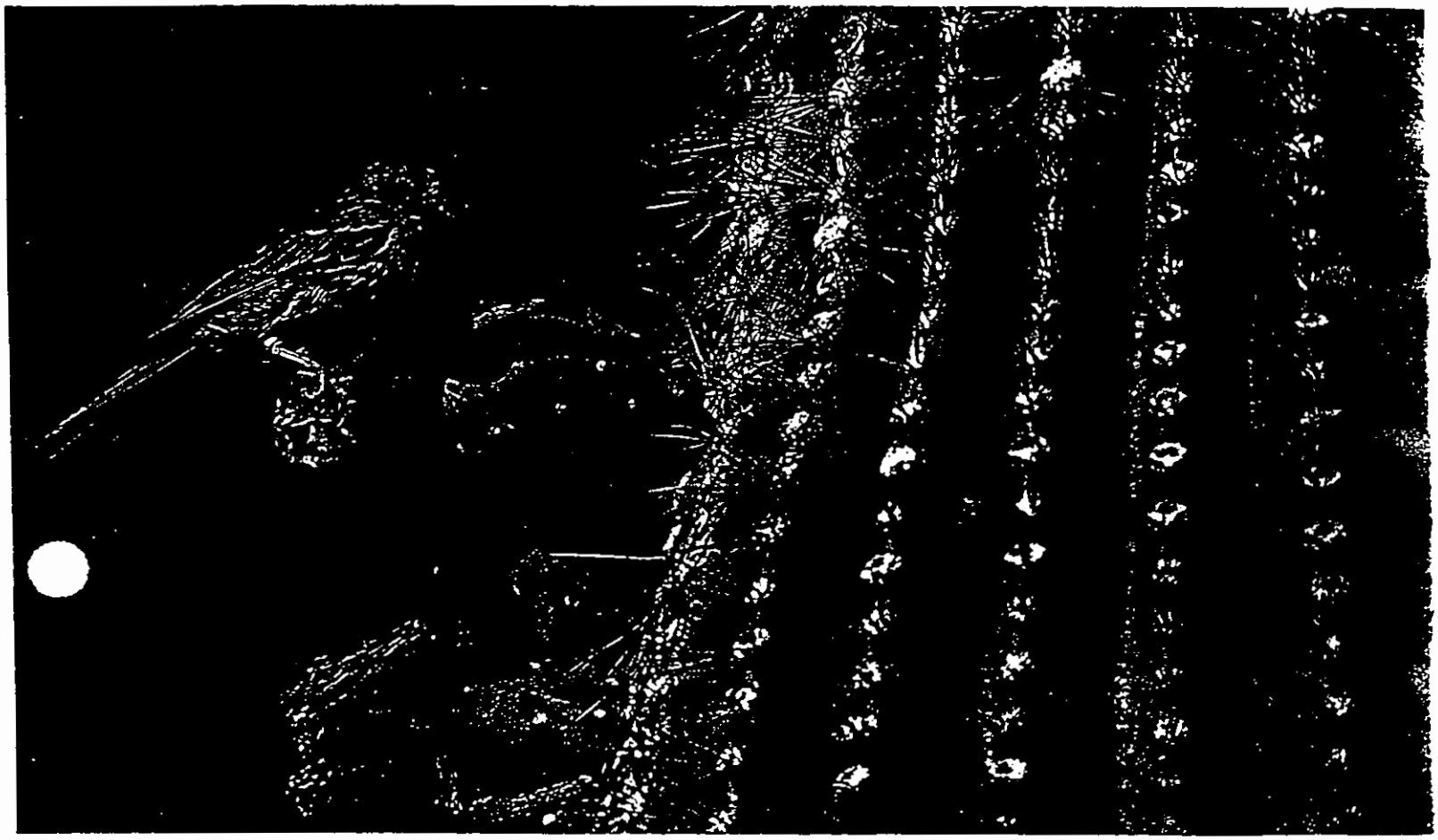
The bulk of the proceeds in the Escrow are to be applied to reimburse the United States for response costs incurred prior to the entry of the consent decree and to reimburse the defendants responsible for conducting future cleanup activity for their respective costs. The defendants responsible for conducting and paying for future cleanup activity are also jointly and severally responsible for any failure by the Custodial Trust, any further trust established pursuant to the consent decree, or the representative of the Escrow to comply with the terms of the consent decree. The Custodial Trust and its trustees are not to be considered owners or operators of the site property for liability purposes solely on account

Cover: A sparrow feeds on cactus flowers at the Barry Goldwater Air Force Range in Arizona

Printed on Recycled Paper

This document is an abridged version of the Defense Environmental Restoration Program Annual Report to Congress for Fiscal Year 1990. Appendices containing additional details have been omitted from this version. The unabridged version of this report is available from the National Technical Information Service at (703) 487-4650 and the Defense Technical Information Center at (703) 274-7633. Annual reports for the years 1985 through 1989 are available from the same sources.

DEFENSE ENVIRONMENTAL RESTORATION PROGRAM



ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1990

(Abridged Version)

FEBRUARY 1991

Foreword

I am pleased to provide the Congress with this report on the accomplishments of the Department of Defense Environmental Restoration Program (DERP) for Fiscal Year 1990. This last fiscal year has seen steady progress on all fronts as well as a continued increase in the level of activity under DERP. The primary focus of DERP continued to be the investigation and cleanup of contaminated DoD sites and formerly used properties. To this end, over 96 percent of the funds authorized by Congress for DERP in Fiscal Year 1990 were applied to Installation Restoration Program (IRP) efforts. Other significant DERP efforts included research and development, waste minimization, and management system improvements.

DoD's first priority in the IRP is to identify and clean up those sites that present the highest risk to public health and the environment. By the end of the fiscal year, 89 DoD installations and 12 formerly used properties were included on EPA's National Priorities List (NPL). Remedial Investigation/Feasibility Study work was ongoing at 81 of the DoD NPL installations and removal actions and/or Interim Remedial Actions had been conducted at 68 of the DoD NPL installations by the end of Fiscal Year 1990.

The total number of sites covered by the IRP increased by 20 percent in Fiscal Year 1990, to more than 17,000 sites at over 1,800 installations. These new sites are attributable to the inclusion of more than 200 smaller installations, such as U.S. Army Reserve Centers, in the IRP. By the end of the fiscal year, Preliminary Assessments had been completed at more than 16,000 of these sites and Site Inspections at more than 9,000 sites. Remedial Investigations/ Feasibility Studies were underway or completed at more than 5,400 sites and Remedial Actions had been initiated or completed at more than 1,400 sites.

By the end of Fiscal Year 1990, IRP work had been completed and no further action is required at more than 6,300 of the sites included in the IRP. The majority of the sites requiring no further action represent instances where studies have shown that no threat to human health or the environment exists and no remedial actions are necessary. Although studying sites that eventually are found to pose no risk is a time-consuming process requiring considerable resources, it is an essential activity representing significant progress in the IRP.

Another measure of IRP progress is in the area of interagency cooperation. During Fiscal Year 1990, Interagency Agreements were signed with EPA and the states for 31 DoD NPL installations, bringing the total number of installations with signed agreements for site investigation and cleanup to 51. In addition, Defense and State Memoranda of Agreement were

"Global stewardship is our shared responsibility and shared opportunity."

President George Bush

"Defense and the environment is not an either or proposition. To choose between these is impossible in this real world of serious defense threats and genuine environmental concerns."

Secretary of Defense Richard Cheney

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finalized between DoD and 12 states in Fiscal Year 1990. This progress illustrates the emphasis DoD has placed on developing workable solutions for site cleanups in cooperation with other cognizant agencies and the public.

We also have made progress in several related areas under DERP:

- *Our management capabilities have been strengthened through personnel training and improvements to site tracking and priority setting tools.*

- *Research and development activities have resulted in better, more cost-effective investigation and cleanup techniques.*

- *Waste minimization projects have been completed to reduce hazardous waste generation rates at our active installations.*

Through these and other activities, we have made significant headway in building an environmental ethic within DoD. The perseverance and commitment of our personnel, from the installation level up to this Headquarters, have enabled us to lead the way among Federal agencies in the investigation and cleanup of our facilities. This continuing dedication to duty, both in the defense of our national security and in the protection of our environment, will enable us to meet the challenges ahead.

As we make the transition from the investigation of our sites to the more costly cleanup phase, we must ensure that our efforts are properly focused to obtain the greatest benefit possible for our cleanup dollars. Many challenges await us in the upcoming years. Although we have come a long way in the seven years that DERP has existed, we still have far to go. The course we have charted for the future is sound and will ensure the achievement of our environmental restoration goals.

The programs and activities presented in this report provide Congress and the public a comprehensive assessment of our efforts to date and our plans for the future. We look forward to working together with all involved parties in continuing the critical work conducted thus far under DERP.

Thomas Baca

The Installation Restoration Program

The Installation Restoration Program (IRP) conforms to the requirements of the National *Oil* and Hazardous Substances Pollution Contingency Plan (NCP). EPA guidelines are applied in conducting investigation and remediation work in the program.

The initial stage, a **Preliminary Assessment** or **PA**, is an installation-wide study to determine if sites are present that may pose hazards to public health or the environment. Available information is collected on the source, nature, extent, and magnitude of actual and potential hazardous substance releases at sites on the installation. The next step, a **Site Inspection** or **SI**, consists of sampling and analysis to determine the existence of actual site contamination. The information gathered is used to evaluate the site and determine the response action needed. Uncontaminated sites do not proceed to later stages of the IRP process.

Contaminated sites are fully investigated in the **Remedial Investigation/Feasibility Study** or **RI/FS**. The RI may include a variety of site investigative, sampling, and analytical activities to determine the nature, extent, and significance of contamination. The focus of the evaluation is to determine the risk to the general population posed by the contamination. Concurrent with these investigative activities, feasibility studies are conducted to evaluate alternative remedial actions.

After agreement is reached with appropriate EPA and/or state regulatory authorities on how the site will be cleaned up, **Remedial Design/Remedial Action** or **RD/RA** work begins. During this phase, detailed design plans for the cleanup are prepared and implemented.

The notable exception to this sequence involves Removal Actions and Interim Remedial Actions (IRAs). These actions may be conducted at any time during the IRP to protect public health or control contaminant releases to the environment. Such measures may include providing alternate water supplies to local residents, removing concentrated sources of contaminants, or constructing structures to prevent the spread of contamination.

The National Priorities List (NPL)

EPA has established a Hazard Ranking System (HRS) for evaluating contaminated sites based on their potential hazard to public health and the environment. A Revised Hazard Ranking System (HRS2) for evaluation of future sites has been proposed by EPA. The application of the HRS, using PA/SI data, generates a score for each site evaluated. The score is computed based on factors such as the amount and toxicity of the contaminants present, their potential mobility in the environment, the availability of pathways for human exposure, and the proximity of population centers to the site.

The NPL is a compilation of the sites scoring 28.5 or higher by the HRS. Such sites are first proposed for NPL listing. Following a public comment period, proposed NPL sites may be listed final on the NPL or may be deleted from consideration.

The Defense Environmental Restoration Program

The Defense Environmental Restoration Program (DERP) was established in 1984 to promote and coordinate efforts for the evaluation and cleanup of contamination at Department of Defense (DoD) installations. The program currently consists of two major elements:

- The Installation Restoration Program (IRP), where potential contamination at DoD installations and formerly used properties is investigated and, as necessary, site cleanups are conducted
- Other Hazardous Waste (OHW) Operations, through which research, development, and demonstration programs aimed at reducing DoD hazardous waste generation rates are conducted.

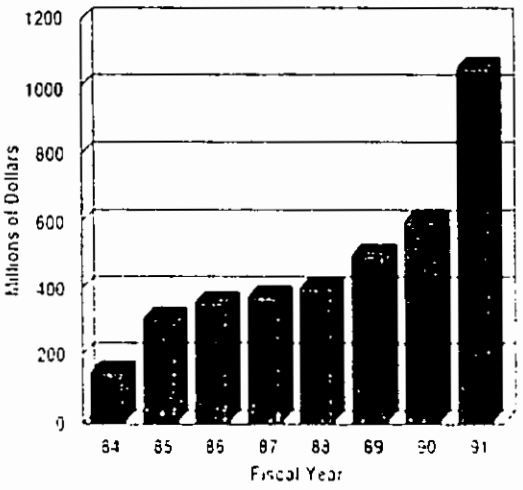
DERP is managed centrally by the Office of the Secretary of Defense. Policy direction and oversight of DERP is the responsibility of the Deputy Assistant Secretary of Defense (Environment). Each military service and the Defense Logistics Agency (DLA) are responsible for program implementation at their installations.

The Superfund Amendments and Reauthorization Act of 1986 (SARA) provide continuing authority for the Secretary of Defense to carry out this program in consultation with the U.S. Environmental Protection Agency (EPA). Executive Order 12580 on Superfund Implementation, [illegible]

Department's Environmental Restoration Program within the overall framework of SARA and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The Defense Appropriations Act provides funding for DERP.

Previously, DERP activities included Building Demolition and Debris Removal (BDDR) and hazardous waste disposal. No BDDR activities have been conducted under the program since FY 87 because higher priority IRP and OHW projects required the funds. Similarly, hazardous waste disposal [illegible]

DERP Funding

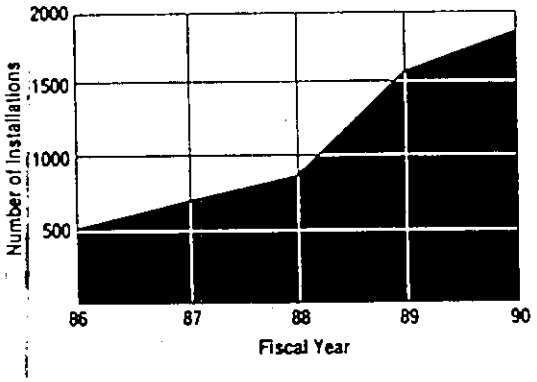


DERP funding has grown steadily, from $150 million in FY 84 to more than $1 billion in FY 9[illegible]

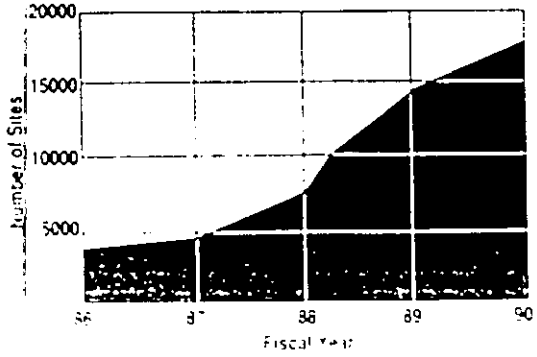
IRP Activity Levels Have Increased Significantly

The number of installations included in the IRP has increased steadily since the inception of the program. Consistent with the Department's worst-first policy, emphasis initially was placed on large, industrial facilities with the highest probability for contamination. Efforts expanded yearly to include smaller installations with lower hazard potential. In addition, installation reassessments initiated to satisfy SARA requirements identify additional sites not previously included in the program. It is anticipated that Resource Conservation and Recovery Act (RCRA) corrective action permits will continue to increase the number of IRP sites as these permits are issued to DoD installations.

Installations



Sites



By FY 89, 14,401 sites at 1,597 installations had been identified. In FY 90, these numbers increased to 17,482 sites at 1,855 installations. The installations added in FY 90 were small, nonindustrial properties. In addition to sites associated with these newly added installations, new sites were defined at installations already in the IRP due to reclassification of contaminated areas into individual sites and inclusion of new sites at installations already in the program. The recent program growth trend has begun to level off and is expected to stabilize over the next few years.

The number of installations listed on the NPL also increased dramatically in FY 90. At the end of FY 89, 41 DoD installations were listed on the NPL and another 46 were on the proposed list. By the end of FY 90, 89 DoD installations were listed on the NPL and none remained on the proposed list. (Because EPA has divided 6 of these installations into 2 NPL listings each, 95 DoD installation listings appear on the NPL.)

IAGs Are A Critical Step in the Cleanup of NPL Sites

SARA requires that an Interagency Agreement (IAG) be reached between EPA and DoD within 180 days after completion of the Record of Decision (ROD) for each NPL-listed facility. The ROD, a public document explaining which cleanup alternatives will be used at an installation, marks the completion of the RI/FS. The completed IAG provides a detailed management plan for the effective cleanup of the facility.

The involvement of EPA and state authorities in preparing the IAG ensures their concurrence, and therefore, enhances the public credibility of the course of action taken by DoD. The IAG also provides a strong management tool for resolving issues rising from overlapping or conflicting jurisdictions.

The IAG negotiation process involves the applicable DoD component and both the EPA regional office and state environmental authorities. The identification and resolution of issues typically takes several months. Once the parties conclude negotiations, the agreement is signed and made available for public comment. Comments received are considered and appropriate changes are made before the agreement goes into effect. Revisions to four IAGs were made in FY 90 in response to comments received from the public.

The Department recognizes the advantages of involving all parties well before the IAG is required (i.e., before the ROD). Accordingly, DoD has involved EPA and the states in the IRP process from early assessment and characterization through final cleanup of the site. The Department seeks a cooperative and collaborative ongoing effort with all parties to avoid discovering problems late in the process that could result in costly delays. The early establishment of good working relationships also resolves potentially duplicative and possibly conflicting regulatory requirements governing cleanup, such as those that occur between CERCLA and RCRA.

IRP Priorities

The order in which DoD conducts IRP project activities is based on a policy assigning the highest priorities to sites that represent the greatest potential public health and environmental hazards. Top priority is assigned to:

- Removal of imminent threats from hazardous or toxic substances or unexploded ordnance (UXO)
- Interim and stabilization measures to prevent site deterioration and achieve life cycle cost savings
- RI/FSs at sites either listed or proposed for the NPL and RD/RAs necessary to comply with SARA.

Anticipating the need to refine priorities as the DERP matures and a large number of sites simultaneously reach the costly cleanup phase, DoD developed the Defense Priority Model (DPM). The DPM uses RI data to produce a score indicating the relative risk to human health and the environment presented by a site. The model considers the following site characteristics:

- Hazard – the characteristics and concentrations of contaminants
- Pathway – the potential for contaminant transport
- Receptor – the presence of potential receptors

This risk based approach recognizes the importance of protecting public health and the environment and helps observers identify those sites that should [illegible]

In FY 89, DoD completed development of the DPM. DoD solicited comments from EPA, the states, environmental organizations, and the public. In response to comments received, the model was refined. In addition, the model has been automated to facilitate scoring.

DoD component personnel have been trained in the use of DPM and have scored more than 250 sites where RD/RA activities could be initiated in FY 90. In this first year of implementation, scoring results were used primarily to identify scoring difficulties and gauge model performance.

In preparation for the FY 91 program scoring effort, further improvements were made to DPM. Most significantly, the methodology used to calculate toxicity of contaminants was changed to reflect more accurately actual toxicity data. Previously, surrogate values were calculated relative to the chemical benzo(a)pyrene. In addition, all information for contaminant characteristics contained in the DPM chemicals data base was updated. This update was conducted in cooperation with EPA to ensure consistency in methods. The DPM data base currently contains more than 280 chemicals, including explosives and radiologicals. Other improvements to DPM include clarification of terms and increased user friendliness of the automated version.

In the summer of 1990, scoring was accomplished for nearly 300 sites where RD/RA work could be initiated in FY 91. A quality assurance review indicated that site scores were more reliable than last year due to increased experience with the model and improved scoring guidance. Confidence is expected to increase each year the model is applied.

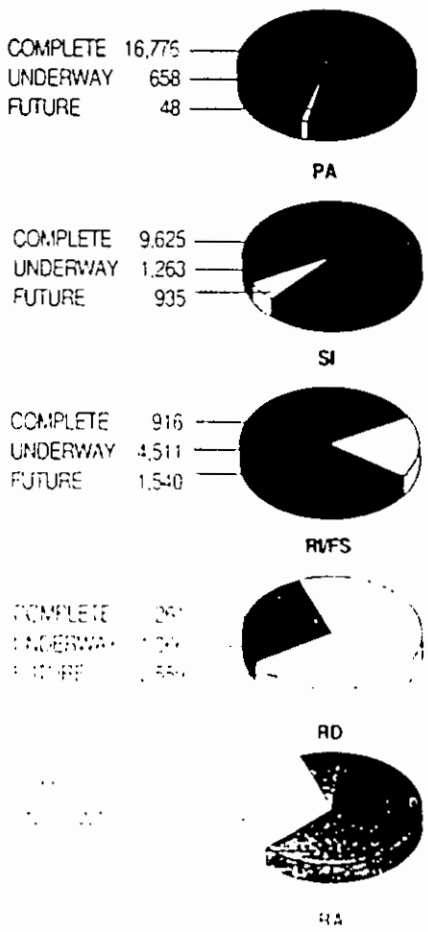
The Department has a continuing dialogue with EPA and states on DPM. During FY 91, DoD intends to continue to improve DPM and proceed with full implementation.

[illegible] NPL [illegible]

Installation Restoration Program Status

The Installation Restoration Program gained significant momentum in FY 90. By the end of the fiscal year, 8,689 projects were actively underway at sites throughout the nation. In keeping with the Department's worst-first policy, considerable effort has been focused on the 89 DoD installations included on the NPL. Sixty-eight of the 296 remedial activities implemented to date (removal actions, Interim Remedial Actions, and final Remedial Actions) have been at NPL sites.

IRP Status by Program Phase



The end point for IRP sites is closeout. A closed out site is one where no further actions are considered appropriate and no further response action is planned (NFRAP). NFRAP is a relatively new Superfund Program term that was incorporated into the NCP final rule in March 1990. The primary criteria for NFRAP is a determination that the site does not pose a significant threat to public health or the environment. NFRAP decisions can be made at any point in the IRP process, but must be documented and may be reversed if future information reveals that additional remedial activities are warranted.

This year marks the initiation of NFRAP as an indicator of IRP progress. At the end of FY 90, 6,361 sites, or more than 36 percent, were in the NFRAP category. Closing out these sites has required considerable resource expenditures and represents significant real progress in the IRP.

Installation Restoration Program
Summary of Installations and Sites

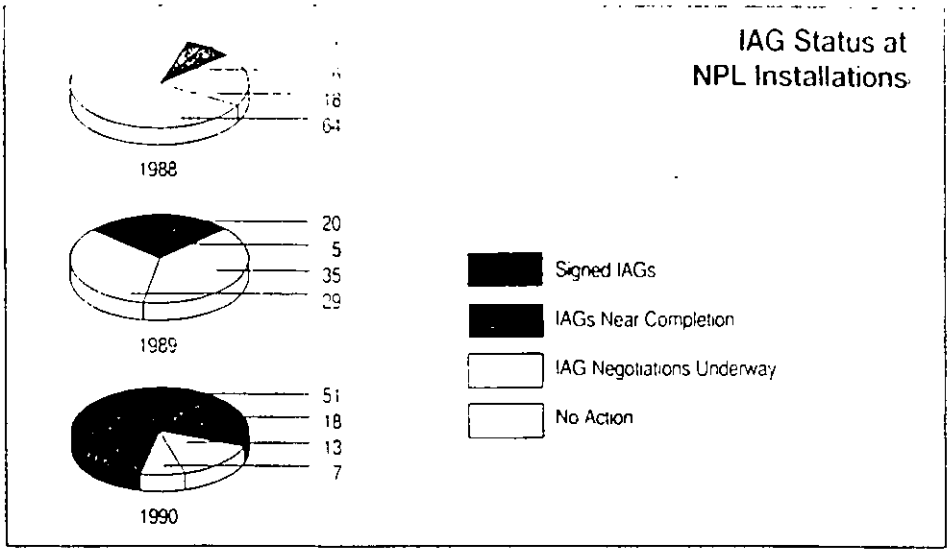
Service	Number of Installations	Number of Sites	Sites Requiring No Further Action
Army	1,266	10,459	5,036
Navy	242	2,253	775
Air Force	315	4,513	448
DLA	4	257	13
Total		17,482	6,361

Significant IAG Progress in FY 90

In June 1988, the Department completed negotiation of IAG model language for NPL sites with EPA. The Office of the Deputy Assistant Secretary of Defense (Environment) (ODASD(E)) subsequently issued guidance to the components concerning the state role in the IAG process. Nationwide, the negotiations simultaneously accelerated. Workshops were held with EPA and state agencies to refine site-specific language for the agreements. Training sessions for DoD personnel who will negotiate agreements also were held.

Negotiations with state agencies revealed concerns, especially regarding funding and jurisdictional matters of RCRA versus CERCLA. These and other issues are continually being discussed to settle such difficulties.

The progress already made is evident from the number of IAGs signed and nearing completion. By the end of FY 89, 19 IAGs had been signed for DoD installations proposed and final-listed on the NPL. By the end of FY 90, 51 IAGs had been signed covering DoD NPL installations. In addition, another 31 IAGs were underway. Of these, 18 IAGs were near completion. Total IRP costs associated with signed IAGs is $3.27 billion. These costs include past IRP costs along with future budgetary estimates for continued investigation and cleanup of the sites at installations where an IAG has been finalized.



DoD Supports State Participation Through DSMOAs

percent of the Defense Environmental Restoration Account (DERA) costs was developed. This procedure was developed through lengthy negotiations between DoD and the Association of State and Territorial Solid Waste Management officials, the National Governors' Association, and the National Association of Attorneys General. Currently, only active DERP sites are eligible under this program.

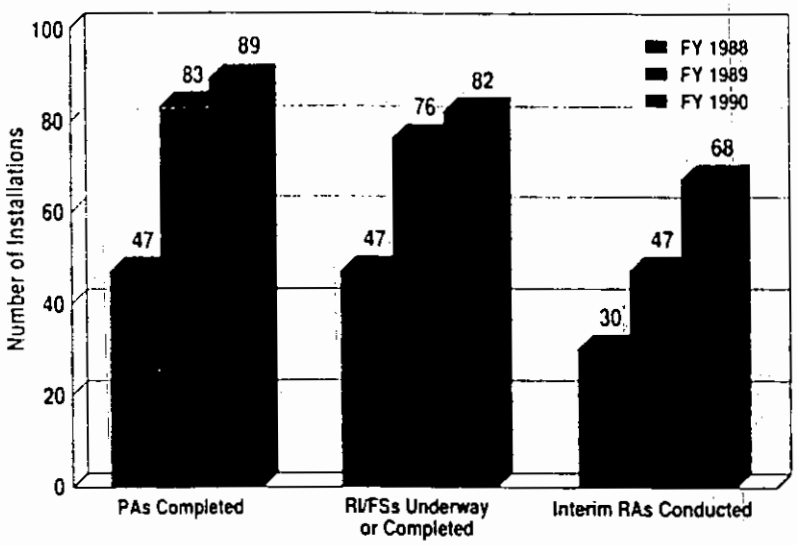
These negotiations resulted in the development of a model Defense and State Memorandum of Agreement (DSMOA) (54 FR 31358, July 28, 1989). The DSMOA not only addresses state agency support at NPL sites, but also outlines the process for work at non-NPL sites. Along with non-NPL reimbursement, the DSMOA provides a process for DoD and the states to resolve technical disputes before judicial remedies are sought. The dispute resolution process is necessary, as most non-NPL work should not require any sort of formal agreement to accomplish cleanups. The DSMOA also includes provisions reflecting the willingness of the state to accept the DPM as DoD's method of [illegible]

(USACE), has been designated as the DoD Executive Agent for receiving, processing, and monitoring CA applications. Each CA covers a 2-year period.

The CA provides funding at both the NPL and non-NPL sites within a state. The states' reporting requirements are minimal and allow them to transfer their oversight funding between installations. Past costs incurred after October 17, 1986 (the date SARA was enacted) also are covered in the CA. Currently, past costs at non-NPL sites only can be reimbursed through the CA.

All states and territories have been contacted and encouraged to participate in the DSMOA process. Favorable responses have been received from more than 40 states and territories. DoD signed 12 DSMOAs and 11 CAs in FY 90, totaling $7.5 million.

The progress made in FY 90 in preparing DSMOAs and CAs represents significant achievements that will enhance cooperation among DoD, EPA, and state authorities. The establishment of IAG, CA, and DSMOA models and the [illegible]



Restoration Progress at DoD NPL Installations as of September 30, 1990

By the end of FY 90, PAs had been completed at 16,776 of the 17,482 identified IRP sites. SIs had been completed at 9,625 of these sites. Based on PA/SI work completed to date, approximately 65 percent of the Department's sites have been found to require further investigation in the RI/FS phase.

By the end of FY 90, RI/FS efforts had been completed at 916 of the sites requiring such investigations. RI/FS activities are either complete or underway at 78 percent of the sites where they are needed. A significant increase in completions is expected during FY 91.

At the end of FY 90, 4,059 remedial activities were known to be needed at IRP sites. Of these, 296 had been completed and 1,191 were underway. During FY 90, 428 remedial activities were undertaken at 238 installations. The number of actions is greater than the number of installations, as more than one type of action was taken at some of the installations.

Solid Progress is Evident at NPL Sites

The Department made steady gains in the evaluation and clean-up of NPL sites in FY 90. Completed PA activities at listed NPL installations increased from 83 to 89, while the number of RI/FSs underway increased from 47 to 81. Further, the number of installations at which IRAs were taken increased from 30 to 68 in FY 90.

FY 90 also saw the completion of RODs at the following NPL installations: Tinker Air Force Base (AFB) in Oklahoma, Ogden Defense Depot in Utah, West Virginia Ordnance Works, and Fort Lewis in Washington. (A ROD had been completed for the Concord Naval Weapons Station in FY 89; however, this installation was removed from the proposed NPL in FY 90). This progress reflects the emphasis DoD places on high-priority IRP sites.

In spite of the FY 90 progress registered in all phases of the IRP, the number of completed RI/FS and RD/RA activities reported is lower than in FY 89. This is not indicative of lost ground, but of improved tracking of actual site progress and the resulting reclassification of several sites.

A centralized IRP status tracking system was adopted by all Department components in FY 89. The accompanying re-evaluation of project status conducted over the last 2 years used more stringent criteria for determining when a program phase is complete. This resulted in several sites being removed from complete status and recategorized as underway or awaiting further action.

Summary of FY 90 Remedial Activities
Summary for all IRP Installations

Type of Activity	Number of Activities	Number of Installations
Alternate Water Supply/Treatment	14	11
Incineration	6	3
Site Treatment/ Remediation	103	52
Decontamination	56	32
Waste Removal	201	108
Ground Water Treatment	48	32
TOTAL	428	238

Status as of September 30, 1990.

Installation Restoration Program Status as of September 30, 1990
Summary by Military Service

	Number of Sites (by Phase)														
	PA			SI			RI/FS			RD			RA		
	C	U	F	C	U	F	C	U	F	C	U	F	C	U	F
Army	10,447	5	7	4,469	154	745	301	971	730	134	269	415	135	276	409
Navy	2,222	28	3	1,579	543	64	51	750	531	8	20	1,051	31	50	1,084
Air Force	3,850	625	38	3,320	566	126	557	2,650	276	116	774	999	127	862	984
DLA	257	0	0	257	0	0	7	140	3	3	3	94	3	3	95
Totals	16,776	658	48	9,625	1,263	935	916	4,511	1,540	261	1,066	2,559	296	1,191	2,572

C = Completed Activity • U = Underway Activity • F = Future Activity Planned

DoD was not responsible for the contamination of the site. Another site, West Virginia Ordnance Works, is an inactive site that is being remediated as an active site.

In FY 90, $58.6 million was spent on activities at former sites. The following are examples of work undertaken by USACE at formerly used properties in FY 90.

Removal Action at Pine Grove Flats, NV

An old mine shaft in a remote part of Nevada was found to contain metal canisters of chemicals. The party that illegally dumped the canisters remains unidentified and no component of DoD ever owned the property. However, labels on the canisters indicated that they were once Army property produced prior to 1966 for deactivating chemical warfare agents. After the State of Nevada issued a Finding of Alleged Violation and Order to USACE and the Bureau of Land Management, USACE removed more than 400 canisters from the 30-foot deep mine shaft. Because of the mine shaft's instability, it was unsafe to enter and a fireman's hook had to be used to remove the canisters. The age of the canisters and the corrosive nature of the chemicals made it necessary to repackage all canisters prior to transportation and disposal. Negotiations with the State of Nevada are ongoing to determine if further response activities are required.

Tank Removal at Quonset Point, RI

During the winter of 1989-90, 113 underground fuel storage tanks were removed from the site. During the removal operation, a significant amount of soil and ground water contamination was encountered. The Rhode Island Department of Environmental Management proposed removing contaminated soil down to the water table, lining the holes with polyethylene, and backfilling with clean material.

The State of Rhode Island accepted a USACE counter proposal, which resulted in an RA consisting of backfilling the holes with the contaminated soil, performing a soil gas analysis supplemented by monitoring wells, and, as necessary, installing skimming wells to recover free product in the ground water. An RI/FS will be conducted to determine the extent of environmental contamination and the need for long-term remediation.

These negotiations were initiated by USACE, resulting in a substantial savings of $500,000 to the government, while achieving compliance with regulatory requirements and maintaining good relations with the State of Rhode Island regulatory agencies.

A total of 113 underground storage tanks were removed from Quonset Point in FY 90

Formerly Used Defense Sites

The Secretary of the Army is the DoD Executive Agent for the implementation of DERP at Formerly Used Defense Sites (FUDS). As Executive Agent, the Army is responsible for environmental restoration activities under DERP on lands formerly owned or used by any DoD components. The U.S. Army Corps of Engineers (USACE) is responsible for executing the FUDS program. Investigation and cleanup procedures at formerly used sites are similar to those at currently owned installations. However, information concerning the origin of the contamination, land transfer information, and current ownership must be evaluated before DoD considers a site eligible for restoration.

A total of 6,980 FUDS with potential for inclusion in the program have been identified through inventory efforts. By the end of FY 90, PAs had been initiated at 3,830 of the sites, of which 1,461 were underway and 2,369 were completed. Based on the completed PAs, it was determined that 1,588 sites were eligible and 781 sites were ineligible for the FUDS program. Of the eligible sites, 308 require no further action, but each of the other 1,280 sites requires one or more remedial/removal projects. SIs had been completed for 110 projects and were underway for another 122 projects as of the end of FY 90.

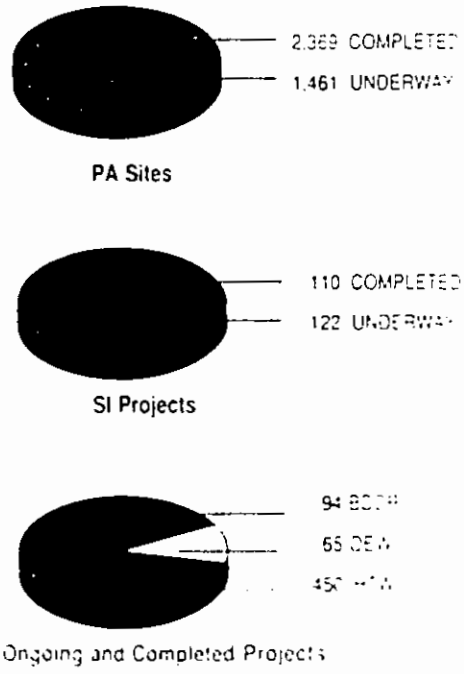
DoD has already funded 609 properties for further investigation and remedial action. These activities include 450 projects addressing hazardous or toxic waste (HTW) contamination from formerly used underground storage fuel tanks or landfills, and leaking polychlorinated biphenyl (PCB) [illegible]

and explosive waste (OEW) from former target ranges or impact areas. Prior to FY 88, 94 BDDR projects involving unsafe buildings or structures on formerly owned or used properties were completed. No BDDR projects have been conducted during the last 2 years.

USACE also represents DoD interests at NPL sites where former properties are located and where DoD may be a Potentially Responsible Party (PRP). Former properties that have passed from DoD control may have been contaminated by past DoD operations as well as by other owners, making DoD one of several PRPs. Ongoing USACE efforts will determine the allocation, if any, of DoD cleanup responsibility. USACE also cooperates with EPA, state, and other PRP representatives to facilitate the cleanup process.

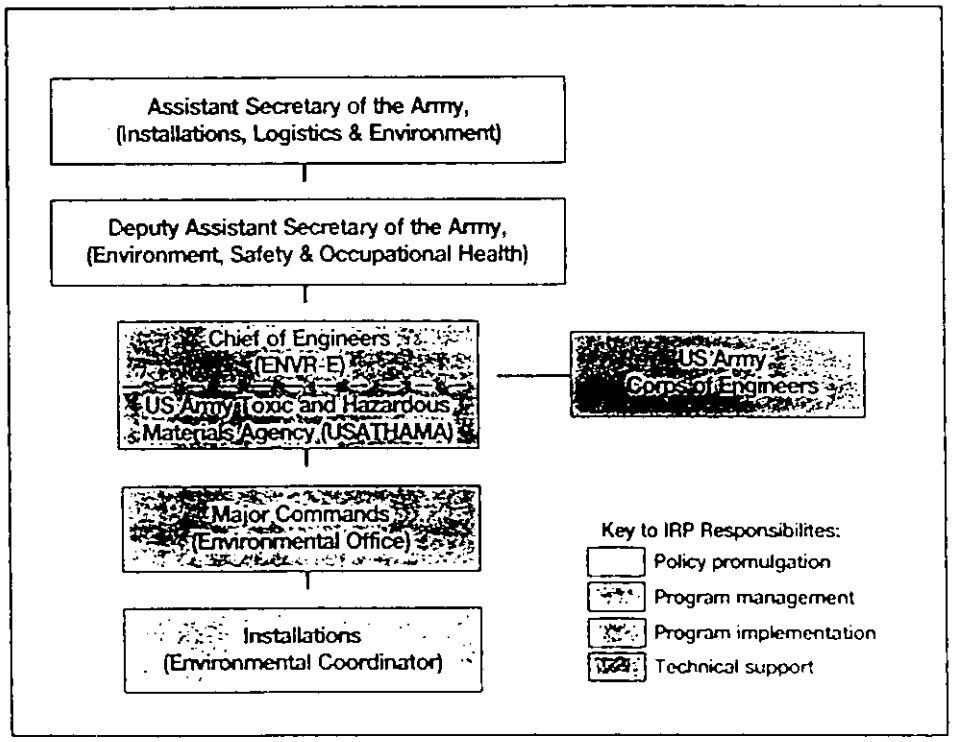
At the end of FY 90, 12 FUDS were listed on the NPL. One [illegible]

Status of Activities at Formerly Used Properties



Army IRP Progress

The most significant IRP growth among DoD components in FY 90 occurred in the Army's program. This growth was the result of aggressive action taken by the Army to evaluate all installations and Army reserve centers. The number of sites included in the Army IRP increased from 8,642 in FY 89 to 10,459 in FY 90. IRP activities have been completed and no further remedial action is planned at 5,036 Army sites, or almost one-half of the sites in the program.



Army IRP Organization

By the end of FY 90, PA work had been completed at all but 12 Army IRP sites and SI work had been completed at 3,369 sites, or 33 percent of the [illegible] sites. The number of sites requiring PA/SI [illegible]

However, the number of sites where RI/FS work is underway or complete increased from 1,096 in FY 89 to 1,255 in FY 90. By the end of FY 90, 23 [illegible] Army IRP

tions, bringing the total number of Army NPL installations covered by IAGs to 23. RI/FS activities are underway at 28 of the Army's NPL facilities. Removal actions and IRAs have occurred at 30 Army NPL facilities.

The following are examples of significant Army IRP project activities conducted in FY 90.

Landfill Closure at Iowa Army Ammunition Plant, IA

In August 1990, the Army completed the excavation of 3,500 cubic yards of lead-contaminated soils and the construction of a 15,000-cubic yard clay cap on the landfill. These actions were performed under a RCRA closure plan that was approved by EPA in September 1988. The discovery of additional contaminated soils requiring excavation had delayed efforts to complete [illegible] construction. Remedial [illegible]

Rapid Response at Valley Forge General Hospital, PA

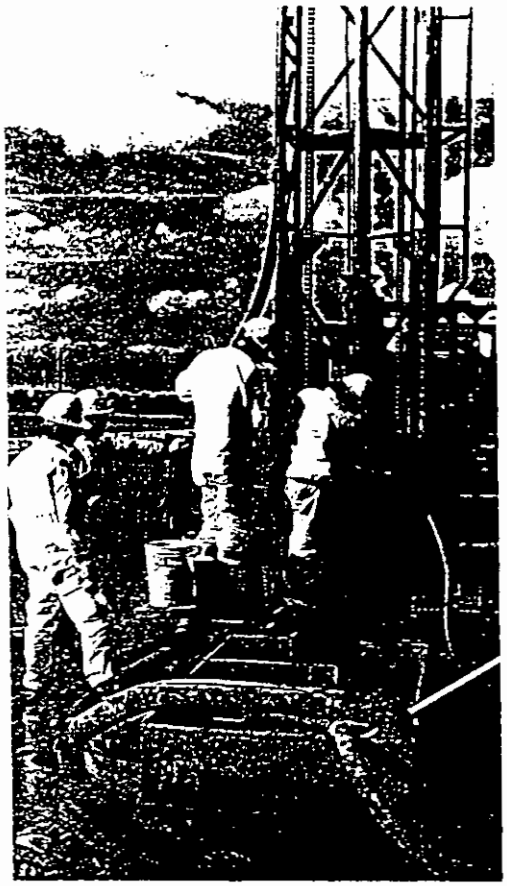
In May 1990, the presence of pesticides and herbicides was discovered by property owners in an unused part of the hospital complex. One month later, the USACE Rapid Response Team overpacked, transported, and disposed of approximately 10 drums of hazardous chemical waste. The Team was able to perform a quick removal of the chemicals. Local residents were pleased with DoD's concern for public health and the environment.

Removal Action at Port Heiden, AK

More than 8,000 drums and several large-capacity above ground and underground fuel tanks were abandoned at Port Heiden Radio Relay Site by the Army and the Air Force after World War II. The remote location of the site required large-scale mobilization using barges for equipment and living quarters before the RA began in the summer of 1990. HTW as well as other regulated materials were removed from the site and transported to approved disposal facilities in the continental United States. Unregulated wastes were recycled, to the extent practical, incinerated onsite, or buried in local approved landfills. The removal action was successfully completed before the winter season began.

ROD at Hastings East Industrial Park, NE

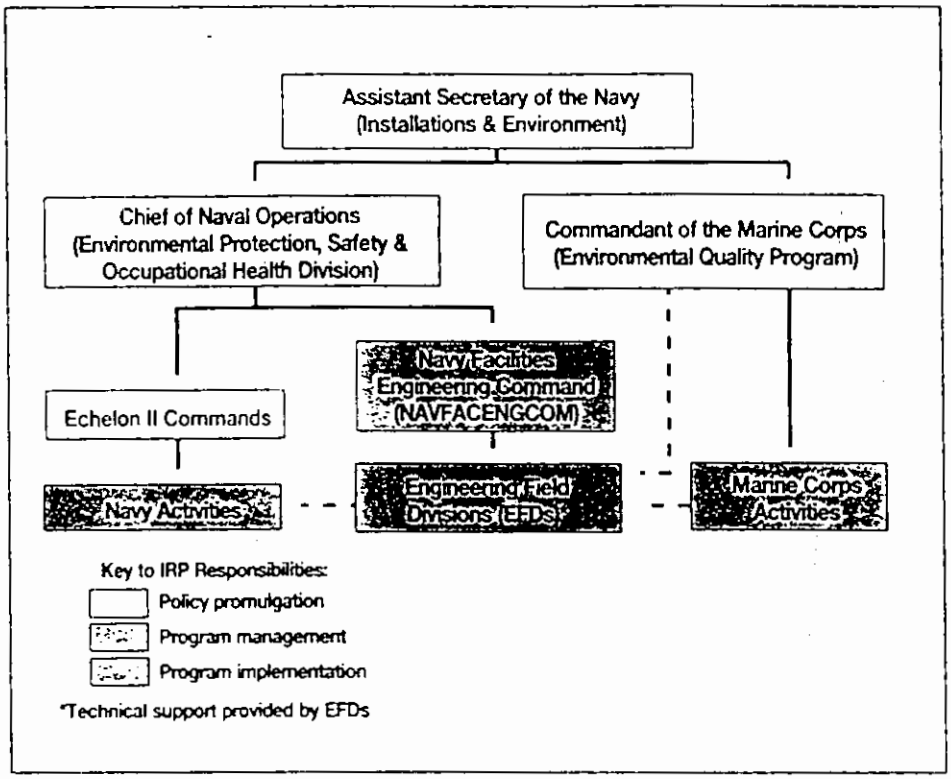
In September 1990, USACE achieved a major milestone when a ROD was signed to allow the official cleanup of the contaminated soil operable unit at the Hastings East Industrial Park, formerly the Blaine Naval Ammunition Depot. In 1991, USACE will prepare engineering design documents for incineration of explosives-contaminated soils.



Extensive investigations at Hastings East Industrial Park culminated in the FY 90 signing of a ROD for the cleanup of this FUDS.

Navy IRP Progress

The number of Navy sites included in the IRP increased slightly in FY 90. An additional 222 Navy sites were added to the IRP last year, bringing the total to 2,253 sites at 242 installations. IRP activities have been completed at 775 sites, or 34 percent of the sites in the Navy program.



Navy IRP Organization

PA completions at Navy sites increased from 1,980 to 2,222 during FY 90 and SI work was completed at 1,579 sites as of the end of the fiscal year. The number of sites at which RI/FS work was completed increased from 10 to 51 sites in FY 90. At the end of the fiscal year, RD work had been performed at [illegible] sites, while 31 RA [illegible]

IAGs were signed covering five of the Navy's NPL installations in FY 90, bringing the total number of Navy NPL installations covered by IAGs to eight. SIs have been completed at 20 of the Navy's listed NPL installations. RI/FS activities are underway at 39 Navy NPL facilities and removal actions and [illegible] at Navy NPL [illegible] FY

The following are examples of significant Navy IRP project activities conducted in FY 90.

Cleanup Agreement for Camp Pendleton, CA

In October 1990, an agreement was signed by federal, state, and military officials to clean up hazardous waste at Camp Pendleton. This marks the first cleanup agreement in EPA's western region. Cleanup work will include the removal of contaminated material from the Marine Corps base, a major toxic site and the last large undeveloped coastal property in Southern California. Field investigations identified several contaminants, including spent oils, solvents, pesticides, metals, and PCBs at 22 areas throughout the 125,000-acre base. Cleanup costs currently are estimated at $29.5 million.

Cleanup Agreement Signed at APG

In March 1990, the Army and EPA signed an agreement to clean up two Superfund sites at Aberdeen Proving Ground. One of the sites, the Edgewood Area, was used for testing and disposal of chemical and conventional munitions since 1918. The agreement sets schedules, assigns responsibilities and provides for cooperation and consultation with all involved agencies.

ANAD Ground Water Cleanup, AL

A series of ground water pump-out systems have been installed to control ground water contamination at the Anniston Army Depot (ANAD) Alabama. Volatile organic compounds (VOCs) were disposed of in three areas: the Trench Area, the Landfill Area, and the Northeast Area. Sixteen extraction wells have been installed in these three areas to collect contaminated ground water which is then treated to remove contamination.

Cleanups at Rocky Mountain Arsenal, CO

To accelerate remediation at the Arsenal, the Army, EPA, Colorado Department of Health, and Shell Oil Company have agreed that 13 IRAs should be conducted to reduce contaminant migration and remove health threats. IRAs completed within the last year include the installation of two new intercept and treatment systems and the closure of approximately 332 abandoned wells. An extensive community relations plan was implemented

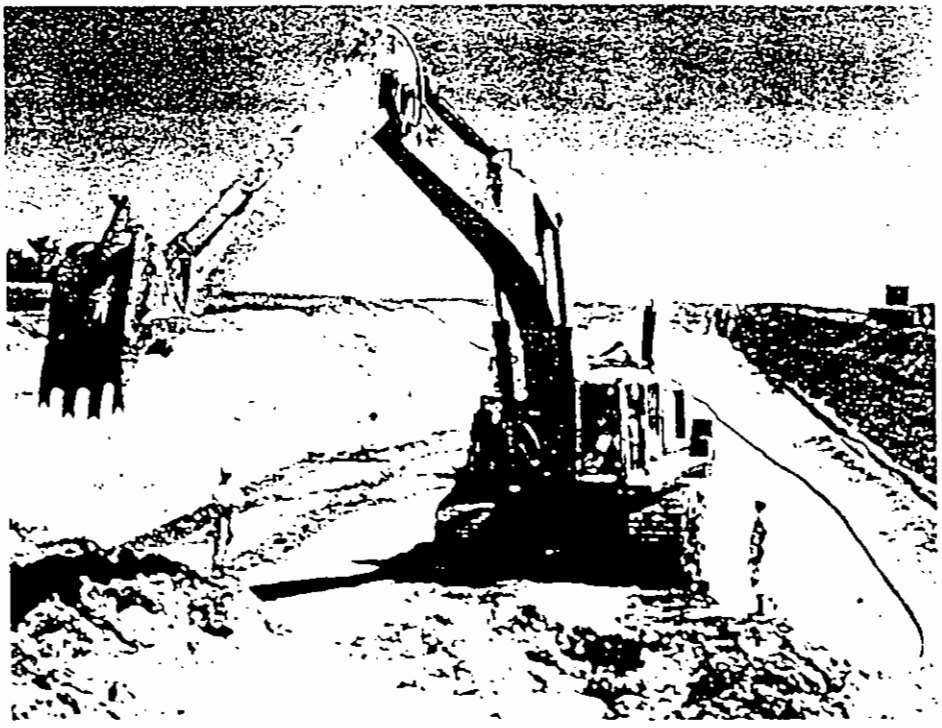
> *"There is an unabashed willingness to comply with environmental regulations at APG."*
>
> **Senator Barbara Mikulski, Maryland**

Incineration of Contaminated Soils at Louisiana AAP

In March 1990, the Army completed the incineration of 102,000 tons of explosives-contaminated soils. Revised excavation criteria were approved by the State of Louisiana and EPA, allowing shallow excavation of the soils from the Area P lagoons in lieu of deep excavation. Because of the high concentrations of explosives in the shallow soils, these revised criteria were estimated to achieve greater than 99 percent explosives removal while reducing the amount of soils requiring destruction. These measures resulted in estimated cost savings of $10 million. The total project cost is approximately $33 million.

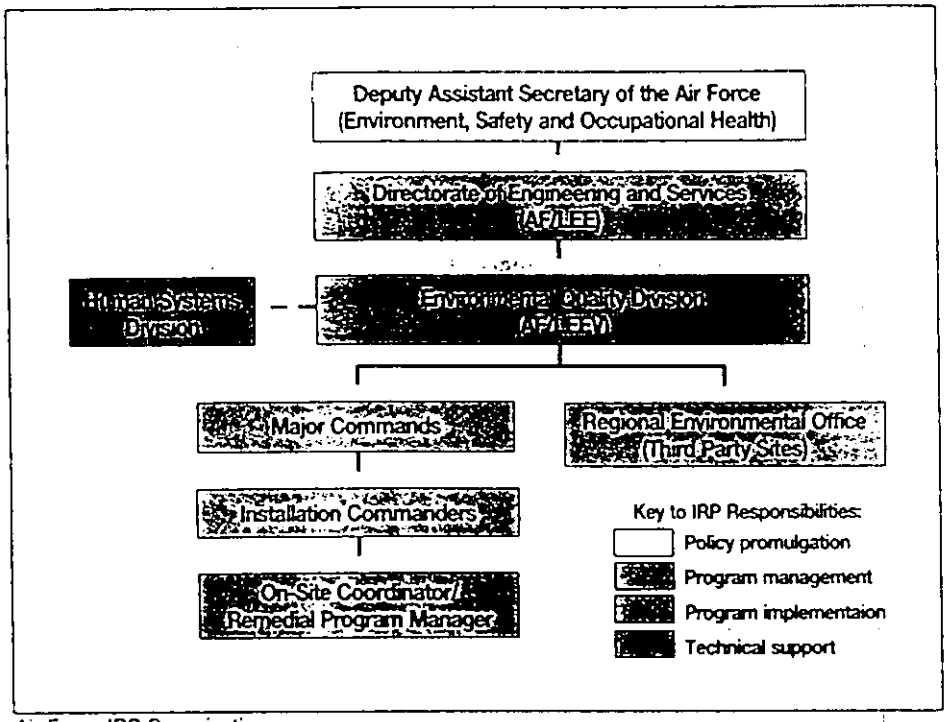
Ground Water Cleanup at Sharpe Depot, CA

Sharpe Depot is using extraction wells to withdraw contaminated ground water and air stripping towers to remove volatile organics from the water. Past practices involved discharging treated water to a canal. However, in September 1990, the Army began sending the cleaned water to a nearby power plant for use in steam generation. This practice has significantly reduced problems associated with discharging treated water in the canal and decreased the use of water resources in the area. The rate of water supplied to the power plant, now 300 gallons per minute (gpm), is expected to increase to 500 gpm in 1991.



Air Force IRP Progress

The number of Air Force IRP sites increased by almost 30 percent in FY 90 to 4,513 sites at 315 installations. IRP activities have been completed and no further remedial action is planned at 448 Air Force sites.



Air Force IRP Organization

PA work has been completed at 3,850 of the Air Force's 4,513 IRP sites, while SI work has been completed at 3,320 sites. Although the Air Force's reclassification of site status resulted in a decrease in RI/FS completions in FY 90, the number of sites where RI/FS work is underway or complete increased from 2,248 in FY 89 to 3,207 in FY 90. Further RI/FS investigations are underway or have been completed at every major Air Force [illegible]

pleted RD/RA work were registered at Air Force facilities in FY 90. However, more than 500 remedial activities were initiated, bringing the total number of RAs underway or completed to 989.

During FY 90, the Air Force completed and signed IAGs for 11 NPL installations. This brought the total number of Air Force NPL installations with signed IAGs to 16. PA/SI work has been completed at [illegible]

ities are underway at all of these facilities. Removal actions and IRAs have occurred at 28 of the Air Force's NPL facilities.

The following are examples of significant Air Force IRP project activities conducted in FY 90.

ROD at Tinker AFB, OK

Tinker AFB became the first Air Force installation to sign an agreement for cleaning up an NPL site. The ROD was approved by EPA, along with Tinker AFB and the Oklahoma State Department of Health. Approximately 100 people attended a public meeting held in April 1990 to discuss cleanup options for the three segments of the site. The meeting allowed the public an opportunity to ask questions and voice concerns regarding the intended cleanup alternatives.

The proposed cleanup alternative for the ground water includes installing 129 extraction wells, constructing a separate wastewater treatment facility to treat extracted [illegible]

Camp Pendleton cleanup agreements "...lay the foundation for the effective working relationships which will be crucial to cleaning up these sites expeditiously and in a manner fully protective of public health and the environment."

Daniel McGovern
Region IX Administrator
Environmental Protection Agency

Removal Actions at Saint Lawrence Island, AK

A PA conducted by the Navy at Saint Lawrence Island in 1989 identified transformers and drums containing hazardous chemicals that posed a threat to human health and the environment. The overall contamination at the site has resulted from spills, leaks at storage areas, burial in landfills, and random disposal of drums.

In July 1990, the Navy initiated the removal of approximately 1,000 drums, 30 transformers, and 17 compressed gas cylinders from the site. The cleanup crew was operating under arduous conditions in an area where access limitations required importation of utilities, supplies, equipment, and personnel by helicopter. Hazardous wastes removed from the site were packaged and airlifted offsite. Transfer of these hazardous contaminants removed the potential for immediate danger to life and health, preserved the delicate arctic ecology, and began the process of environmental cleanup in the area.

NIROP Ground Water Cleanup, MN

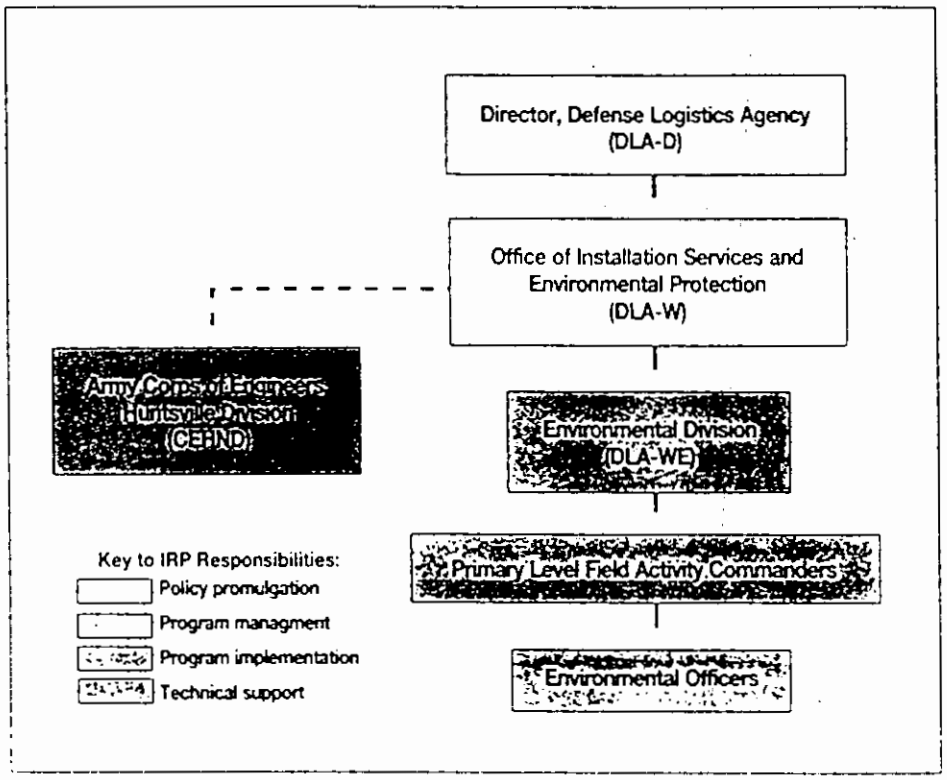
In September 1990, a ROD was signed between the Navy, the Minnesota Pollution Control Agency, and EPA, which will allow for the cleanup of contaminated ground water at the Naval Industrial Reserve Ordnance Plant (NIROP). The ROD outlines a two-phased plan that calls for the installation of five pumping wells, and the construction of a treatment plant to pump and treat ground water to meet federal drinking water standards. The selected cleanup plan is designed to prevent further movement of trichloroethene (TCE) contaminated ground water toward the Mississippi River.

ROD for Ships Parts Control Center, Mechanicsburg, PA

A ROD was signed in September 1990 to allow for the cleanup of a storm water drainage ditch contaminated with PCBs. Remediation for the first segment of this non-NPL cleanup has been awarded. This work includes excavating sediment to bedrock for the first 2,300 linear feet of the ditch. In response to low contaminant concentrations and safety considerations due to sinkholes in the unstable karst terrain, the Navy has fenced the area. Dams have been installed to trap sediments. The remainder of the remediation will include removal of sediments where composite samples indicate concentrations over 5 parts per million (ppm) of PCBs and the addition of another gabion dam. Long-term monitoring and confirmatory sampling are included in the overall ditch remediation.

Defense Logistics Agency IRP Progress

The Defense Logistics Agency (DLA) IRP continued to show steady progress in all areas in FY 90. The number of installations and sites in DLA's program increased slightly in FY 90 to 32 sites at 257 installations. IRP activities have been completed and no further remedial action is planned at 102 sites, or almost 40 percent of the DLA sites in the program.



Defense Logistics Agency IRP Organization

PA/SI work has been completed at all of DLA's 257 sites and RI/FS work is complete or underway at 147 of the 150 sites targeted for such studies. Six remedial activities are complete or underway at DLA sites.

In FY 90, IAGs were signed covering two DLA installations. These were the first IAGs completed for DLA NPL installations. PA/SI work has been completed and RI/FS activities are underway at all three of the DLA installations final-listed on the NPL. Removal actions and IRAs have occurred at one of DLA's three NPL facilities.

In July of FY 90, Sharpe Army Depot (AD) was transferred from the Army to DLA, making Sharpe AD the fourth DLA installation listed on the NPL. Because the Army was responsible for most of the work conducted at the installation through FY 90, Sharpe AD is not included in the DLA program counts presented in this report.

The following are examples of [illegible] DLA IRP [illegible] FY 90.

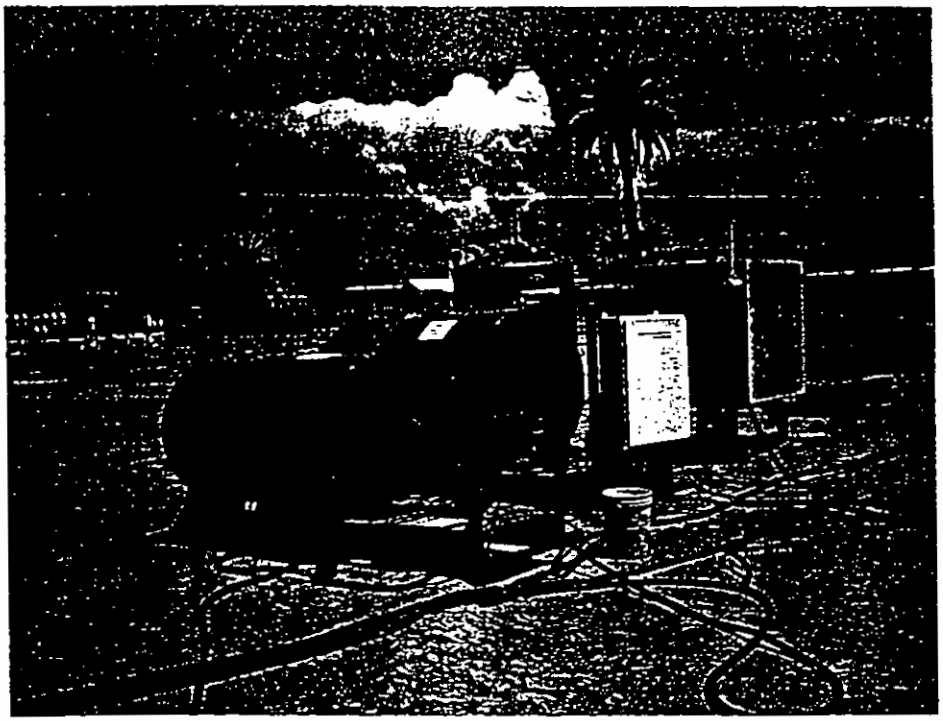
Ground Water Treatment at McClellan AFB, CA

Investigations at McClellan AFB have revealed ground water contamination caused by rainwater leachate from a 10-acre waste pit area. A cap was constructed over the waste pits to prevent further leaching of contaminants into the ground water. A series of extraction wells have been installed to pump ground water to an onsite treatment plant. The plant has been in operation since 1987 and currently is receiving the pumped water at a rate of 250 gpm. The treatment system consists of air stripping and carbon filtration. The treated water is released into Magpie Creek; however, future plans call for reclaiming the treated water for industrial uses.

Cleanup Effort Earns Environmental Honors at Kelly AFB, TX

Kelly AFB has earned national recognition for its efforts in cleaning up a jet fuel spill on the east side of the base near Quintana Road. Renew America, a nonprofit organization based in Washington, DC, that promotes a safe and healthy environment, awarded Kelly AFB an Environmental Achievement Award certificate for the Quintana Road Pilot JP-4 Fuel Recovery Project.

The award selection is based on the ability of a project to protect, restore, or enhance the environment. The success of the project was due to close, continuing cooperation between the Air Force and San Antonio [illegible]



The Pump and Treat System at Williams Air Force Base is currently recovering fuel from ground water on a continuous basis.

Innovative Cleanup System at Williams AFB, AZ

Williams AFB is using a new aquifer pumping system to treat contaminated ground water at the site. The system became operable in August 1990, recovering fuel that had contaminated ground water from a leaking underground storage tank. The down-hole pumping system is equipped with a product pump inlet approximately 13 feet above the water pump inlet. Fluid levels are monitored with a pressure transducer to ensure that the fluid/air interface is maintained across the product inlet. David Annis, Project Manager for the Arizona Department of Water Resources, observed a system demonstration and stated that the testing and recovery system was impressive, and it was obvious that a great deal of effort had been put into both designing the system and adapting it to conditions at the site.

The Quintana Road project was "...an environmentally successful program, one that can be replicated...in many communities interested in solving similar environmental problems."

Tina Hobson
Executive Director
Renew America

Other Hazardous Waste Program Progress

The Other Hazardous Waste (OHW) Program, the second element of DERP, examines current operations to find cost-effective approaches to DoD's waste management activities and to prevent pollution at the point of generation. Funds are provided to promote DoD's total quality management of hazardous waste initiatives. Such efforts include research, development, and demonstration of pollution prevention and hazardous waste management technology. This work involves studies of UXO detection and range clearance methods; investigation of alternate products, revised specifications, and improved acquisition and operating practices; procurement of hazardous waste reduction equipment; information exchange; and other environmental restoration and pollution prevention activities.

In July 1989, DoD published a directive entitled "Hazardous Materials Pollution Prevention." In this Directive, the prevention of pollution is emphasized to replace historical end of pipe solutions. This policy requires that hazardous materials be selected, used, and managed over their life cycle so that DoD realizes the lowest cost to properly protect human health and the environment. The preferred approach is to avoid or reduce hazardous materials use. With the issuance of this Directive, DoD components are required to:

- Include guidance on hazardous materials in all directives, regulations, manuals, specifications, and other guidance documents issued
- Develop and maintain effective programs to manage hazardous [illegible]
- Establish adequate reporting to track progress in achieving program goals
- Participate in information exchange on hazardous materials pollution prevention
- Cooperate with environmental agencies pursuing similar objectives.

The July 1989 Directive augments extensive waste minimization work already underway within the services, especially the logistics community. It requires that environmental concerns be integrated into the Department's everyday work.

In FY 90, $22.5 million in DERP funds were provided for hazardous waste minimization projects. Notable examples of OHW Program accomplishments are provided below.

Hazardous Waste Source Reduction

The Aircraft Intermediate Maintenance Department (AIMD) at the Marine Corps Air Station, Yuma, Arizona has reduced its generation of liquid hazardous waste by 90 percent. This was accomplished by segregating all sources of concentrated hazardous waste and minimizing the amount of hazardous material used in each process. All rinse water generated by AIMD shops is analyzed, allowing elimination of source contamination through product substitution or changed operation techniques. Estimated cost savings per year are $270,000, with a corresponding annual waste reduction of 108,000 gallon

ROD at Ogden Defense Depot, UT

Ogden Defense Depot became the first DLA installation to sign an agreement for cleaning up an NPL site. EPA Region VIII, the State of Utah, and the depot approved a ROD for cleanup operations. A public hearing was held in July 1990 to discuss cleanup options for both the soil and ground water. The meeting provided the public an opportunity to voice their concerns and ask questions regarding the cleanup alternatives.

Approximately 40 cubic yards of soil will be removed and incinerated. A pump and treat system with reinjection into the aquifer is the proposed remedial action for ground water.

Bioremediation at Defense Fuel Support Point in Casco Bay, ME

Bioremediation of soil contaminated with 6,500 mg/kg of JP-5 jet fuel began in August 1990. By November, concentration levels had been reduced by 70 percent. Approximately 600 cubic yards of contaminated soil was removed to a tank dike area where it was fertilized using nitrogen, phosphorous, and potassium. Natural rainfall provided soil moisture. The soil was spread thinly (6 inches) to allow for maximum oxygen diffusion into the soil.

Earlier laboratory data had demonstrated the presence of sufficient populations of JP-5 degrading bacteria. The bacteria utilize the jet [illegible]

Removal Action at the Arctic Surplus Site, Fairbanks, Alaska

Through a Consent Order with EPA, DLA performed a removal action at this privately owned site. This site was placed on EPA's NPL during 1989. DLA's objective was to remove the major wastes to avoid any potential for public exposure. Surplus materials had been placed at the Arctic Surplus Site by the private owners and operators of the salvage yard. Most of these materials were purchased through the local Defense Reutilization and Marketing Office (DRMO), a DLA tertiary level field activity. DLA became involved at the site because of the potential imminent threat to public health.

By the end of FY 90, activities completed at the site included staging 3,041 empty 55-gallon drums, sampling and testing 1,878 full 55-gallon drums, draining and packaging 676 batteries, excavating 84 cubic yards of chlordane-contaminated soils and 200 cubic yards of lead-contaminated soils, and testing and draining 135 transformers. In addition, an incinerator was disassembled and associated dioxin-contaminated materials and soil were removed. The waste materials collected during these activities are being transported to permitted toxic waste landfills and incineration facilities.

A total of 1,878 55-gallon drums were tested at the Arctic Surplus Site in 1990.

Hawaii Hazardous Waste Minimization Project

The Hawaii Hazardous Waste Minimization Project is a multi-phase venture in which efforts are being developed and implemented to reduce hazardous waste generation rates and off-island disposal needs for all military operations in the State. Near-term recommendations have been developed and are being pursued at 21 Army, Navy, Air Force, Marine Corps, DLA, and National Guard installations. These near-term measures, defined as activities that could reasonably be implemented within one year, are estimated to result in reductions in DoD's waste generation rates in *Hawaii* by up to 28 percent once implemented. Potential savings of almost $500,000 per year are projected for all of the near-term measures being pursued.

The next several phases of the project, which is being managed by the Navy, will formulate, implement, and evaluate long-term waste minimization measures. The entire project is scheduled for completion by 1996.

"We feel that this project has established the DoD as the leader for waste minimization in Hawaii... We commend your foresight in establishing this project."

John C. Lewin, M.D.
Director of Health
State of Hawaii
Department of Health

Asbestos Replacement

A study for asbestos replacement in packing/gaskets has been initiated and two of the three phases of the study have been completed. Physical parameter and detrimental material screening tests have been completed. Laboratory testing of a fixed test fixture to simulate rotary and reciprocating fixtures according to Navy standards is underway. Further investigations include addi[illegible] and follow on [illegible] at the Great [illegible] Center. The [illegible] Lab's success [illegible] approval [illegible]

Electroplating Metals Recovery

Naval Aviation Depot, Norfolk has developed a successful program to reduce cyanide wastewater generation in their electroplating lines by 50 percent. The Depot has installed two electrolytic recovery units, one on the cadmium-cyanide plating line and one on the silver-cyanide plating line. These units electrochemically oxidize dissolved cyanides in the rinsewaters to produce cyanates. Simultaneously, the metals (cadmium and silver) are reduced to their elemental state and recycled to the plating tanks. Approximately 99 percent metal recovery is achieved.

The Depot's goal is to reduce all hazardous waste generation by exploring additional technologies, including recycling of chromium rinsewater and scrubber waters from a hard chrome plating line, substituting for hard chrome plating, converting from water-base filters to dry filters in paint booths, freeze crystallization treatment for metal-laden rinse water, and ozone treatment for organic chemicals.

Solvent Distillation

The disposal of [illegible] has been eliminated at Naval Air Station Whidbey Island. Waste [illegible] PD-680 [illegible] cleaning and degreasing operations. Used solvents are now sent offsite and distilled for reuse, reducing costs associated with waste disposal and material usage.

Hazardous Materials Reduction Program

A chemical use reduction program has been established at Tinker AFB, Oklahoma within the last year. This special program reviews the justification and authorization for using hazardous materials base-wide. Although the program is new, it has already accomplished a reduction in the use of some chemicals by one-third. The program is currently being expanded to manage all chemicals on base by FY 91.

Inventory Control

A training program to educate users in the identification, control, and use of hazardous materials has also been implemented at the Naval Air Station, Whidbey Island. The program is intended to improve inventory control by avoiding overstocking of hazardous materials and by turning in unused materials to supply for possible resale and reuse prior to shelf life expiration. Instruction [illegible] the training [illegible]

Aerobic Biodegradation

The Air Force Engineering Service Center is developing a full-scale aboveground bioreactor capable of treating ground water and waste streams contaminated with mixtures of chlorinated aromatic compounds. Bench scale experiments have shown that it can aerobically biodegrade complex mixtures of solvents and chemicals to non-detectable levels.

The pilot-scale bioreactor was tested at Kelly AFB under a variety of operating conditions. The system reduced concentrations of various solvents from the parts per million level down to the parts per billion level at a 40-minute retention time. Several chlorinated solvents previously considered nonbiodegradable were readily degraded by this system. A second field test is scheduled for 1991 to collect additional operating data for use in the design of a full-scale system.

Aluminum Ion Vapor Deposition

The Army is conducting a test program at ANAD, Alabama to determine the feasibility of using Ion Vapor Deposition (IVD) of aluminum in lieu of cadmium plating at Depot facilities. Cadmium plating operations are a large source of hazardous waste generation at many ADs. Aluminum IVD does not generate hazardous waste and the aluminum is nontoxic. Worker exposure to toxic materials is reduced by the elimination of plating solutions. Further, aluminum IVD provides superior corrosion resistance compared to [illegible]

Chlorofluorocarbons Substitution

This research is intended to identify and validate less or non-ozone depleting alternative materials for chlorofluorocarbons (CFCs). The research includes establishing benchmark values for military specifications materials using standardized techniques for board assembly and testing, and evaluating new and existing alternative cleaning materials using the same procedures as benchmark testing. Further studies will include testing of a terpene-based solvent that does not contain CFCs, identifying and quantifying contaminants in recycled CFC cleaning solvents, and determining the possible adverse effects of ultrasound cleaning on the reliability of soldering joints and internal wire bonds on printed wire assemblies.

Spray-Casting

The Air Force Engineering Service Center is developing a spray-casting process to replace electroplating operations. Current electroplating processes involve the use of concentrated, complexed metal plating solutions that require extensive ventilation and health and safety procedures.

The use of this technique will provide significant benefits, including the elimination of hazardous waste, reduction of health and safety problems, and decreased air quality problems and ventilation costs. Annual savings of $450,000 associated with material usage and waste disposal costs are projected. In addition to these benefits, superior coating engineering properties (i.e., yield strength, tensile strength, hardness, ductility) can be achieved. A full-scale demonstration is scheduled at Tinker AFB in FY 93/94.

Ground Water Modeling

The Air Force Institute of Technology's School of Civil Engineering and Services has made significant changes to a contaminant transport model used in IRP activities to study ground water contamination. The new model includes key physical mechanisms that were omitted from the original model as a result of mathematical simplifications. It can provide more accurate outputs for given ground water conditions and parameters. The model is currently in use at Tyndall AFB.

Depot Hazardous Waste Minimization (HAZMIN) Technology

DoD depot operations involving equipment maintenance generate hazardous waste as the result of painting, paint removal, cleaning, and plating processes. New technologies to decrease the amount of waste produced are needed because of the high cost, future liability, and potential increased restrictions on current treatment and disposal methods. To achieve these objectives, the Army is evaluating several measures, including using high-efficiency paint application systems to decrease air emissions, extending the bath lives of chemical paint stripping formulations by filtration, and reclaiming and reusing plating solutions through the use of electrodialysis. These test programs are being conducted at Sacramento (CA), Letterkenny (PA), and Corpus Christi (TX) ADs.

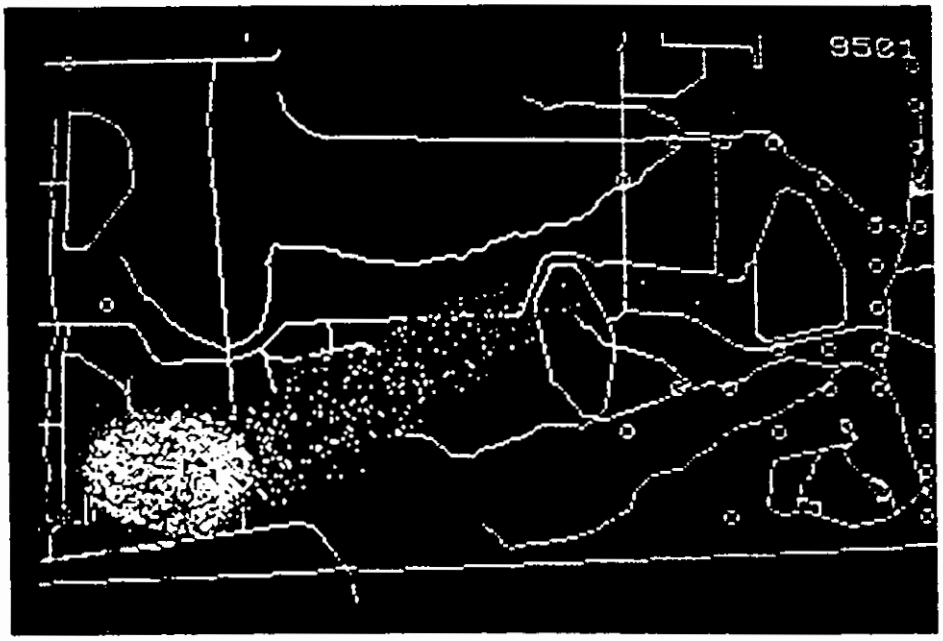
In Situ Field Bioindicator Systems

The Navy currently has no reliable system that can be used to routinely monitor and quantify environmental impacts at contaminated sites. To better assess such impacts on the marine environment and establish a clear cause-and-effect relationship with hazardous wastes of concern, the Navy is developing a system to allow physical and chemical measurements to be conducted simultaneously with measurements of biological response in the field (in situ). The system is planned for use in a variety of environments to address various Navy environmental problems.

In Situ Vitrification

In situ vitrification (ISV) is a thermal process that converts contaminated soil and waste into a durable product containing glass in crystalline phases. In this process, the soil is heated to a molten stage and allowed to cool to the final vitrified product. ISV is designed to retain or immobilize heavy metals, other organics, and radionuclides in the glass structure and to destroy or capture organics in an off-gas treatment system.

Bench- and pilot-scale ISV tests were conducted at Arnold AFB to test the removal of contaminants present in soils at the base fire training area. In this demonstration, inorganics were effectively retained within the melt and 89 percent of the organics in the soil were destroyed, with an overall destruction and removal efficiency of 99 percent. A full-scale remediation at Arnold AFB is scheduled to begin in 1991.



Considerable efforts are being expended in developing improved models for predicting the movement of contamination in ground water.

Research, Development, and Demonstration

Traditional approaches to hazardous waste site cleanup may not be permanent or cost-effective solutions. These approaches can require large capital outlays and operating costs and may merely move the problem from one location to another. DoD is working to identify and develop permanent cleanup technologies and innovative waste site investigation techniques that will be efficient and cost-effective. In addition, significant effort is being focused on the development and testing of methods to reduce the generation of hazardous wastes at DoD facilities. While these efforts require large financial commitments upfront, the potential future cost savings are enormous.

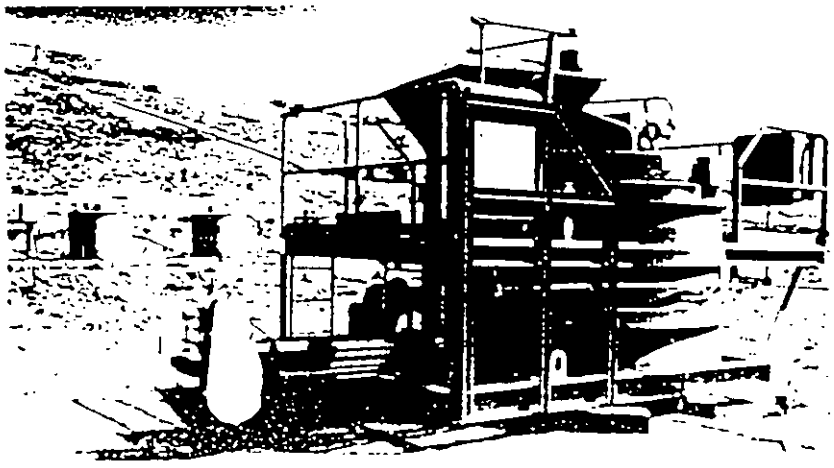
In FY 90, DoD invested approximately $47 million of Environmental Restoration Account funds in Research, Development, and Demonstration (RD&D) of cleanup technologies and hazardous waste minimization.

RD&D efforts are coordinated by an Installation Restoration Technology Coordinating Group (IRTCG) which consists of representatives from each component. The IRTCG encourages improved communication among the components to ensure the most effective possible use of limited RD&D funds. In addition, a DoD/EPA/DOE working group established in 1985 addresses the cost of hazardous waste cleanups, evaluates innovative technology needs, and develops a coordinated approach to these efforts.

The following examples of recent RD&D projects demonstrate the progress made by DoD and illustrate the potential benefits of well-directed research work.

Composting of Explosives-Contaminated Soil

A full-scale pilot demonstration is underway at Umatilla Army Depot, OR, to optimize the composting of explosives-contaminated soils. Tests are being conducted to reduce treatment time, identify different compost amendments, and find the least expensive materials to add to the compost system. A mechanical composter, approved for use with explosives contaminated soil, has been procured and will be [illegible] compost.



Hot-Gas Decontamination

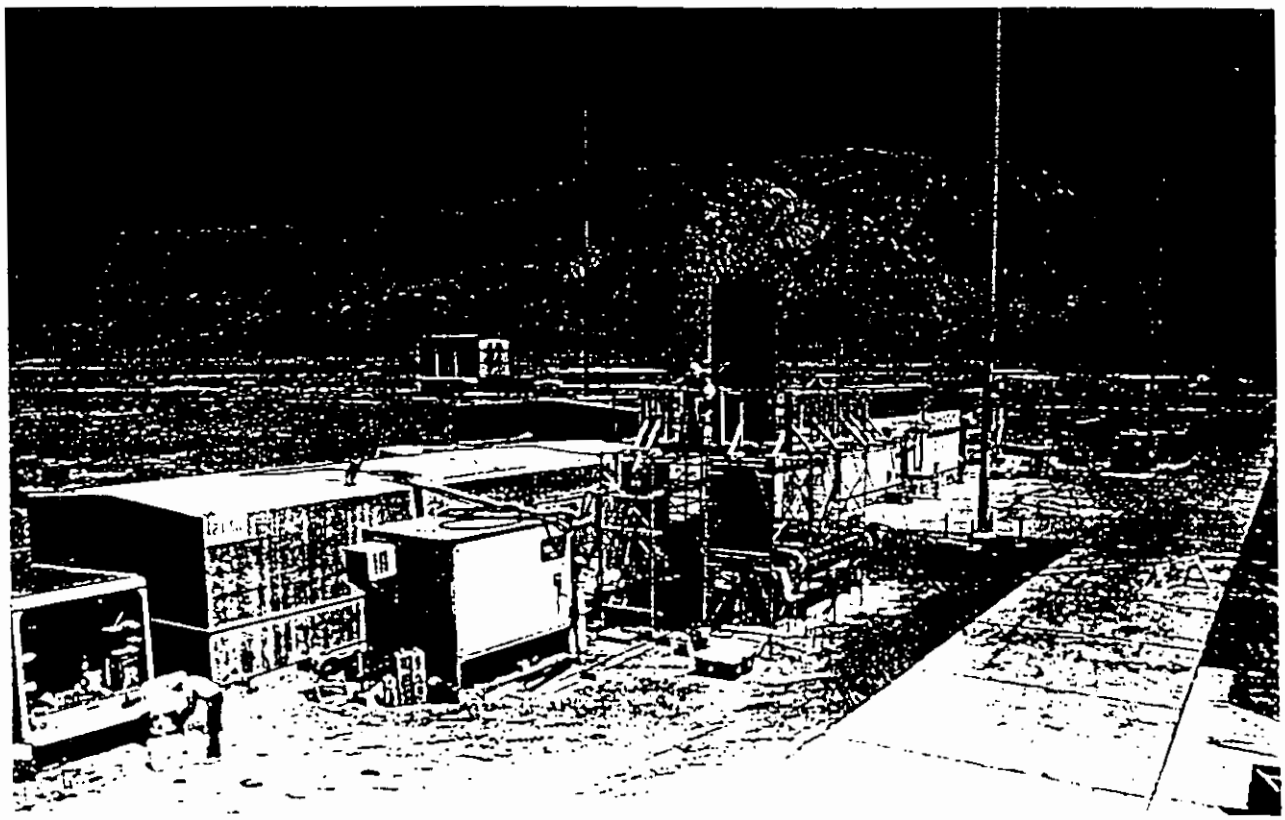
The U.S. Army Toxic and Hazardous Materials Agency (USATHAMA) conducted a pilot study to determine the operating conditions required to effectively decontaminate explosives-contaminated equipment. Previous pilot studies showed that structural components can be decontaminated using a heated gas to thermally decompose or volatilize explosives, with subsequent incineration of the off-gases. The compounds evaluated in this study were trinitrotoluene (TNT) and ammonium picrate. Test items included piping, motors, powder boxes, and sewer lines. The hot-gas process was effective in treating items contaminated with TNT and ammonium picrate.

USATHAMA is evaluating the process to determine its effectiveness on items contaminated with chemical agents and other energetic and pyrotechnic materials.

Hydroblasting Wastewater Recycling

The Naval Civil Engineering Laboratory conducted field tests of a recycling system to reduce the volume of hydroblasting wastewater generated at the Naval Shipyards. Hydroblasting uses a sodium nitrate solution to remove the soft deposits on boiler tubes and other parts of ship boilers.

Field testing showed that hydroblasting wastewater can be recycled nine times without adversely affecting boiler tube cleaning operations, potentially reducing wastewater generation by 90 percent and resulting in a 2.7 million gallon reduction in wastewater generation at Naval Shipyards. Associated disposal costs can be reduced by almost $8 million with system implementation and the remaining 10 percent of the wastestream treated to meet sewer discharge requirements. A portable hydroblasting wastewater recycling unit is scheduled for implementation testing at Pearl Harbor Naval Shipyard in 1991. The technology will then be available to other Naval Shipyards and Shore Intermediate Maintenance Activities.

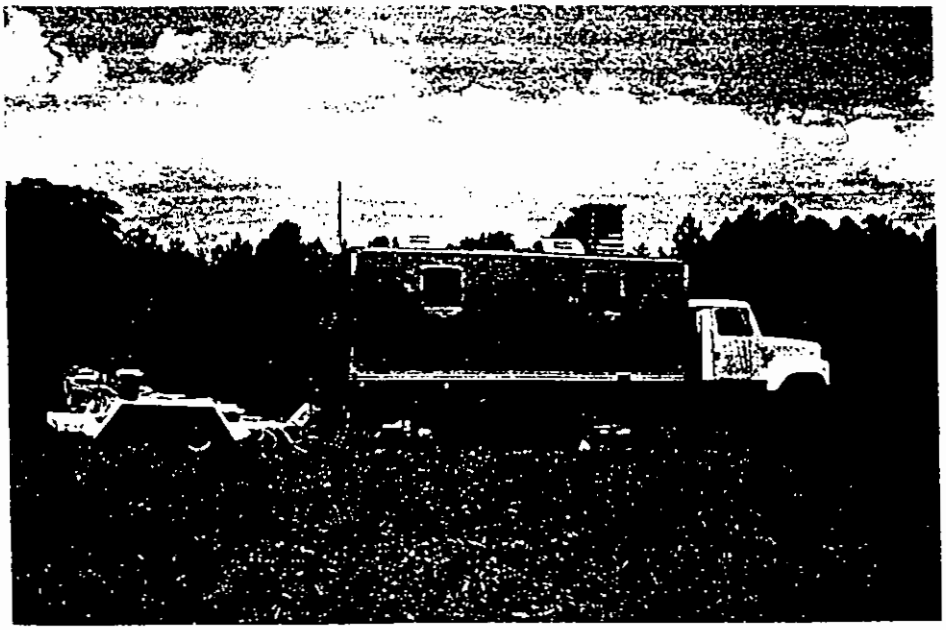


Hot Gas Decontamination pilot studies are proving effective at treating explosives contaminated items

Site Characterization and Analysis Penetrometer System

The Army has developed a state-of-the-art Site Characterization and Analysis Penetrometer System (SCAPS) for use in mapping areas of soil and ground water contamination. The SCAPS is mounted on a uniquely engineered truck designed with protected work spaces to allow access to toxic and hazardous sites. The SCAPS screening penetrometers are equipped with sensors that can determine physical and chemical characteristics, strength, electrical resistivity, and spectral properties of soils.

During initial field testing performed in July through September 1990, the SCAPS equipment successfully delineated petroleum, oil, and lubricant contaminated zones at Jacksonville Naval Air Station and Tyndall AFB. Major development efforts are currently being directed toward the production of sensors capable of detecting solvents and hydrocarbon products at low levels, explosives wastes, and toxic and hazardous metal wastes. The goal is to produce sensor systems that respond rapidly to the presence of specific contaminants at low levels in soil. This effort is being jointly funded by the Army, Navy, and Air Force.



The Site Characterization and Analysis Penetrometer System allows rapid collection of samples and exploration of subsurface conditions at contaminated sites.

Toxicology Demonstration

Three sites at the Naval Air Station, Whidbey Island, are being investigated for toxicological impacts on wildlife and the environment. The study is being conducted by the Institute of Wildlife and Environmental Toxicology at Clemson University, where analytical samples collected from the ongoing field work are being analyzed. Radio transmitters have been attached to one adult female and three juvenile Northern Harriers to document feeding and foraging activities. Heron nestlings have also been identified and colony breeding and nesting activities are being monitored. A program review and workshop was conducted in August 1990.

Fluidized Bed Paint Stripper/Degreaser

The Army is evaluating the feasibility of using a heated fluidized bed of aluminum oxide to remove paint and grease from tactical equipment parts at maintenance depots. Production scale testing is being conducted at Red River (TX) and Letterkenny (PA) ADs. The fluidized bed system can substantially reduce the generation of hazardous waste and provide a safer work environment. Close coordination is being maintained with the Air Force and Navy during this test program.

Training of DoD Personnel in DERP Activities

The Defense Environmental Restoration Program requires a team effort to complete effectively its varied and complicated tasks. This is especially true in the IRP portion of the program. DoD has implemented training programs so that personnel can effectively manage various aspects of the cleanup process. The following are examples of courses of instruction provided in FY 90.

Health and Safety Training

DoD personnel who may be exposed to hazardous substances through their work in the IRP are routinely provided training regarding safe operating practices while working in areas of potential contamination, use of personal protective equipment, and the operation of contaminant monitoring systems. This training fulfills the requirements of the Occupational Safety and Health Act and helps assure the safety of DoD personnel working at IRP sites.

DLA DERP Training

During FY 90, DLA personnel participated in a variety of training programs to improve their effectiveness in managing DERP. Several DLA environmental officers attended EPA courses on RI/FS procedures and DoD-sponsored courses on DPM use. The DLA Office of Installation Services and Environmental Protection FY 90 conference included several blocks of instruction on the DERP. All DLA environmental officers attended these sessions.

DERP Training of USACE Personnel

USACE is conducting response activities under both the FUDS and IRP portions of DERP. Courses to meet training needs are taught by inhouse USACE instructors, USEPA contractors, and contractors under the sponsorship of the Proponent Sponsored Engineer Corps Training (PROSPECT) Program. These courses are designed to enhance the technical skills needed to accomplish the hazardous waste mission. Topics include environmental laws and regulations, safety and health for hazardous waste sites, air surveillance for hazardous materials, risk assessment guidance, hazardous materials treatment technology, ground water investigations, sampling for hazardous materials, and radiation safety. During FY 90, 629 USACE employees involved in DERP successfully completed these courses.

DoD personnel receive the health and safety training provided to most DERA participants.

Agricultural Soil Amendments from Wastes

The Army, in coordination with EPA, Region IX, California Department of Health Services, and California Regional Water Quality Control Board, has conducted an Engineering Evaluation/Cost Analysis (EE/CA) evaluating the use of zinc-laden sediments from the Riverbank Army Ammunition Plant (RBAAP) as an agricultural soil amendment. Sediments with elevated levels of zinc have accumulated in the RBAAP evaporation/percolation ponds from past plant operations and waste treatment techniques.

Under the RBAAP IAG, the contaminated sediments are required to be addressed because of the presence of zinc in excess of the Total Threshold Limit Concentration (TTLC) criteria, as defined under Title 22 of the California Code of Regulations.

The EE/CA recommends the use of the zinc-rich sediments as a soil amendment on zinc-deficient agricultural land. When applied in agronomically appropriate amounts, the zinc in the sediments will enhance the agricultural productivity of the soils. Coincidentally, zinc deficiency is by far the most important micronutrient problem in California soils. Specifically, agricultural soils in the Riverbank area, and extending throughout the areas of eastern Stanislaus and eastern Merced Counties and southern San Joaquin County, are considered to be among the most zinc-responsive soils in the State.

Implementation of this removal and soil amendment action, scheduled for 1991, complies with both the letter and the spirit of the NCP by "promoting treatment versus nontreatment options and use of innovative technologies." Use of the sediments as a soil amendment will both remediate the contaminated site and provide a beneficial source of critical plant nutrients to enhance the productivity of the farmland to which it will be applied.

Antifreeze Recycle/ Substitution

A study has been initiated by DLA to evaluate the substitution of antifreeze. Antifreeze is not regulated as a hazardous waste under RCRA, but is regulated by some states. The study includes screening possible alternative materials and evaluating three commercial recycling systems. It is intended to reduce the large quantities of antifreeze waste costs associated with waste disposal and material purchase costs.

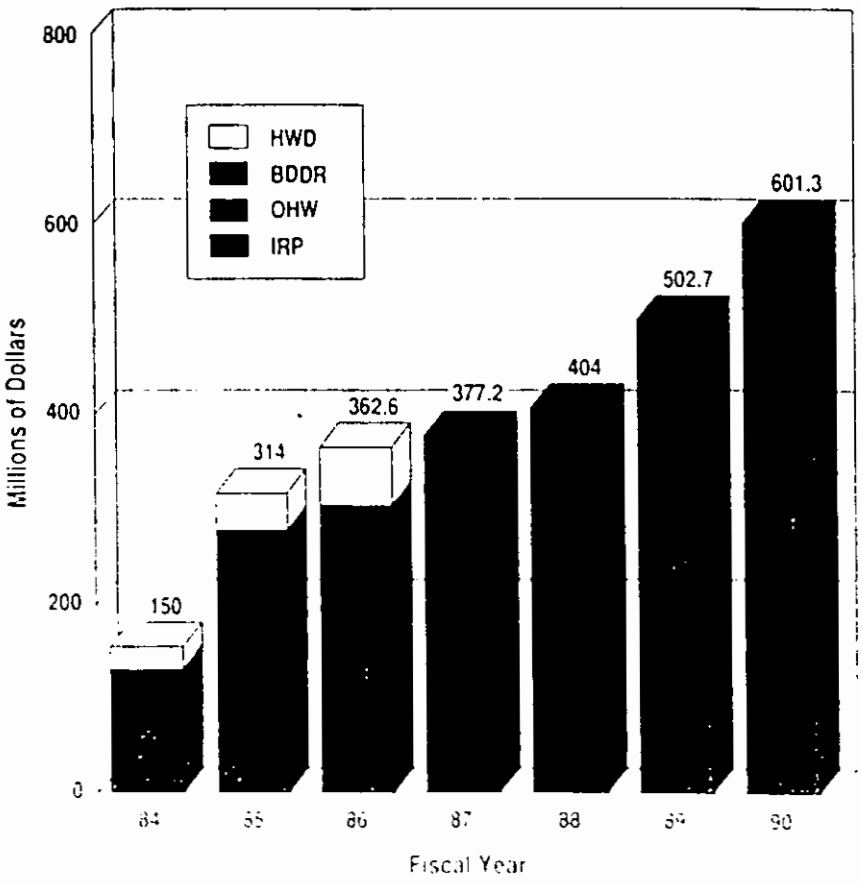
Integrated Risk Assessment Demonstration

Estimating the risk posed by contaminated marine sediments based on laboratory chemical analyses only has proven inadequate. To predict the environmental impact without overestimating or underestimating the scope of remediation, an integrated risk assessment that incorporates biological assessment techniques with chemical techniques may be the best approach.

This demonstration will support two programs, including the assessment of the Aquatic Hazardous Waste Site at the Naval Air Station North Island and the monitoring of contaminated sediments at the Naval Station, San Diego. It will integrate existing techniques at these two sites to provide the Navy with a multidimensional approach to assess the chemical and biological implications of contaminants in marine sediments. Standard protocols will be developed for risk assessments and data interpretations.

Program Funding

In FY 84, Congress consolidated and expanded DoD programs to clean up hazardous waste in a separate appropriation entitled the Defense Environmental Restoration Account (DERA), under the Defense Appropriations Act. This has allowed the Department to accelerate the work and add research and other components to DERP. More than 84 percent of DERA funds have been allocated to the IRP since FY 84. In FY 90, 96 percent was expended in the IRP portion of the program. This heavy emphasis is expected to continue in FY 91 because of the growth in these high-priority requirements. The FY 91 DoD Authorization Act provides $1.1 billion in DERA funding.



The Department has estimated the total cost of future DoD IRP activities at installations and formerly used properties to be $9 billion (baseline) to $14 billion (adjusted) in FY 87 dollars. The bulk of this funding is for the more costly RD/RA cleanup phase of the program.

The baseline cost estimate was developed from information on site cleanup requirements that is currently available. The adjusted cost estimate includes projections for sites where extensive data collection is underway. Once this work is complete, a better definition of the sites that actually require cleanup will be possible.

Cleanup standards also remain uncertain. Some agreements for remedial action at NPL installations have not been reached with EPA and state agencies. DoD will review the total program cost estimate periodically as the program matures and more information becomes available.

DPM Training

To prepare remedial project managers for scoring sites for the FY 91 program, DoD developed an intensive two-day DPM training class. The class includes explanations of the model components, data input requirements, and hands-on scoring experience using the automated DPM. Approximately 150 DoD personnel attended classes held in various locations throughout the United States in FY 90. These personnel scored nearly 300 sites where remedial design/action is planned for FY 91.

DPM training prepares IRP project managers to score sites being considered for remediation.

Defense Environmental Restoration Training

In late FY 90, a contract effort was initiated to study the full spectrum of training requirements in DERP. The first phase calls for a needs assessment of all key individuals involved in DERP activities. Particular attention is being given to installation commanders, directors of engineers and housing, environmental coordinators, onsite workers, and DERP project management officers. Additional efforts include identifying training that currently exists that can be directly or indirectly used to meet DoD's needs. Follow-on work will include developing and testing a project manager's course for new employees working within the Army system.

Environmental Law for the Non-Lawyers

The Navy developed and sponsored [illegible] relevant to decisionmakers involved in the remediation process. Topics included: CERCLA; RCRA; SARA; the Historic Site Preservation Act; the Clean Air Act; the Endangered Species Act; the National Environmental Policy Act; fiscal and contracting laws pertinent to environmental issues, an introduction to law, legal research, and civil procedure; sovereign immunity; enforcement mechanisms; and personal liability.

IRP Training of Air Force Personnel

An installation restoration course offered by the Air Force Institute of Technology at Wright-Patterson AFB, Dayton, Ohio has proven very successful. More than 200 engineers, lawyers, public affairs personnel, and bioenvironmental engineers have been trained. This course provides an overview of Air Force policy and management guidance, hydrogeology, community and regulatory relationships, interagency agreements, and cleanup case histories. The course is offered four times a year and it is anticipated that over 300 individuals will be [illegible] FY 91.

DERP Training of High-Level Personnel

In the spring of 1990, the Air Force established an environmental course for their commanders and general officers. This intensive one-week course challenges senior leadership to become the drivers for preparing schedules for cleaning up sites on their installations, developing a team approach with regulators for site cleanup, and establishing a working relationship with community leaders. This course will be offered four times in FY 91. To date, more than 60 senior leaders have attended the course and it is anticipated that over 100 individuals will attend in FY 91.

NCP	National Oil and Hazardous Substances Pollution Contingency Plan
NFRAP	No Further Response Action is Planned
NIROP	Naval Industrial Reserve Ordnance Plant
NPL	National Priorities List
ODASD(E)	Office of the Deputy Assistant Secretary of Defense (Environment)
OEW	Ordnance and Explosive Waste
OHW	Other Hazardous Waste
PA	Preliminary Assessment
PCB	Polychlorinated Biphenyl
PPM	Parts per Million
PRP	Potentially Responsible Party
RA	Remedial Action
RCRA	Resource Conservation and Recovery Act of 1976
RD	Remedial Design
RD&D	Research, Development and Demonstration
RI	Remedial Investigation
ROD	Record of Decision
SARA	Superfund Amendments and Reauthorization Act
SI	Site Inspection
TCE	Trichloroethene
USACE	United States Army Corps of Engineers
UXO	Unexploded Ordnance
VOC	Volatile Organic Compound

List of Acronyms

AD	Army Depot
AFB	Air Force Base
ANAD	Anniston Army Depot
APG	Aberdeen Proving Ground
BDDR	Building Demolition and Debris Removal
CA	Cooperative Agreement
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CFC	Chlorofluorocarbon
DERA	Defense Environmental Restoration Account
DERP	Defense Environmental Restoration Program
DLA	Defense Logistics Agency
DoD	Department of Defense
DOE	Department of Energy
DPM	Defense Priority Model
DRMO	Defense Reutilization and Marketing Office
DSMOA	Defense and State Memorandum of Agreement
EPA	Environmental Protection Agency
FS	Feasibility Study
FUDS	Formerly Used Defense Sites
FY	Fiscal Year
GPM	Gallons per Minute
HRS	Hazard Ranking System
HTW	Hazardous or Toxic Waste
IAG	Interagency Agreement
IRA	Interim Remedial Action
IRP	Installation Restoration Program
IRTCG	Installation Restoration Technology Coordinating Group
ISV	In Situ Vitrification
IVD	Ion Vapor Deposition

SUMMARY OF

ENVIRONMENTAL RESPONSE ACTION

AND COSTS FOR THE

FIRST ROUND OF BASE CLOSURES

ARMY BASE CLOSURE/REALIGNMENT
ENVIRONMENTAL RESPONSE ACTIONS

CLEANUP: ($000)

CATEGORY/DESCRIPTION	PRIORITY	LOCATION	STATE	FY 1991	FY 1992	FY 1993
RI/FS	1A	ALABAMA AAP	AL	425	0	0
RA	1A	ALABAMA AAP	AL	10125	12771	100
RI/FS	1A	PUEBLO AD	CO	7185	750	300
RA	1A	PUEBLO AD	CO	350	2500	3000
RI/FS	1A	UMATILLA AD	OR	2700	4200	600
RA	1A	UMATILLA AD	OR	400	6000	9700
RI/FS	1A	AMT	MA	2600	2000	22500
RA	1A	AMT	MA	50	24200	200
RI/FS	1B	BENNETT ANG	CO	500	0	0
RI/FS	1B	CAMERON STATION	VA	1250	0	0
RA	1B	CAMERON STATION	VA	550	200	5375
RI/FS	1B	CODEA RIVER	AL	350	0	0
RI/FS	1B	DEFENSE MAP AGENCY	MDW	100	0	200
RA	1B	DEFENSE MAP AGENCY	MDW	0	0	400
RI/FS	1B	FT DES MOINES	IA	370	150	0
RA	1B	FT DES MOINES	IA	50	750	1000
RI/FS	1B	FT DIX	NJ	400	500	0
RA	1B	FT DIX	NJ	1401	14200	2400
RI/FS	1B	FT DOUGLAS	UT	540	0	0
RA	1B	FT DOUGLAS	UT	0	0	250
RI/FS	1B	FT HOLABIRD	MD	150	0	0
RA	1B	FT HOLABIRD	MD	0	300	50
RI/FS	1B	FT MEADE	MD	6100	0	0
RA	1B	FT MEADE	MD	300	33000	16000
RI/FS	1B	FT SHERIDAN	IL	605	350	0
RA	1B	FT SHERIDAN	IL	650	2000	3500
RI/FS	1B	FT WINGATE	NM	0	900	0
RI/FS	1B	GAITHERSBURG	MD	75	0	0
RA	1B	RES CENTER	ME	400	0	0
RI/FS	1B	HAMILTON	CA	190	0	0
RA	1B	HAMILTON	CA	50	695	3200
RI/FS	1B	INDIANA	IN	300	0	0
RI/FS	1B	JEFFERSON PG	IN	1000	2861	0
RA	1B	KAPALAMA MIL RSV	HI	2100	75	0
RI/FS	1B	LEXINGTON AD	KY	2000	1000	250
RA	1B	LEXINGTON AD	KY	0	0	2750
RI/FS	1B	NEW ORLEANS	LA	95	0	0
RI/FS	1B	NIKE AP8	MD	220	0	0
RA	1B	NIKE AP8	MD	450	0	0
RI/FS	1B	PONTIAC STOR FAC	MI	200	0	0
RA	1B	PONTIAC STOR FAC	MI	0	300	1300
RI/FS	1B	PRESIDIO OF SF	CA	2426	0	3900
RA	1B	PRESIDIO OF SF	CA	0	6970	0
RI/FS	1B	TACONY WAREHOUSE	PA	200	100	0
RA	1B	TACONY WAREHOUSE	PA	20	625	625
RA	1B	FAMILY HOUSING	VARIOUS	25[illegible]	125[illegible]	[illegible]
SUBTOTAL				49547	120647	77[illegible]

COMPLIANCE:

CULTURAL RESOURCES	1H	FT DEVENS	MA	10	10	0
CULTURAL RESOURCES	1H	PUEBLO AD	CO	0	20	200
CULTURAL RESOURCES	1H	UMATILLA AD	OR	0	20	100
CULTURAL RESOURCES	1H	AMT	MA	0	200	0
CULTURAL RESOURCES	1M	CAMERON STATION	VA	50	30	0
CULTURAL RESOURCES	1M	CODEA RIVER	AL	0	0	26
CULTURAL RESOURCES	1M	FT DES MOINES	IA	35	15	0
CULTURAL RESOURCES	1M	FT DOUGLAS	UT	60	30	0
CULTURAL RESOURCES	1M	FT MEADE	MD	0	90	50
CULTURAL RESOURCES	1M	FT SHERIDAN	IL	20	40	0
CULTURAL RESOURCES	1M	FT WINGATE	NM	140	400	600
CULTURAL RESOURCES	1M	GAITHERSBURG	MD	0	0	10
CULTURAL RESOURCES	1M	LETTERKENNY AD	PA	0	20	0
CULTURAL RESOURCES	1M	NEW ORLEANS	LA	0	205	14
CULTURAL RESOURCES	1M	NIKE AP8	MO	0	18	0
CULTURAL RESOURCES	1M	PRESIDIO OF SF	CA	64	0	0
CULTURAL RESOURCES	1M	YUMA PG	AZ	500	0	0
SUBTOTAL				879	1098	1000
TOTAL				50425	121745	78500

Comp	Location	St	Category	Description	Pri	CY_91	BY1_92	BY2_93
RESTORATION								
RI/FS								
	Mather AFB	CA	RI/FS	AC and W Sites	1A	$900		
	Mather AFB	CA	RI/FS	23 Sites	1A	$2,054		
AF	Pease AFB	NH	RI/FS	8 Sites	1A		$4,000	
AF	Mather AFB	CA	RI/FS	23 Sites	1A	$4,450	$350	
AF	Chanute AFB	IL	RI/FS	Remedial Investigation at 8 Sites	1A	$400		
AF	Pease AFB	NH	RI/FS	18 Sites	1A		$4,500	
AF	Norton AFB	CA	RI/FS	Stage 4	1A	$2,500		
AF	George AFB	CA	RI/FS	Supplemental Op Unit # 1	1A	$600		
AF	Mather AFB	CA	RI/FS	8 Sites (SWAT Water)	1A	$2,000		
AF	Pease AFB	NH	RI/FS	8 Sites	1A			$2,500
AF	Chanute AFB	IL	RI/FS	Removal Contaminated Soil	1A	$96		
AF	George AFB	CA	RI/FS	Plans, Record of Decision Op Unit # 3	1A	$1,000		
AF	Pease AFB	NH	RI/FS	26 Sites Stages 3, 4, & 5	1A	$8,600		
AF	Chanute AFB	IL	RI/FS	Remedial Investigations	1A	$437		
AF	George AFB	CA	RI/FS	Plans, Record of Decision Op Unit # 4	1A	$1,000		
AF	George AFB	CA	RI/FS	Multi-site	1A		$1,500	
	Sub Total		RI/FS			$24,037	$10,350	$2,500
RD/RA								
AF	Mather AFB	CA	RD/RA	44 Sites	1A		$1,500	$500
AF	Norton AFB	CA	RD/RA	Landfill # 2	1A		$500	
AF	Chanute AFB	IL	RD/RA	Landfill Sites # 1 through # 4	1A	$1,000	$8,000	
AF	George AFB	CA	RD/RA	Multi-site	1A		$1,000	
AF	Norton AFB	CA	RD/RA	Golf Course Operable Unit	1A		$1,000	
AF	George AFB	CA	RD/RA	JP-4 on Groundwater	1A		$1,800	
AF	Norton AFB	CA	RD/RA	NE Base Operable Unit	1A			$200
AF	George AFB	CA	RD/RA	Multi-site	1A		$2,000	
AF	Norton AFB	CA	RD/RA	Waste Drum Storage Area # 1	1A			$125
AF	George AFB	CA	RD/RA	Operational Costs JP-4 on Groundwater	1A			$100
AF	Norton AFB	CA	RD/RA	Operational Costs, Central Base Op Unit	1A			$200
AF	Pease AFB	NH	RD/RA	Jet Test Cell	1A			$300
AF	Norton AFB	CA	RD/RA	Underground Waste Oil Storage Tank	1A			$125
	Pease AFB	NH	RD/RA	Ops Costs, Landfill # 5	1A			$2,000
	Norton AFB	CA	RD/RA	Operational Costs, NE Operable Unit	1A			$200
AF	Pease AFB	NH	RD/RA	Bldg # 118	1A			$300
AF	Norton AFB	CA	RD/RA	Land Fill # 1	1A			$100
AF	Mather AFB	CA	RD/RA	AC and W Sites	1A		$600	
AF	Norton AFB	CA	RD/RA	AVGAS Spill Area	1A			$125
AF	Chanute AFB	IL	RD/RA	Bldg # 932 - Sludge Pit and Fire Pit # 2	1A		$1,000	
AF	Norton AFB	CA	RD/RA	Fuel Sludge Area	1A			$2,000
AF	Pease AFB	NH	RD/RA	Land Fill # 5	1A		$400	
AF	Norton AFB	CA	RD/RA	Landfill # 2	1A			$1,250
AF	Norton AFB	CA	RD/RA	IWTP Operable Unit	1A		$2,000	
AF	Norton AFB	CA	RD/RA	Ops Costs, IWTP Operable Unit	1A			$200
AF	Norton AFB	CA	RD/RA	Operational Costs, Central Base Op Unit	1A		$200	
AF	Norton AFB	CA	RD/RA	Landfill # 2	1A			$10,000
AF	George AFB	CA	RD/RA	POL Leach Fld, Waste Burn Pit, Fire Trng Area	1A		$500	
AF	Norton AFB	CA	RD/RA	Fire Protection Trng Area # 2	1A			$125
AF	George AFB	CA	RD/RA	Operational Costs NE Disposal Area	1A		$300	
AF	Norton AFB	CA	RD/RA	Sludge Disposal Area	1A			$2,500
AF	George AFB	CA	RD/RA	Operational Costs NE Disposal Area	1A			$200
AF	Norton AFB	CA	RD/RA	Underground Ferrocyanide Tank	1A			$125
AF	Pease AFB	NH	RD/RA	Bldg # 113	1A			$300
AF	Norton AFB	CA	RD/RA	Ops Costs, Golf Course Operable Unit	1A			$200
AF	Mather AFB	CA	RD/RA	AC and W Sites	1A		$6,000	
AF	Chanute AFB	IL	RD/RA	RD Continues for 5 Sites	1A	$750	$0	$0
AF	Chanute AFB	IL	RD/RA	Pump and Treat at Landfill Sites # 1 thru # 4	1A		$3,000	
AF	Norton AFB	CA	RD/RA	Ops Costs, Golf Course Operable Unit	1A			$200
AF	Norton AFB	CA	RD/RA	NE Base Operable Unit	1A		$1,000	
AF	Norton AFB	CA	RD/RA	S-290 Tank	1A			$150
AF	George AFB	CA	RD/RA	POL Leach Fld, Waste Burn Pit, Fire Trng Area	1A			$100
AF	Norton AFB	CA	RD/RA	Waste Pit # 4	1A			$125
AF	Pease AFB	NH	RD/RA	Fire Training Area # 2	1A		$1,650	$1,350
AF	Norton AFB	CA	RD/RA	Electroplating Shop Spill Area	1A			$125
	Norton AFB	CA	RD/RA	Ops Costs IWTP Operable Unit	1A		$200	
	George AFB	CA	RD/RA	POL Leach Fld, Waste Burn Pit, Fire Trng Area	1A	$200		
AF	Pease AFB	NH	RD/RA	Fire Training Area # 2	1A		$400	
AF	George AFB	CA	RD/RA	JP-4 on Groundwater	1A	$350		
	Sub Total		RD/RA			$2,300	$33,050	$23,225

NAVY BASE CLOSURE/REALIGNMENT
ENVIRONMENTAL RESPONSE ACTIONS
($000)

CLEANUP:

CATEGORY/DESCRIPTION	PRIORITY	LOCATION	STATE	FY 1991	FY 1992	FY 1993
PA/SI	1B	NAVSTA NEW YORK	NY	230	0	0
PA/SI	1B	NAVSTA PUGET SOUND	WA	50	0	0
RD/RA	1B	NAVSTA PUGET SOUND	WA	0	500	0
RI/FS	1B	NAVSTA PUGET SOUND	WA	100	0	0
SI	1B	NAVSTA PUGET SOUND	WA	0	25	0
RI	1A	NAVSTA PUGET SOUND	WA	0	700	500
RI	1A	NAVSTA PUGET SOUND	WA	0	300	0
UNIDENTIFIED	1A	MULTIPLE	VARIOUS	0	1575	0
SUBTOTAL				380	3100	500

MPLIANCE:

RCRA UST	1H	NAVAL HOSPITAL PHIL	PA	150	0	0
TSCA PCB	2H	NAVAL HOSPITAL PHIL	PA	0	0	50
ASBESTOS	3H	NAVAL HOSPITAL PHIL	PA	0	0	11425
RADON	3H	NAVAL HOSPITAL PHIL	PA	0	0	100
WATER (PRETREAT)	3H	NAVAL HOSPITAL PHIL	PA	3	8	0
PROPERTY ASSESSMENT	3H	NAVAL HOSPITAL PHIL	PA	0	0	50
RCRA UST	1H	NAVAL STN BROOKLYN	NY	50	300	0
TSCA PCB	2H	NAVAL STN BROOKLYN	NY	0	0	750
ASBESTOS	3H	NAVAL STN BROOKLYN	NY	0	0	6425
PROPERTY ASSESSMENT	3H	NAVAL STN BROOKLYN	NY	0	0	100
RCRA UST	1H	NAVAL STN PUGET SOUND	WA	0	20	200
RCRA HAZ WASTE FAC UPGRAD	1H	NAVAL STN PUGET SOUND	WA	250	250	0
ASBESTOS	2H	NAVAL STN PUGET SOUND	WA	250	200	3000
UNIDENTIFIED	1H	MULTIPLE	VARIOUS	0	122	0
SUBTOTAL				703	900	22100
TOTAL ENVIRONMENTAL RESPONSE ACTIONS				1083	4000	22600

PA/SI								
AF	Pease AFB	NH	PA/SI	UST Sites	1A	$450		
	Pease AFB	NH	PA/SI	Waste to Energy Plant	1A	$117		
	Sub Total		PA/SI			$567	$0	$0
Other								
AF	Norton AFB	CA	Other	LTM Multiple Sites	1A			$800
AF	Chanute AFB	IL	Other	Long Term Monitoring Pump and Treat	1A			$250
AF	Chanute AFB	IL	Other	On-site RPM Support	1A	$60	$60	$60
AF	George AFB	CA	Other	RPM/Support	1A	$120	$120	$120
AF	Pease AFB	NH	Other	UST Removals	1A	$173		
AF	Pease AFB	NH	Other	Soil Removal after UST Removal	1A	$173		
AF	Norton AFB	CA	Other	LTM Multiple Sites	1A		$650	
AF	George AFB	CA	Other	LTM Abandoned Well	1A	$100		
AF	Norton AFB	CA	Other	On-site RPM Support	1A	$120	$120	$120
AF	Mather AFB	CA	Other	On-site RPM/Support	1A	$120	$120	$120
AF	Pease AFB	NH	Other	On-site RPM/Support	1A	$120	$120	$120
AF	George AFB	CA	Other	Base Wide Work Plan [illegible]	1A	$600		
	Sub Total		Other			$1,586	$1,190	$1,590
Mgt/Mpr								
AF	George AFB	CA	Mgt/Mpr	TDY	1A	$20	$20	$20
AF	Pease AFB	NH	Mgt/Mpr	TDY	1A	$20	$20	$20
AF	Mather AFB	CA	Mgt/Mpr	TDY	1A	$20	$20	$20
AF	Chanute AFB	IL	Mgt/Mpr	TDY	1A	$20	$20	$20
AF	Norton AFB	CA	Mgt/Mpr	TDY	1A	$20	$20	$20
	Sub Total		Mgt/Mpr			$100	$100	$100
	Sub Total		RESTORATION			$28,590	$44,690	$27,415

	Canute AFB	IL	UST Testing/Alids Installation	IH	$25		
	Pease AFB	NH	UST Removal	IH	$200	$200	
	Norton AFB	CA	Audio Visual Service Containment Pond	IH		$200	
AF	Pease AFB	NH	Manpower (GM13 & GS6)	IH	$108	$108	
AF	Canute AFB	IL	Manpower (GM13 & GS6)	IH	$108	$108	$108
AF	George AFB	CA	Tank Testing	IH			$60
AF	Multi		Environmental Services Office	IH	$600	$1,719	$1,014
AF	Norton AFB	CA	UST Removal	IH		$600	$600
AF	Mather AFB	CA	Manpower (GM13 & GS6)	IH	$108	$108	$108
AF	Canute AFB	IL	UST Temporary Closures	IH			$75
AF	Mather AFB	CA	UST Removal	IH		$45	$180
AF	Canute AFB	IL	UST Removal	IH		$300	$300
AF	George AFB	CA	Manpower (GM13 & GS6)	IH	$108	$108	$108
AF	Norton AFB	CA	Manpower (GM13 & GS6)	IH	$108	$108	$108
AF	George AFB	CA	Closure Plan, TSD, FTA, WTP	IH	$130		
	Sub Total		Priority I		$1,495	$3,604	$2,661
AF	George AFB	CA	RCRA Closure of HW Storage Facility	IIH			$100
AF	Norton AFB	CA	DRMO Closure Plan	IIH		$450	
AF	Mather AFB	CA	RCRA Closure Costs	IIH			$500
AF	Mather AFB	CA	UST Management Plan	IIH	$3		
AF	Mather AFB	CA	RCRA Corrective Actions	IIH			$700
AF	Canute AFB	IL	UST Management Plan	IIH	$3		
AF	George AFB	CA	RCRA Closure of Fire Training Area	IIH			$100
AF	Mather AFB	CA	Air Credit Transfer Costs	IIH			$20
AF	Pease AFB	NH	Assessment of Fuel Transfer Lines	IIH			$200
AF	Canute AFB	IL	RCRA Corrective Actions	IIH		$400	
	Sub Total		Priority II		$6	$850	$1,620
AF	George AFB	CA	Oil/Water Separator Closure	IIH		$462	
	Sub Total		COMPLIANCE		$1,501	$4,916	$4,281

DOD 6055.9-STD

DEPARTMENT OF DEFENSE

AMMUNITION AND EXPLOSIVES SAFETY STANDARDS

JULY 1984

ASSISTANT SECRETARY OF DEFENSE
PRODUCTION AND LOGISTICS

CHAPTER 12

REAL PROPERTY CONTAMINATED WITH AMMUNITION AND EXPLOSIVES

A. SCOPE

This chapter contains particular policies and procedures necessary to provide protection to personnel from accidental injury as a result of contamination of DoD real property by ammunition and explosives. It requiries identification and control measures that are in addition to, not substitutes for, those generally applicable to DoD real-property management. Contamination as used in this chapter refers in all cases to contamination with ammunition and explosives.

B. POLICY

1. Every means possible shall be used to protect members of the general public who may become exposed to hazards from contaminated real property currently or formerly under DoD ownership or control.

2. Permanent contamination of real property by final disposal of ammunition and explosives is prohibited. This prohibition extends to disposal by land burial; by discharge onto watersheds or into sewers, streams, lakes, or waterways. This policy does not preclude burial to control fragments during authorized destruction by detonation, or disposal by dumping in deep water in the open ocean when these procedures are authorized by the DoD Component concerned, and compliance with applicable statutes and regulations relative to environmental safeguards is ensured.

3. DoD real property that is known to be contaminated with ammunition and explosives that may endanger the general public may not be released from DoD custody until the most stringent efforts have been made to ensure appropriate protection of the public. Some contamination is, however, so extensive that removal of the hazard is beyond the scope of existing technology and resources. Such properties shall be retained until rendered innocuous.

C. PROCEDURES

1. General. Some DoD real property is contaminated with ammunition and explosives due to its use as manufacturing areas, firing and impact ranges, and waste collection or disposal areas including pads, pits, basins, ponds, streams, burial sites, and other locations incident to such operations.

2. Identification and Control

a. Permanent records, including master planning installation maps, shall identify clearly all areas contaminated with ammunition and explosives, and shall be maintained by each DoD installation. These records shall indicate, to the extent possible, positive identification of the ammunition and explosives contamination by nomenclature, hazard, quantity, and exact locations. If the installation is inactivated, the records shall be transferred to the office designated by the DoD Component concerned to ensure permanent retention.

b. All contaminated locations shall be placarded appropriately with permanent signs that prohibit entrance of unauthorized personnel. These signs shall be multilingual, when appropriate. The DoD Component concerned shall ensure periodically that such signs are restored and maintained in a legible condition.

c. Active firing ranges, demolition grounds, and explosives test areas shall be assumed to be contaminated with unexploded ordnance explosive material and shall be controlled accordingly.

3. Land Disposal

a. Plans for leasing, transferring, or disposing of DoD real property when ammunition and explosives contamination exists or is suspected to exist shall be submitted to DDESB for review and approval of explosive safety aspects.

b. DoD Component correspondence or reports of contaminated excess real property shall state the nature and extent of such contamination, location of contaminated lands and improvements, any plans for decontamination, and the extent to which the property may be used safely without further decontamination.

c. When accountability and control of real property contaminated with ammunition and explosives are transferred among DoD Components, the action shall be accompanied by a like transfer of the permanent records of contamination.

d. Accountability and control of real property contaminated with ammunition and explosives may not be transferred to agencies outside the Department of Defense and the accountability for such contaminated real property shall remain vested in the Department of Defense until the property has been rendered innocuous. By innocuous, it is meant that it is reasonable to assume the real property is not contaminated with live ammunition or explosives to an extent that constitutes an unacceptable risk to the general public. When real property is reported to the disposal agency General Services Administration (GSA) after decontamination, information to indicate the nature and extent of the original contamination and the decontamination methods used shall be enclosed with the report of excess with the requirement that they be entered in the permanent land records of the civil jurisdiction in which the property is located.

e. Limited-use outgrants may be arranged with other federal agencies for compatible use of contaminated real property such as wildlife refuges, safety zones for federal power facilities, or other purposes not requiring entry except for personnel authorized by the DoD Component concerned. These outgrants shall include all restrictions and prohibitions concerning use of the property to ensure appropriate protection of both DoD personnel and the general public.

4. Decontamination Methods and Use Restrictions

a. Surface Clearing. Visual inspection and electronic detection instruments shall be used to locate and remove unexploded ordnance located at or very near the surface. Later use of the real property shall be restricted to activities that do not require excavation of the surface such as wildlife preserves, sanitary land fills, and livestock grazing.

b. Minimum Depth. A minimum depth shall be used where scarifying the area is both possible and allowable. Mechanical procedures such as rake or windrower to a 6-inch depth may be used and followed up with magnet and rock picker. This procedure will clear the area of all metal fragments and unexploded ordnance on the surface or buried within the scarifying depth. Later use shall be restricted to activities requiring minimum disturbance of the surface such as limited agriculture or tree farming.

c. Specified Depth. Unexploded ordnance shall be removed to a depth below which any future soil disturbance is expected to be performed by the general public. Real property decontaminated by this method may be released for unrestricted use to the depth cleared. The reliability of this method is dependent upon:

(1) A determination of the penetration characteristics of the unexploded ordnance known or suspected to be present in the soil to be decontaminated.

(2) Testing of candidate detection instruments in the specific geographical, geological, and physical features present to determine reliable depth of detection for the types of ordnance suspected. An example of such a test is contained in DDESB TR 76-1 (reference (f)).

d. Any clearance certification shall list the known or suspected contaminates, the method of decontamination used, and restrictions, if any, for future use to include maximum safe depth of soil disturbance or excavation.

D. MINERAL EXPLORATION AND EXTRACTION

1. Ammunition and Explosives Facilities.

a. Mineral exploration and drilling activities are to be separated from ammunition and explosives operating and storage facilities by public traffic route explosives safety distances provided there is to be no occupancy of the site by personnel when the exploration or drilling is completed, and by inhabited building explosives safety distances if occupancy is to continue when exploration or drilling is completed. If toxic chemical agents or munitions are present, public exclusion distances must be maintained to the exploration or drilling activities. Examples of exploration activities are seismic or other geophysical tests. Examples of drilling activities are those for exploration or extraction of oil, gas, and geothermal energy.

b. Mining activities are to be separated from ammunition and explosives operating and storage facilities by inhabited building explosives safety distances. If toxic chemical agents or munitions are present, public exclusion distances must be maintained to the mining activities. Examples of mining activities are strip, shaft, open pit and placer mining which normally require the presence of operating personnel.

* 2. Contaminated Lands. Exploration, drilling, and mining are prohibited on the surface of explosives or toxic chemical agent contaminated lands. Exploration and extraction is permitted by directional (slant) drilling at a depth greater than 50 feet beneath the explosives contaminated land surface or by shaft mining at a depth greater than 100 feet beneath such land surface.

* 3. Safety Review of Exploration and Extraction Plans. Military Department approved plans for mineral exploration and extraction on land that is in proximity to ammunition and explosives facilities or land that is contaminated or suspected to be contaminated with explosives must be forwarded to the Chairman, DDESB for safety review and approval. Submission will include information necessary for explosives safety evaluation consistent with subsection C.3. above. Relationships with other PES should be included.

AGENDA
DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE MEETING
KIMBALL CONFERENCE CENTER
1616 P Street, NW
Washington, D.C.

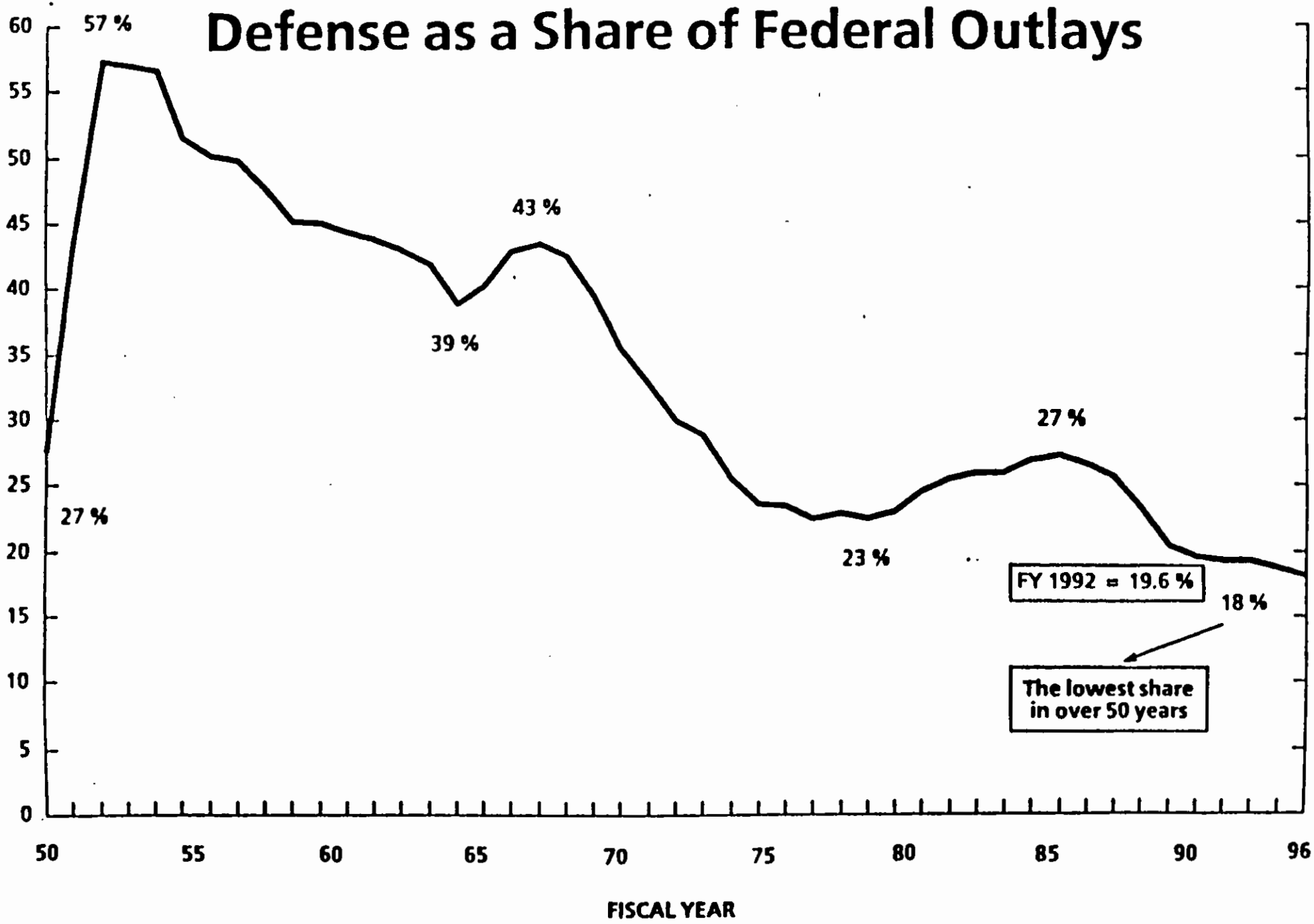
JUNE 19, 1991, 9:00 AM - 4:00 PM

9:00-9:20 a.m.	I.	Chairman's Welcome - Mr. Baca, Members A. Task Force Mission B. Introductions
9:20-9:40	II.	Base Closure Process: Overview - Colonel Hourcle
9:40-10:00	III.	Task Force Procedures - LTC Bryan A. Charter B. Task Force deadlines C. Federal Advisory Committee Act Requirements D. Operating Rules
10:00-10:20	IV.	Environmental Response Process: Overview - (Col. Jackson)
10:20-11:20	V.	Experience to Date: Case Histories A. Panel Presentations: - Pease AFB (Mr. Cheney) - Chanute AFB (Mr. Ayers) - Norton AFB (Col. Walsh) - Fort Meade (Mr. Torissi)
11:20-12:00		B. Task Force Discussion
12:00-1:00 p.m.	LUNCH	
1:00-1:45	VI.	Members of Congress
1:45-3:30	VII.	Discussion of Issue Papers - Staff A. Staff Presentations B. Task Force Discussion
3:30-3:50	VIII.	Next Steps - Mr. Doxey A. Schedule of Task Force Meetings B. Schedule of Report Preparation C. Opportunities for Additional Information Gathering: - field trips D. Task Force Assignments E. Staff Assignments
3:50-4:00	IX.	Closing Remarks - Mr. Baca

Defense

Base Closures

and Realignments


Defense as a Share of Federal Outlays
60
55
50
45
40
35
30
25
20
15
10
5
0
57 %
27 %
39 %
43 %
23 %
27 %
18 %
FY 1992 = 19.6 %
The lowest share in over 50 years
50
55
60
65
70
75
80
85
90
96
FISCAL YEAR

What's at Stake

Reductions in DoD force structure and budget are dramatic

Base Closures and realignments are Integral to a balanced drawdown

By FY 1995:

- **The Army will have 10 fewer divisions**
  - **33% reduction in active divisions**
  - **40% reduction in reserve divisions**

- **The Navy will have 1 less carrier and 2 fewer carrier air wings**
  - **Battle force ships decline by 94 to a total of 451 – a 17% reduction**

- **The Marine Corps will retain its 4 divisions – personnel will decline by 13%**

- **The Air Force will have 10 fewer tactical fighter wings – a 37% reduction**
  - **87 fewer strategic bombers – a decline of 32%**

DoD Personnel
End Strength in Thousands

	FY 1990	FY 1995	% Reduction
Army	751	536	-29%
Navy	583	510	-13%
Marine Corps	197	171	-13%
Air Force	539	437	-29%
	2,070	1,654	-20%
Reserves	1,128	906	-20%
Civilians	1,073	940	-14%

Force Structure

	FY 1990	FY 1995
Army Divisions	28 (18 active)	18 (12 active)
Aircraft Carriers	13	12
Carrier Air Wings	15 (13 active)	13 (11 active)
Battle Force Ships	545	451
Tactical Fighter Wings	36 (24 active)	26 (15 active)
Strategic Bombers	268	181

Why close bases?

- Forces are going to decline dramatically
  - All categories of forces affected
  - Drawdowns from 15% to over 30%
- Workload will decline accordingly
- Too few construction and O&M dollars chasing too many projects

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Conclusion:
We want fewer excellent bases, not a lot of average ones

Recent Base Closure History

- Legislation stopped closures for a decade
- In 1988, Secretary Carlucci and Congress agreed to a Commission which recommended:
  - Closing 86 bases (16 major)
  - Realigning (plus or minus) 59 bases
- 1988 closures and realignments have the force of law
- In 1990, Secretary Cheney tried to close additional bases
  - Old legislation applied
  - Congress charged list was politically motivated

1990 Base Closure Legislation

- Exclusive process for closing or realigning bases
  - Except for actions below thresholds
  - Except for the 1988 closures
- New Base Closure and Realignment Commission
  - 1991
  - 1993
  - 1995
- Defense Management Review studies may be Impacted
- GAO Involved early

A Complicated Process

- Secretary of Defense
  - Proposes selection criteria
  - Develops 6-year force structure plan
  - Recommends closures and realignments
- President
  - Nominates commissioners
  - Approves Commission recommendations
- Congress
  - Confirms commissioners
  - Oversees process and approves final list

Final Selection Criteria

Military Value:

1. The current and future mission requirements and the impact on the operational readiness of the Department of Defense's total force.
2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.
3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.
4. The cost and manpower implications.

Return on Investment:

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

Impacts:

6. The economic impact on communities.
7. The ability of both the existing and potential receiving communities infrastructure to support forces, missions and personnel.
8. The environmental impact.

STATEMENT OF SALVATORE P. TORRISI

BEFORE THE

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

ON THE

FORT MEADE ENVIRONMENTAL RESTORATION ACTIVITIES ASSOCIATED WITH THE BASE CLOSURE PROGRAM

JUNE 19, 1991

STATEMENT OF COLONEL LOUIS M. JACKSON

BEFORE THE

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

ON THE

ARMY ENVIRONMENTAL RESTORATION PORTION

OF THE BASE CLOSURE PROGRAM

JUNE 19, 1991

GOOD MORNING. MY NAME IS LOUIS M. JACKSON. I AM COMMANDER OF THE U.S. ARMY TOXIC AND HAZARDOUS MATERIALS AGENCY (WHICH IS ALSO CALLED USATHAMA). THE USATHAMA IS A FIELD OPERATING ACTIVITY OF THE U.S. ARMY CORPS OF ENGINEERS. THE USATHAMA HAS A SUBSTANTIAL ROLE IN THE MANAGEMENT AND EXECUTION OF THE ARMY'S ENVIRONMENTAL PROGRAM. THE AGENCY IS THE CENTRAL MANAGER FOR THE ENVIRONMENTAL RESTORATION PORTION OF THE ARMY'S BASE CLOSURE PROGRAM.

TODAY, I WILL COVER FIVE BASIC AREAS. FIRST, I WILL IDENTIFY THE INDIVIDUALS AND ORGANIZATIONS WITH PRIMARY RESPONSIBILITIES FOR THE ARMY'S BASE CLOSURE PROGRAM. SECOND, I WILL DISCUSS THE GENERAL POLICIES ESTABLISHED BY THE ARMY FOR ENVIRONMENTAL RESTORATION ACTIVITIES DURING THE EXECUTION OF THE BASE CLOSURE PROGRAM. THIRD, I WILL REVIEW THE PROCESS USED BY THE ARMY AS IT EXECUTES THE ENVIRONMENTAL RESTORATION PORTION OF THE BASE CLOSURE PROGRAM. FOURTH, I WILL SUMMARIZE THE ARMY'S ENVIRONMENTAL RESTORATION ACCOMPLISHMENTS TO DATE IN THE BASE CLOSURE PROGRAM. FINALLY, I WILL DISCUSS THE EXPERIENCE GAINED DURING THE PAST TWO YEARS WHILE IMPLEMENTING THE BASE CLOSURE PROGRAM. THIS ANALYSIS WILL INCLUDE LESSONS LEARNED ABOUT THE PROCESS AS WELL AS AREAS WHERE CONTINUED IMPROVEMENT CAN RESULT IN GREATER BENEFIT TO THE ARMY AND LOCAL COMMUNITIES.

1. RESPONSIBILITIES.

THE SECRETARY OF THE ARMY HAS OVERALL RESPONSIBILITY FOR THE ARMY BASE CLOSURE ACTIONS. ASSISTANT SECRETARY OF THE ARMY FOR

INSTALLATIONS, LOGISTICS AND THE ENVIRONMENT HAS OVERSIGHT AND POLICY RESPONSIBILITIES FOR THE ARMY BASE CLOSURE ACTIONS. THE DIRECTOR OF MANAGEMENT HAS THE EXECUTION RESPONSIBILITY FOR THE MANAGEMENT AND EXECUTION OF ALL REALIGNMENTS AND CLOSURES IN THE ARMY. THE MAJOR COMMANDS WITH ASSISTANCE FROM THE U.S. ARMY CORPS OF ENGINEERS (USACE) ARE RESPONSIBLE FOR EXECUTING THE ENVIRONMENTAL RESTORATION AND CONSTRUCTION MISSIONS.

2. POLICIES.

THE ARMY ENVIRONMENTAL POLICY FOR BASE CLOSURE AT INSTALLATIONS INCLUDES THE GOAL OF CLEANING UP CONTAMINATION TO ALLOW FOR THE UNRESTRICTED USE OF THE PROPERTY AT THE TIME OF TRANSFER.

THE ARMY CONDUCTS THE ENVIRONMENTAL RESTORATION PORTION OF THE BASE CLOSURE PROGRAM IN A MANNER SIMILAR TO ITS INSTALLATION RESTORATION PROGRAM (IRP). ALL IMMINENT THREATS TO LIFE, HEALTH, OR SAFETY ARE REMOVED, CONTAINED, OR ELIMINATED AS QUICKLY AS POSSIBLE. STUDIES ARE USED TO IDENTIFY CONTAMINATION EXISTING AT AN INSTALLATION. IN ACCORD WITH APPLICABLE FEDERAL, STATE, AND ARMY REGULATIONS, ALL ENVIRONMENTAL CONTAMINATION PRESENT ON THE INSTALLATION OR MIGRATING FROM IT IS MONITORED AND CONTAINED OR TREATED TO ACCEPTABLE PUBLIC HEALTH OR ENVIRONMENTAL IMPACT LEVELS.

ON A CASE-BY-CASE BASIS, THE ARMY MAY CONSIDER RELEASING BASE REALIGNMENT AND CLOSURE (BRAC) EXCESS PROPERTY SUBJECT TO LAND USE RESTRICTIONS. IN SOME INSTANCES, THESE RESTRICTIONS COULD BE REQUIRED IN ORDER TO MAINTAIN LONG-TERM REMEDIAL ACTIONS. IN OTHER CASES, IF THERE IS NO IMMINENT THREAT TO HEALTH, SAFETY, OR

THE ENVIRONMENT FROM THE CONTAMINATION, AND THE ESTIMATED COST OF CLEANUP IS GREATER THAN THE ANTICIPATED RECEIPTS FROM SALE OF THE SITE, THE CLEANUP OF THE INSTALLATION MAY BE DEFERRED TO THE DEFENSE ENVIRONMENTAL RESTORATION PROGRAM IN FISCAL YEAR 96 OR BEYOND ON A "WORST FIRST" BASIS. ADDITIONALLY, SOME FACILITIES MAY BE CLEANED AND SOLD IN SEPARATE PARCELS RATHER THAN AS ONE LARGE PACKAGE. WHEN THE RESTRICTIONS ARE ATTACHED TO THE SALE, THE RESTRICTIONS MUST BE COMPATIBLE WITH ACTIVITIES ON NEIGHBORING PROPERTIES AND CONSISTENT WITH THE EXPECTED FUTURE USE OF THE SITE. IN ALL CASES, ANY RESIDUAL CONTAMINANTS AND USE RESTRICTIONS ARE FULLY IDENTIFIED TO THE BUYER.

IN CASES WHERE THE ARMY INSTALLATION IS BEING TRANSFERRED TO ANOTHER FEDERAL AGENCY, THE ARMY TAKES THE LEAD FOR ALL RESTORATION STUDIES AND INVESTIGATIONS. THE COST OF ANY CLEANUP WILL BE NEGOTIATED BETWEEN THE ARMY AND THE GAINING AGENCY.

AS A GENERAL RULE, ALL ENVIRONMENTAL RESTORATION ACTIVITIES NECESSARY TO CLOSE OR REALIGN INSTALLATIONS COVERED UNDER THE BRAC PROGRAM ARE FUNDED USING THE BASE CLOSURE ACCOUNT. ONLY BASE CLOSURE AND REALIGNMENT ACTIVITIES MAY BE FUNDED FROM THAT ACCOUNT. THOSE EXPENDITURES NECESSARY TO MAINTAIN INSTALLATIONS IN COMPLIANCE WITH FEDERAL, STATE, AND LOCAL ENVIRONMENTAL REQUIREMENTS, SUCH AS RCRA AND NPDES PERMITS, COME FROM THE NORMAL OPERATING ACCOUNTS.

IN MANAGING BASE CLOSURE FUNDS FOR ENVIRONMENTAL RESTORATION ACTIVITIES, PRIORITY IS GIVEN TO SITUATIONS WHERE UNACCEPTABLE HUMAN HEALTH OR ENVIRONMENTAL HAZARDS EXIST. ADDITIONALLY, THE ARMY WILL MEET COMMITMENTS MADE TO THE U.S. ENVIRONMENTAL

PROTECTION AGENCY (EPA) AND STATE REGULATORY AGENCIES IN FEDERAL FACILITY AGREEMENTS AND CORRECTIVE ACTION SCHEDULES. FINALLY, ENVIRONMENTAL RESTORATION AT SITES WHERE AN ECONOMIC PAYBACK IS ANTICIPATED WILL BE CONSIDERED.

3. PROCESS.

THE PROCESS FOR CONDUCTING THE ENVIRONMENTAL RESTORATION PORTION OF BASE CLOSURE IS PATTERNED AFTER THE CERCLA AND SARA REGULATIONS.

THE FIRST STEP IS A PRELIMINARY ASSESSMENT. THIS IS A QUALITATIVE EVALUATION OF THE SITE, FOCUSED ON ITS SUITABILITY FOR TRANSFER. DURING THE PRELIMINARY ASSESSMENT, ALL EXISTING RECORDS RELATED TO THE ENVIRONMENTAL CONDITION OF THE SITE ARE EVALUATED TO DETERMINE IF ANY ENVIRONMENTAL HAZARDS ARE PRESENT. A SITE VISIT IS MADE, AERIAL PHOTOGRAPHS ARE EVALUATED TO DETERMINE POTENTIAL AREAS OF CONTAMINATION (SUCH AS STRESSED VEGETATION AND LAND SCARS), AND CURRENT AND FORMER EMPLOYEES ARE INTERVIEWED TO DETERMINE WHERE UNREPORTED DISPOSAL OF HAZARDOUS WASTE MAY HAVE OCCURRED. THE ASSESSMENT INCLUDES BUILDINGS (FOR SUCH THINGS AS ASBESTOS), TRANSFORMERS (FOR PCB'S), AND UNDERGROUND STORAGE TANKS. AS A RESULT OF THESE EFFORTS, POTENTIAL HAZARDOUS WASTE CONTAMINATION SOURCES ARE IDENTIFIED. THIS DOCUMENT IS REVIEWED BY THE INSTALLATION; THE INSTALLATION'S MAJOR COMMAND; THE BASE CLOSURE, ENVIRONMENTAL, AND DIRECTOR OF MANAGEMENT OFFICES AT HEADQUARTERS, DEPARTMENT OF THE ARMY (HQDA); AS WELL AS APPLICABLE ELEMENTS WITHIN THE U.S. ARMY CORPS OF ENGINEERS (USACE). THE PRELIMINARY ASSESSMENT TYPICALLY

CONTAINS RECOMMENDATIONS SUGGESTING FURTHER WORK OR ADDITIONAL INVESTIGATIONS BE CONDUCTED TO CHARACTERIZE THE SITE. IF NO HAZARDOUS WASTE OR OTHER ENVIRONMENTAL IMPACTS ARE IDENTIFIED AT THE SITE WHICH WOULD PRECLUDE TRANSFER OF THE PROPERTY DURING THE PRELIMINARY ASSESSMENT PHASE, THE PROPERTY CAN BE SOLD OR TRANSFERRED. IT TAKES APPROXIMATELY 6 MONTHS TO PREPARE THE PRELIMINARY ASSESSMENT.

AT THOSE INSTALLATIONS WHERE THE PRELIMINARY ASSESSMENT IDENTIFIES SITES WITH KNOWN OR SUSPECTED CONTAMINATION, A REMEDIAL INVESTIGATION/FEASIBILITY STUDY (RI/FS) IS CARRIED OUT. THE RI/FS IS USED TO MORE PRECISELY DETERMINE THE NATURE AND EXTENT OF ENVIRONMENTAL CONTAMINATION. IT IS ACCOMPLISHED THROUGH PHYSICALLY COLLECTING AND TESTING SAMPLES FROM THE SITE. THE DATA OBTAINED IS ANALYZED TO DETERMINE: WHAT HEALTH RISKS MAY EXIST AND WHICH REMEDIAL ACTION ALTERNATIVES MAY EXIST BASED ON A RANGE OF LAND USE SCENARIOS. THE ACTIONS UNDERTAKEN DURING THIS PHASE ARE REVIEWED BY AND COORDINATED WITH EPA AND STATE REGULATORY AGENCIES. CONCURRENCE IS OBTAINED FROM EPA AND THE STATE PRIOR TO INITIATION OF FIELD WORK. EPA AND STATE REGULATORS ARE PROVIDED COPIES OF THE RI/FS DOCUMENTS FOR REVIEW AND CONCURRENCE. THROUGHOUT THE PROGRAM, THERE IS EXTENSIVE INTERNAL ARMY COORDINATION AMONG THE INSTALLATION, MACOM, HQDA, AND USACE. AT THE COMPLETION OF THE FS, A PUBLIC MEETING IS HELD TO REVIEW THE FINDINGS AND TO OBTAIN PUBLIC INPUT. AT THE CONCLUSION OF THE RI/FS IF NO ENVIRONMENTAL CLEANUP IS REQUIRED, THE SITE CAN BE SOLD OR TRANSFERRED. WHEN CLEANUP IS REQUIRED, A RECORD OF DECISION (ROD) WILL BE PREPARED. THE ROD IS COMPRISED

OF THOSE DOCUMENTS SUPPORTING THE AGREEMENT REACHED BETWEEN THE ARMY AND THE REGULATORY AGENCIES ON THE ACTIONS REQUIRED TO MITIGATE THE CONDITIONS IDENTIFIED AT A SITE. THE RI/FS PROCESS CAN TAKE FROM 20 TO 46 MONTHS. EFFORTS ARE UNDERWAY TO EXPEDITE THESE SCHEDULES.

SOME CLEANUP ACTIONS CAN BE ACCOMPLISHED PRIOR TO THE PREPARATION OF A ROD AT THE END OF THE RI/FS. THESE INCLUDE REMOVAL AND CLEANUP ASSOCIATED WITH UNDERGROUND STORAGE TANKS, ASBESTOS CLEANUP, AND ACTIONS ASSOCIATED WITH PCB REMEDIATION. MANY OF THESE TYPES OF ACTIONS ARE BEING ADDRESSED AT BRAC I SITES DURING FISCAL YEAR 91.

A STATEMENT OF CONDITION WILL BE ISSUED WHEN REMEDIAL ACTIONS ARE COMPLETED AND THE SITE IS RESTORED FOR ITS INTENDED END USE. THE STATEMENT OF CONDITION CONSOLIDATES INFORMATION GENERATED DURING THE PRELIMINARY ASSESSMENT, THE RI/FS, AND THE REMEDIAL ACTION PHASE. IT INCLUDES MAPS AND A LEGAL DESCRIPTION OF THE PROPERTY. THIS DOCUMENT BECOMES PART OF THE FORMAL DEED OF TRANSFER WHEN THE PROPERTY IS SOLD OR TRANS- FERRED. THE DEED FOR PROPERTY BEING CONVEYED BY THE ARMY WILL CONTAIN A COVENANT WARRANTING THAT ALL KNOWN REMEDIAL ACTIONS NECESSARY TO PROTECT HUMAN HEALTH OR THE ENVIRONMENT HAVE BEEN COMPLETED. IT WILL FURTHER STATE, IF ADDITIONAL ARMY-CAUSED CONTAMINATION IS LATER FOUND, ITS CLEANUP WILL REMAIN THE RESPONSIBILITY OF THE ARMY. IF THE PROPERTY IS BEING TRANSFERRED TO ANOTHER FEDERAL AGENCY SUBJECT TO LAND USE RESTRICTIONS, WORDING IS PLACED IN THE DEED SO THE PROPERTY WILL REVERT BACK TO THE ARMY IF IT IS NOT USED IN CONFORMANCE WITH THE AGREED UPON LAND USE.

LONG-TERM REMEDIAL ACTIONS SUCH AS GROUNDWATER TREATMENT MAY TAKE MANY YEARS TO COMPLETE. AS A PART OF THE OPERATION AND MAINTENANCE OF ANY REMEDIAL ACTION, MONITORING WILL BE CONDUCTED TO ENSURE CLEANUP GOALS ARE MET. ON A CASE-BY-CASE BASIS, STATEMENTS OF CONDITION MAY BE PREPARED, AND THE PROPERTY MAY BE TRANSFERRED OR SOLD, WHILE CONTAMINATED GROUNDWATER IS STILL BEING TREATED. THIS WOULD BE PERMISSIBLE IN AN AREA WHERE MUNICIPAL WATER IS AVAILABLE AND WHERE GROUNDWATER IS NOT A SOURCE OF DRINKING WATER. ONCE THE ARMY'S GROUNDWATER CLEANUP IS COMPLETED, THE STATEMENT OF CONDITION WILL BE AMENDED.

4. ACCOMPLISHMENTS TO DATE.

THERE ARE 81 ARMY BRAC I SITES WHICH ARE BEING EVALUATED FOR CLOSURE. PRELIMINARY ASSESSMENTS HAVE BEEN COMPLETED FOR 53 OF 53 HOUSING AREAS AND 25 OF 28 INSTALLATIONS. PRELIMINARY ASSESSMENTS WERE NOT PREPARED FOR THE OTHER THREE INSTALLATIONS SINCE THOSE INSTALLATIONS ALREADY HAD ONGOING RI/FS'S UNDER THE INSTALLATION RESTORATION PROGRAM. RI/FS'S ARE CURRENTLY IN PROGRESS FOR 22 OF 28 SITES. NO FURTHER ACTIONS ARE PLANNED AT FOUR FACILITIES UNDER THE BASE CLOSURE PROGRAM. FUTURE ENVIRONMENTAL EFFORTS AT THOSE FACILITIES WILL BE CONDUCTED UNDER THE INSTALLATION RESTORATION PROGRAM.

SIXTEEN OF THE 53 PRELIMINARY ASSESSMENTS FOR HOUSING AREAS INDICATED NO FURTHER ACTION WAS REQUIRED. AN ADDITIONAL 16 HOUSING AREAS REQUIRED FURTHER SAMPLING AND ANALYSIS AND WERE DETERMINED TO CONTAIN NO HAZARDS. AS A RESULT, 700 HOUSING UNITS AT 32 OF THE 53 HOUSING AREAS HAVE BEEN CERTIFIED BY THE ARMY FOR

RELEASE OR TRANSFER, THE REMAINING SITES ARE AT DIFFERENT STAGES OF REMEDIATION.

5. LESSONS LEARNED.

ONE OF THE ISSUES IMPACTING THE PROGRAM HAS BEEN THE BELATED RELEASE OF ENVIRONMENTAL RESTORATION FUNDING FOR THE BASE CLOSURE PROGRAM. IN FISCAL YEAR 91, THE ARMY FIRST RECEIVED FUNDS LATE IN ITS THIRD QUARTER. LATE RELEASE OF FUNDS HAS COMBINED WITH THE AMBITIOUS CLOSURE SCHEDULE TO CAUSE CONSIDERABLE MANAGEMENT PROBLEMS AND SLIPPAGE. THE ARMY'S SCHEDULES IN THIS PROGRAM WILL BE DIFFICULT TO MAINTAIN UNLESS FUNDS ARE RELEASED IN THE FIRST QUARTER OF EACH FISCAL YEAR.

BASED ON OUR EXPERIENCE WITH THE PROGRAM, WE BELIEVE THE APPROACH OF RELEASING INSTALLATIONS IN PARCELS IS POSSIBLE AND DESIRABLE. THIS PERMITS THE ARMY TO GENERATE REVENUE BY SELLING PARCELS AND USING THE RESULTING REVENUE TO HELP OFFSET THE COST OF BASE CLOSURE. THIS CONCEPT HAS BEEN UTILIZED AT FORT MEADE AND WILL BE DISCUSSED DURING MR. TORRISI'S TESTIMONY FOCUSING ON THE FORT MEADE EXPERIENCE. THIS APPROACH WILL ALSO BE CONSIDERED AT OTHER BASE CLOSURE SITES ONCE THE FIELD STUDIES ARE COMPLETED AND UNCONTAMINATED AREAS IDENTIFIED.

OUR IDEAL IN THIS PROGRAM IS TO CARRY OUT ENVIRONMENTAL RESTORATION THAT WILL PERMIT UNRESTRICTED LAND USE. WHEN UNRESTRICTED LAND USE IS NOT POSSIBLE, REUSE OPTIONS SHOULD BE NARROWED EARLY IN THE ASSESSMENT OF THE SITE. THEN THE DATA GATHERING DURING THE FIELD INVESTIGATION PHASE CAN BE TAILORED TO

MEET THOSE NEEDS. THIS WILL RESULT IN A LESS COSTLY PROGRAM AND A FASTER SCHEDULE.

THE ARMY IS CONDUCTING THE BASE CLOSURE ENVIRONMENTAL RESTORATION PROGRAM IN CONFORMANCE WITH CERCLA AS AMENDED BY SARA AND ITS IMPLEMENTING REGULATIONS, AND THE NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN (NCP). AS A RESULT, THE PROGRAM IS CARRIED OUT IN COOPERATION WITH EPA. IN MANY EPA REGIONS, BASE CLOSURE PLANS AND REPORTS, WHICH ARE PROVIDED FOR REVIEW AND COMMENT, DO NOT RECEIVE TIMELY EVALUATIONS. SINCE ARMY POLICY IS TO OBTAIN REGULATORY CONCURRENCE ON THE WORK BEING DONE BY THE ARMY, LACK OF EPA PARTICIPATION CAN SLOW DOWN THE PROGRESS OF THE WORK.

IT HAS BEEN SUGGESTED THAT IN THE FUTURE BASE CLOSURES FOR THE ARMY INTERACT WITH EPA ONLY AT NPL SITES WHERE EPA HAS ACTIVE RESPONSIBILITY. AT OTHER FACILITIES, THE ARMY COULD LIMIT ITS COORDINATION TO THE STATES. THE DEPARTMENT OF DEFENSE AND STATE MEMORANDUM OF AGREEMENT (DSMOA) CAN BE USED TO PROVIDE FUNDS TO STATES TO EXPEDITIOUSLY REVIEW DOD CLEANUP PROJECTS, THUS HELPING TO MAINTAIN OVERALL SCHEDULES.

THE ARMY'S EXPERIENCE TO DATE IS THAT EPA AND STATE REVIEWERS CHANGE SEVERAL TIMES DURING A PROJECT. THIS RESULTS IN MID-COURSE CHANGES IN REGULATORY PHILOSOPHY AND APPROACH. A CONSISTENT APPROACH BY REGULATORY AGENCY REVIEWERS WOULD BE OF GREAT BENEFIT.

SINCE THE BASE CLOSURE ENVIRONMENTAL RESTORATION TIME LINES ARE SHORT, AN EARLY MEETING AT THE START OF THE PROCESS WITH

REGULATORY AGENCIES TO FORMALIZE THEIR REVIEW PROCESS AND PHILOSOPHY IS DESIRABLE.

IN CONCLUDING, I WOULD LIKE TO ADVISE THE TASK FORCE THAT THE ARMY HAS MADE SIGNIFICANT PROGRESS TO DATE IN CONDUCTING THE ENVIRONMENTAL RESTORATION PORTION OF THE BASE CLOSURE PROGRAM. THE ARMY IS DEDICATED TO INSURING THE MAXIMUM NUMBER OF SITES ARE RESTORED AND RETURNED TO THE PRIVATE SECTOR IN A TIMELY MANNER.

THIS COMPLETES MY TESTIMONY.

Possible Litigation Strategies to Prevent the Expedited Transfer of Pease Air Force Base from Federal Government Ownership

Section 8056 of the 1991 Defense Appropriations Act (P.L. 101-511) requires the Air Force to indemnify the State of New Hampshire, its lenders and others from any liability for Air Force releases of hazardous substances at Pease Air Force Base. By indemnifying redevelopers of Pease Air Force Base against certain environmental liabilities, Section 8056 may encourage an expedited transfer of the Federal government's ownership of Pease Air Force Base, which is on the Superfund National Priorities List ("NPL"), 40 C.F.R. Part 300, Appendix B, before completion of the environmental studies and clean-up activities that Section 120 of the Superfund Amendments and Reauthorization Act ("SARA") (42 U.S.C. § 9620) requires at Pease.

A possible conflict between Section 8056 and Section 120 of SARA would be a major element of any legal strategy employed by opponents of an expedited transfer of Pease Air Force Base. Some legal theories that might presented in opposition to a transfer are outlined below.

Opponents of the transfer of Pease Air Force Base out of federal government hands could file a declaratory judgment action in U.S. District Court in New Hampshire under 28 U.S.C. § 2201. The plaintiffs could allege federal question jurisdiction under 28 U.S.C. § 1331 because the case would arise under federal statutes, and based on decisions such as Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, reh'g en banc denied (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989), an environmental organization could successfully

demonstrate standing if some of its members live in New Hampshire and allege injury in fact in the form of a delayed clean-up and an ultimately more degraded environment for a longer period than would be the case absent the expedited transfer. Adjacent landowners to the redevelopment could also demonstrate standing.

The complaint would request a determination that any transfer of Pease before completion of the procedure required at Pease by SARA Section 120, including the conduct of a Remedial Investigation/ Feasibility Study ("RI/FS") and the completion of any required remedial action, violates SARA. The complaint would also request injunctive relief to prevent the Air Force from transferring Pease to non-federal ownership until the Air Force complies fully with the SARA Section 120(e) and (h).

This theory would be premised on the failure of Section 8056 to excuse Pease Air Force Base from compliance with SARA Section 120.[1] Subsection (e) of Section 120 establishes a detailed time schedule under which the Air Force must start the RI/FS within six months of Pease being listed on the NPL, and must begin any required remedial action within fifteen months of RI/FS completion. One result of the mandatory action deadlines under Section 120 is that any required clean-up at Pease is likely to begin sooner during

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[1] The Senate report provision that explains what eventually became Section 8056 of the DoD Authorization Act states that "the indemnification provision [for Pease] in no way is intended to affect the liabilities of either the Defense Department or of any indemnified party under [SARA] . . . ." S. Rep. No. 521, 101st Cong., 2d Sess. (1990).

federal government ownership than would be the case if Pease were not federally owned.

SARA Section 120(h) requires that:

> in the case of any real property owned by the United States on which any hazardous substance was . . . known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain . . . a covenant warranting that all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer . . . .

The plaintiffs would argue that subsections (e) and (h) of Section 120 impose significant additional restrictions and obligations beyond those normally required at NPL sites on the federal government before it can transfer a federal facility on which a release of hazardous substances has occurred. Section 120(h) explicitly requires that the federal government warrant in the deed that it has completed all necessary remedial action before[2] it transfers ownership of any federal facility on the NPL.

The plaintiffs would also argue that any attempt to remove Pease from the scope of Section 120 by transferring its ownership before clean-up could result in a less effective long-term remedial action than if Pease remained subject to Section 120. This position would be based on the federal government's obligation to assure long-term operation and maintenance ("O&M") tasks at federal facilities cleaned

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[2] A necessary precondition to the completion of required remedial action is the selection of the appropriate remedial action through the conduct of an RI/FS.

up under section 120. No such federal obligation exists at former federal facilities, and payment of O&M costs would depend instead on the solvency of the subsequent owner or on the Superfund.[3]

The plaintiffs could also include a claim under Sections 107 and 310 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607 and 9659, for response costs they incurred to investigate the extent of any release of hazardous substances from Pease. Such a claim must be preceded by at least sixty days notice to EPA and the Air Force, and to be recoverable the costs must be incurred consistent with the National Contingency Plan, 40 C.F.R. Part 300. Examples of response costs that the courts have allowed citizens to recover include soil and groundwater sampling and analysis costs. Landowners adjacent to Pease could hire a contractor to drill several wells ($5-10,000), and send samples collected from them to a laboratory for analysis ($3-5000). Another reason that the redevelopment opponents might include a CERCLA response cost recovery claim is because of a recent appellate court decision that allows non-government plaintiffs who bring CERCLA cost recovery cases to collect their attorneys' fees. General Electric Co. v. Litton Industrial Automation Systems, Inc., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 59 U.S.L.W. 3651 (U.S. Mar. 26, 1991).

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[3] This argument would probably fail due to the requirement in Section 8056 for the Air Force to indemnify the beneficiaries against all costs relating to hazardous substances resulting from Air Force activities. This indemnification would likely be interpreted to include O&M costs.

In addition to the statutory claims outlined above, any adjacent landowners who oppose expedited Pease redevelopment could include in their complaint pendant state law claims such as nuisance and trespass if they could demonstrate the migration of contaminated groundwater under their property from Pease. Such a demonstration might be made based on the Air Force's own Preliminary Assessment of Pease under the Defense Environmental Restoration program, or on sampling data collected by the plaintiffs as described in the preceding paragraph.

There may be other non-environmental federal or state law claims that redevelopment opponents could include as well.

From the redevelopment opponents' perspective, litigation of the type described above would be successful if it survived the government's initial summary judgment and dismissal motions, regardless of the ultimate outcome. This is so because the uncertainty created by the pending litigation would be likely to collapse any existing redevelopment financing, and would probably deter any new redevelopment financing. The uncertainty created by the lawsuit would also have the potential to impair the issuance or marketability of any state-issued or -supported bonds for financing.

The substantial legal issues presented by the federal government's transfer of Pease before completion of any required remedial action under SARA Section 120 make it likely that a legal challenge to such action would survive the government's early dispositive motions, resulting in possibly lengthy litigation.

DEPARTMENT OF THE AIR FORCE

PRESENTATION TO

TASK FORCE ON DEFENSE BASE CLOSURES AND REALIGNMENTS

SUBJECT: CASE HISTORY-INTERIM LEASE OF HANGAR 763, NORTON AFB

STATEMENT OF: COL PETER WALSH
DIRECTOR OF ENVIRONMENTAL QUALITY
OFFICE OF THE CIVIL ENGINEER

JUNE 19, 1991

NOT FOR PUBLICATION UNTIL RELEASED

BY THE TASK FORCE ON DEFENSE BASE CLOSURES AND REALIGNMENTS

MR. CHAIRMAN AND MEMBERS OF THE TASK FORCE,

Thank you for the opportunity to present the case history on some of the difficulties we have encountered with regard to interim use of properties at Norton AFB. While the Norton AFB case relates specifically to interim use of properties via lease arrangements, I will also discuss some of the impediments which could prevent the Air Force from permanently conveying properties once the installation is closed in June 1994.

Let me begin by stating that the Air Force is very much concerned about the impact closing our installations will have on the local economy and community. While our mandate is to close installations, our intention is to do so with minimal disruption to the community. Our strategy is to provide a smooth transition of properties to productive, private use as Air Force programs drawdown and are realigned to other bases and as military and civilian employees are moved to support these program transfers. To facilitate this transition, we are accommodating development authorities, where possible, by leasing facilities to them prior to the actual closure of the bases. They in turn can sublease the facilities to private firms that can provide civilian jobs in the community. The overall effect is to create jobs, bolster the local economy, and provide tax revenues prior to the loss of Federal payrolls.

To date, the Air Force has entered into leases with the Inland Valley Development Agency (at Norton AFB) and Pease Development Authority (Pease AFB). Of primary concern today, is the lease the Inland Valley Development Agency has with it's sublessee, Lockheed Commercial Aircraft Center, Inc.; a subsidiary of the Lockheed Corporation.

BACKGROUND

Environmental studies to determine the location and extent of hazardous waste sites on Norton AFB have been ongoing since 1982. Twenty-two sites have been identified. Of primary concern is a plume of trichloroethylene contaminated groundwater which extends across the central portion of the base, including the facilities being leased by Lockheed Corporation. Contaminate levels in this plume range from several parts per billion to as high as 4,600 parts per billion. An interim remedial action to remove and treat this TCE contaminated groundwater will come online this year. A base-wide remedial investigation and feasibility study (RI/FS) is scheduled for completion in September 1992.

Norton AFB was listed on the National Priorities List in July 1987. A three-party Interagency Agreement (Federal

Facilities Agreement) was entered into on June 22, 1989. Parties to the agreement include: the Environmental Protection Agency (Region IX); State of California, Department of Health Services; and the United States Air Force.

CASE HISTORY

Lockheed signed an interim lease for the use of docks 3 and 4 of Building 763 at Norton AFB on July 10, 1990. Lockheed plans to use the hangar to maintain and modify Boeing 747 aircraft. To begin operations, Lockheed obtained a lease for only docks 3 and 4, but intends to secure permanent interests in docks 1 and 2, other hangars and administrative facilities from the Inland Valley Development Authority upon closure of Norton Air Force Base, which is scheduled for June 1994.

Building 763 is a large aircraft hangar used by the Air Force since the early 1960s to repair and maintain cargo aircraft such as C-135s and C-141s. In addition to maintenance on fuel and hydraulic systems, solvents such as trichloroethylene (TCE) have been used for cleaning aircraft parts since the 1970s. A small electroplating shop has also been operated in the northeast corner of Hangar 763 since the

1970s. Historical records, obtained in conjunction with the Preliminary Assessment of Norton AFB, document the spillage of fuels, other petroleum products, trichloroethylene, and heavy metals (such as cyanide and chromium) from electroplating operations onto the floor of Hangar 763 over the past 20 years.

Prior to commencing construction modifications at Hangar 763, Lockheed undertook engineering studies to determine if the concrete floor would support "747" aircraft. In October 1990, foundation borings were taken; the results showed that most of the floor would have to be removed and replaced with 12-14 inches of reinforced concrete.

It was during these engineering investigations that contamination was confirmed beneath the hangar floor. Subsequent environmental studies, conducted during February and March of 1991, showed that soils beneath the concrete floor were contaminated with volatile organic compounds (primarily trichloroethylene and toluene) and heavy metals (primarily cadmium and cyanide). Heavy metal contamination was found to be localized in a small portion of the hangar, while volatile organic compound contamination occurred under most of the hangar floor. The majority of contamination was found within the upper three feet of the soil.

The parties to the Interagency Agreement were first informed of the potential contamination underlying hangar 763 in November 1990 and insisted that any actions the Air Force may take with regard to removal of contaminated soils be conducted in accordance with the Interagency Agreement and consistent with the National Contingency Plan (NCP).

Section 300.415 of the National Contingency Plan addresses removal actions and establishes the criteria to be used to determine the type of removal action allowed. Three types of removal actions are discussed: (1) emergency; (2) time-critical; and (3) non-time-critical. The type of removal action to be undertaken depends upon the estimated cost and time to complete the removal and imminent or potential threats to human health or the environment.

As a general rule, emergency removals are conducted as soon as a release is discovered and require minimal coordination with Federal and State regulatory authorities; time-critical removals are conducted within 2-3 months following discovery; and non-time-critical removals can take as long as 8-12 months to complete. Lockheed had planned to complete the modifications to Hangar 763 at least by December 1990 to meet obligations made to a major client. A non-time-critical removal would not be completed in time to meet these commitments.

After considerable deliberation and consultation with the EPA and the California Department of Health Services, the Air Force decided to conduct a time-critical removal action to remove the known levels of contaminated soil underlying Hangar 763 immediately. That decision was taken in order to protect workers in the hangar from ill effects of air venting of the contaminants, to prevent further spread of the contaminants by water seeping down through broken areas of the hangar floor pavement, and to expedite Lockheed's ability to lay the new floor and commence its new operations there.

However, both the Environmental Protection Agency and the State of California, Department of Health Services had specific reservations as to whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the applicable National Contingency Plan regulations allowed a removal action to be undertaken primarily for purposes of facilitating reuse activities. They refused to issue formal "approvals" of the action, though they concurred with the technical aspects of the removal and expressly agreed not to oppose it legally. The Air Force was left to authorize that removal action pursuant to its own decision-making authority under the Defense Environmental Restoration Program (Superfund Amendments and Reauthorization Act) and Executive Order 12580

which delegates to the Department of Defense many CERCLA authorities of the President with regard to contamination which is on military installations or emanating from them.

This "do it at your own risk" situation is not a comfortable one, and the Air Force in the future could find such removal action proposals opposed by either regulatory agencies or citizen groups. We believe that authoritative guidance from Headquarters EPA addressing and clarifying this issue will go far in expediting cleanups and property conveyances at closing installations.

Having to independently take removal actions to cleanup surface contamination is only one difficulty we have encountered in trying to facilitate transfer and reuse of properties. There are at least three other difficulties which are seriously hampering our ability to convey property at Pease Air Force Base and which could hamper property conveyances at Norton Air Force Base if not resolved soon.

1. In the past, the Environmental Protection Agency has opted to list entire military installations on the National Priorities List. While this was done to optimize the

management of cleanup activities within the installation boundaries, it has effectively slowed-down cleanups by invoking the requirements in CERCLA for the Air Force to enter into Interagency Agreements and to strictly adhere to the National Contingency Plan. The coordination and oversight processes contained in these agreements are inordinately time consuming and cumbersome. Review of documents, regardless of their technical content and complexity, typically takes 60 days with a 30 day automatic extension, if requested. As much as one-third of the time it takes to reach a Record of Decision on a Remedial Investigation and Feasibility Study is due to reviews and agency coordination.

EPA's decision to list entire installations on the NPL has effectively prohibited the parceling and transfer of clean properties until all contaminated sites are cleaned-up. An alternative approach would be to list only the areas of contamination allowing the uncontaminated parcels to be conveyed without delay.

The emphasis in the National Contingency Plan has been on conducting removal actions which are necessary to protect human health and the environment. As discussed in the Norton Air Force Base-Hangar 763 Case History, this focus has impeded our ability to accomplish removal actions specifically for the purpose of conveying property.

2. Currently, there are two separate processes, administered by separate offices within EPA, which govern the cleanup of hazardous waste sites on an installation: (1) those covered by the corrective action process required by specific sections of the Resource Conservation and Recovery Act; and (2) those covered by the remedial action process required under CERCLA. These overlapping processes could be rolled into one to attain greater program management consistency while, at the same time, optimizing both EPA and Air Force staff time and resources.

3. Presently, EPA and State authorities hold a very restrictive interpretation of CERCLA Section 120 (h)(3) which effectively prohibits transfer of properties until all remedial actions necessary to protect human health and the environment have been taken. In the case of groundwater contamination, completed remedial actions could take years or several decades. House Resolution 2179, recently introduced into the Congress, seeks to resolve this dilemma by clarifying the statutory language to include remedial actions which have been commenced on the property.

Impediments 1 and 2 could be resolved by clarifying regulations or guidance; impediment 3 appears to resolvable only by a statutory change to CERCLA.

In conclusion, the Norton Air Force Base case history you asked that we address today deals with the difficulties we have encountered in trying to modify facilities under an interim lease arrangement when there is known contamination on or under the property. The Air Force can employ its removal authority under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act but it does so on its own and at risk of alienating the other parties to the Interagency Agreement. We would prefer to work in a cooperative, but expeditous manner with the Environmental Protection Agency and appropriate state regulatory authorities to reach a mutually satisfactory approach to these removal actions.

However, a more important issue is how the Air Force will be able to convey properties expeditiously when they are known to be contaminated on the surface or in underlying groundwaters. Until the questions of whether uncontaminated properties on National Priorities Listed sites can be transferred and whether Section 120 (h) really requires that all remedial actions be completed, the Air Force will be prevented from conveying properties in an expeditious manner.

Good morning, I am Salvatore Torrisi, Chief of the Base Closure Division for the U.S. Army Toxic and Hazardous Materials Agency. My testimony today will focus on the environmental restoration activities conducted at Fort Meade as part of the Army's Base Closure Program.

Under the Base Closure and Realignment Act of 1988, Fort Meade was slated for realignment and partial closure with 9,000 acres being excessed.

Fort George G. Meade is a permanent Army installation located on 13,670 acres in Anne Arundel County, Maryland between Baltimore and Washington D.C. The northernmost one-third of the installation, referred to as the cantonment area, contains administrative, recreational and housing facilities; the remaining portion serves mainly as a firing/combat range and training areas with minimal maneuver areas. Currently Fort Meade provides support and services for about 65 Department of Defense tenant activities and organizations. The major tenants are the National Security Agency (NSA); Headquarters, First Army; Army Intelligence and Security Command; Naval Security Group; and the 6940th Electronic Security Wing (U.S. Air Force). In addition, Fort Meade provides range and training support for other units of the armed services. The 9,000 acre base closure parcel consists of the firing/combat ranges and training area south of the cantonment area, Tipton Army Airfield, the active sanitary landfill, a sewage lift

station, an Ammunition Supply Point and potable water supply wells.

Prior to 1988, the Army was conducting remedial investigations at the active sanitary landfill and the clean fill area as part of the Fort Meade installation restoration program. The Army began its base closure environmental restoration evaluation by conducting a Preliminary Assessment of the 9,000 acre property. The purpose of the assessment was to identify all potentially contaminated areas requiring further environmental investigation and possible remediation prior to the release of the property, and to identify all areas where there is no contamination. The Preliminary Assessment was completed in October 1989. The areas requiring further investigation consist predominantly of former and existing landfills and former artillery impact areas. Plans to conduct additional environmental investigations at Fort Meade based on the Preliminary Assessment were finalized and approved by Region III of the U.S. Environmental Protection Agency, and by the Maryland Department of Environment in September 1990. The plans address the evaluation of potential risks from chemical contamination. A site investigation of those sites identified in the Preliminary Assessment was conducted. Both the Remedial Investigation Report for the active sanitary landfill and clean fill area and the Site Investigation Report are expected to be completed by December 1991. At this time, the site investigation report may identify a need for additional studies at the base closure areas evaluated. This effort will subsequently be

further environmental (chemical) investigation were limited to a few areas, no property could be immediately released without additional study since there was the potential for unexploded ordnance to be present throughout the entire 9,000 acres. The Army proposed a three phased approach for releasing property at Fort Meade. This three phased approach was designed to incrementally parcel the property based on the relative likelihood of the presence of unexploded ordnance.

At Fort Meade, the westernmost part of the installation was considered the least likely to contain unexploded ordnance. Selection of this tract would have had the added benefit of releasing the land most preferred for development first, thus bringing in income to finance base closure activities.

USATHAMA requested input from the Corps of Engineers Real Estate Directorate for assistance in determining the parcel boundaries. Specifically, a parcel should contain appropriate access and features which make it salable. Once an ordnance survey has been performed on a parcel and a Statement of Condition approved, that parcel could be released while an ordnance survey would begin on the next parcel.

This three phased parcelling concept was ultimately overtaken by events when the Fiscal Year 1991 Military Construction Appropriations Act directed the transfer of 7,600 acres of the 9,000 acres to the Department of Interior. DOI will add this tract to the neighboring Patuxent Wildlife Research Center.

Transferring the property to the Department of Interior for wildlife and surface use only will require only a surface ordnance survey that should cause minimal impact to vegetation and wildlife in the area.

Major issues that have arisen during the Fort Meade base closure environmental restoration program are as follows:

1. Establishing the extent and degree of the ordnance survey. Since past records describing impact areas and caliber of munitions utilized are either nonexistent or difficult to reconstruct, it is difficult to determine both the area and depth of ordnance clearance required.

2. Estimating the cost of conducting an ordnance survey while knowing the cost is dependent on the amount of unexploded ordnance recovered. As I just mentioned, at Fort Meade, this information is very limited.

3. Reconciling the potential need to clear densely wooded areas of Fort Meade in order to conduct ordnance surveys, with the desire to minimize the adverse impacts vegetation clearance would pose in this environmentally sensitive area.

4. Establishing the logistics and parameters for conducting an ordnance survey in the large area of wetlands found at Fort Meade. Both technical feasibility and regulations protecting

wetlands had to be considered. Agreement has been reached that an ordnance survey will be conducted in wetlands which are traversable by foot. No survey will be conducted in wetlands that are not traversable by foot.

5. Resolving the conflict between the Department of Defense Regulation 6055.9 which governs the transfer of property contaminated with unexploded ordnance, and the Fiscal Year 1991 Military Construction Appropriations Act which directs the transfer of 7,600 acres to the Department of Interior by September 1991. Department of Defense Regulation 6055.9 states "Accountability and control of real property contaminated with ammunition and explosives may not be transferred to agencies outside the Department of Defense and the accountability for such contaminated real property shall remain vested in the Department of Defense until the property is rendered innocuous. By innocuous, it is meant that it is reasonable to assume real property is not contaminated with live ammunition or explosives to an extent that constitutes an unacceptable risk to the general public." This issue is being addressed by Headquarters, Department of Army and the Office of the Secretary of Defense.

6. Clarifying the uncertain future of the 1,400 acre parcel not subject to transfer to the Department of the Interior. The uncertain future use of this 1,400 acres may result in an inefficient use of base closure funds by the Army. Under current policy, the Army will prepare and conduct a surface and subsurface

ordnance survey in order to release the land without land use restrictions. Meanwhile, the local Coordinating Council has recommended this tract also be subjected to use restrictions similar to those in the lands to be added to the Patuxent Wildlife Research Center. If, at a later date, it is indeed decided this property too, will be released for restricted surface use only, the money spent in expensive subsurface ordnance surveys would have been wasted. An early decision concerning the ultimate use of this acreage would be helpful.

In conclusion, the environmental portion of base closure program is a complex process which is not easily separated from socio-economic issues and is an integral part of these activities. It has been a challenge to assure all environmental and regulatory issues have been properly addressed. The Fort Meade project will be an even greater challenge to complete in a manner which satisfies local community concerns while simultaneously achieving maximum return on investment by the Army. The Army has restored property at other locations and sold it for local beneficial use. It is not easy, but it can be done.

This completes my testimony.

STATEMENT OF REPRESENTATIVE RAY

TO

ENVIRONMENTAL RESPONSE TASK FORCE

I appreciate the opportunity to appear before the Base Closure Environmental Response Task Force this afternoon to provide my views on base closure environmental issues and how they might be addressed.

Last year, I strongly supported Congressman Fazio's efforts to establish this Task Force as part of a legislative strategy to make base closure environmental activities more visible to Congress and provide a dedicated source of funds to support these activities.

Two years ago, the Environmental Restoration Panel held a hearing on Department of Defense base closure environmental issues -- the first of its kind in Congress. At that time, we learned that DoD did not know very much about environmental issues affecting base closure. We also found that DoD had not factored environmental considerations into its base closure decision making process. Lastly, it became clear that DoD did not have a very realistic estimate of the costs associated with environmental compliance and cleanup activities related to base closure.

Obviously, DoD's awareness of the environmental aspects of base closure has significantly improved since that panel hearing, but more needs to be done and this Task Force can play a major role in that process. I believe the Task Force's most important contribution would be to identify ways to cut through the red tape to expedite the characterization and cleanup of hazardous waste sites at closed bases. The conflict and overlap between federal, state, and local laws and regulations make cleanups at DoD bases among the most complex and difficult in the nation. Moreover, the mutual suspicion and misunderstanding between the regulators and DoD personnel complicate efforts to sort these issues out in a timely fashion. In addition, DoD procurement regulations, contract procedures, and funding requirements are often inconsistent with expedited cleanup efforts.

Having a cleanup at an active DoD installation get bogged down in bureaucratic bickering is regrettable, to allow the same thing to happen at a closed base would be nothing short of tragic. It would delay the availability of the property for alternative uses at a time when the community is feeling the most severe economic hardship because of base closure. It would be even more tragic because I know what can be accomplished when all parties start to pull together. This year I have assisted in the negotiation of supplemental agreements at national priority list sites at two Georgia bases. These agreements are expected to reduce cleanup schedules in the existing federal facility agreements by months or years, without lowering the quality of the cleanup itself. With your permission, I would like to provide a copy of the Robins Air Force Base agreement for the record. The situation at closed bases for expedited cleanups is even more promising because the need for quick action is recognized by all

parties and there is a greater receptivity to innovation and responsible risk taking.

The Task Force has a tremendous opportunity to recommend innovative ways to work through current statutory and regulatory requirements, and foster improved cooperation between Dod and the regulators to streamline base closure cleanups. Another major issue that I think needs to be looked into carefully is the legal problems associated with the expedited transfer of land at base closure NPL sites. Reviewing the closure, cleanup and transfer of property at Pease and Norton Air Force Bases highlighted the importance of this problem. Because the Environmental Protection Agency has designated all of the property contained in these bases as NPL sites, there is concern that all of the property would have to be cleaned up before any land could be transferred.

Equally troubling, it is not clean whether "uncontaminated" portions could be carved out for expedited transfer and reuse, or that there could be surface leasing of areas affected by sub-surface groundwater contamination.

We have consulted with some Superfund lawyers and the attached paper that they have provided suggests that current law provides a litigation lighting rod over these base closure NPL sites about the size of the Washington Monument. Any individual or group who is unhappy about the cleanup or land reuse plan of these base closure NPL sites can mount a strong legal challenge that would seriously complicate efforts to attract developers or lenders. The whole thing could be tied up in court for months or years while the community suffers.

As a result, I have introduced legislation, H.R. 2179, that would amend Section 120(h) of the Superfund Amendments and Reauthorization Act to provide for the expedited cleanup and transfer of base closure NPL sites. Since I have introduced this legislation, the number of communities that might be affected by this problem has grown from 5 to 14, and this total is bound to grow when the next two Base Closure and Realignment lists come out.

It would be very useful to the Panel and Congress if the Task Force could look into this issue and suggest ways of addressing it administratively or legislatively.

In addition, I think it would be worthwhile for the Task Force to provide its recommendations on the role of communities in making land transfer decisions that involve environmental issues.

Another major consideration by the Task Force would be to identify any other base closure related environmental issues that are unique and deserve special consideration. Over the past two years, we have become aware of the cleanup and land transfer issues, but I am sure that there are a number of other environmental issues that need to be addressed to facilitate the timely

closure and economic reutilization of current and future base closure candidates. The sooner Congress becomes aware of these problems, the sooner it can deal with them.

In closing, I want to again express my appreciation to the Task Force for being invited to appear this afternoon. I look forward to the Task Force's report and believe its findings and recommendations will materially assist the Department of Defense and Congress in dealing with environmental issues associated with base closure and realignment actions. I also want to assure the Task Force that the Environmental Restoration Panel will be happy to assist your efforts in any way it can. We all want to address environmental issues in a way that will minimize the economic dislocation and hardship of communities affected by base closure. Working together, I think we can reconcile environmental requirements with the needs of these communities.

102D CONGRESS
1ST SESSION

H. R. 2179

To amend provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to Federal property transferred by Federal agencies.

IN THE HOUSE OF REPRESENTATIVES

MAY 1, 1991

Mr. RAY (for himself, Mr. FAZIO, and Mr. MATSUI) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and Armed Services

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A BILL

To amend provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to Federal property transferred by Federal agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TRANSFERS OF CERTAIN FEDERAL PROPERTY UNDER SUPERFUND.

(a) NOTICE.—(1) Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) is amended in paragraph (1) by striking out "any contract for the sale or other transfer of real property" and inserting in lieu there-

of the following: "any contract for sale of, any lease of, any grant of easement on, or any written agreement for other transfer of, real property".

(2) Section 120(h) of such Act is further amended in paragraph (1) by striking out "such contract" and inserting in lieu thereof "such contract, lease, grant, or agreement".

(b) REMEDIAL ACTION REQUIRED.—(1) Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) is amended in paragraph (3)(B)(i) by—

(A) striking out "all"; and

(B) inserting after "has been taken" the following: "in accordance with paragraph (4)".

(2) Section 120(h) of such Act is further amended by adding at the end the following new paragraph:

"(4) REMEDIAL ACTION REQUIRED.—For purposes of paragraph (3)(B)(i), remedial action necessary to protect human health and the environment has been taken on the property if one of the following conditions exist:

"(A) Remedial action has been completed on the property.

"(B) No remedial action is required on the property.

"(C)(i) Remedial action has been commenced on the property with respect to any hazardous substance remaining on the property;

"(ii) the deed entered into for the transfer of such property contains clauses (I) assuring access to the property so that any further remedial action required can be taken, and (II) limiting the use of such property to uses that would be consistent with the protection of human health and the environment; and

"(iii) the United States agrees to continue diligently carrying out any further required remedial action on the property until all remedial action has been completed.".

(c) AUTHORITY TO REMOVE HAZARDOUS SUBSTANCE.—Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) is further amended by adding at the end the following new paragraph:

"(5) REMOVAL.—For purposes of attaining a condition described in paragraph (4), the President, acting through the head of any department, agency, or instrumentality of the United States, may remove or arrange for the removal of, under section 104(a)(1), any hazardous substance on real property

subject to this subsection, regardless of whether an imminent and substantial danger to the public health or welfare or the environment exists.".

(d) AUTHORITY TO SUBDIVIDE AND LEASE FEDERAL PROPERTY.—Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) is further amended by adding at the end the following new paragraph:

"(6) AUTHORITY TO SUBDIVIDE AND TRANSFER FEDERAL PROPERTY.—(A) For purposes of this subsection, in the case of real property which is subject to this subsection, the head of the department, agency or instrumentality with jurisdiction over the property may subdivide the property for purposes of sale, lease, grant of easement, or other transfer in accordance with this paragraph. Such real property may be subdivided regardless of whether the property is listed as a site on the National Priorities List.

"(B) In the case of a parcel of property subdivided out of such real property, the head of the department, agency, or instrumentality may sell, lease, grant an easement, or otherwise transfer the parcel in accordance with this subsection and other provisions of Federal law relating to Federal property sales or transfers.".

SEC. 2. ENVIRONMENTAL RESTORATION ON CERTAIN MILITARY INSTALLATIONS UNDER REVISED SUPERFUND LAW.

(a) REPORT.—Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress a report on the manner in which the Department of Defense plans to carry out environmental restoration activities on military installations described in subsection (b) to take into account the amendments made by section 1 of this Act.

(b) MILITARY INSTALLATIONS.—The military installations referred to in subsection (a) are the military installations to be closed pursuant to title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note), pursuant to the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510), or otherwise by the Department of Defense.

O

IT IS SO AGREED:

3/22/91
DATE

GARY D. VEST, Deputy Assistant
Secretary of the Air Force
(Environment, Safety and
Occupational Health)

3/22/91
DATE

CHRISTIAN R. HOLMES, Deputy
Assistant Administrator for
Federal Facilities Enforcement

3/22/91
DATE

For RICHARD F. GILLIS
Major General, USAF
Commander, WR-ALC

3/22/91
DATE

JOE D. TANNER, Commissioner
Georgia Department of
Natural Resources

3/22/91
DATE

PATRICK TOBIN, Deputy
Regional Administrator
United States Environmental
Protection Agency Region IV

STAFF ANALYSIS OF H.R. 2179

This is in response to the Task Force's June 19 request for the views of the staff on H.R. 2179, 102nd Congress, a bill "To amend provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 relating to Federal property transferred by Federal agencies."

Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires a Federal agency to provide notice of hazardous substance storage, release or disposal on real property in the contract and in the deed for the sale or other transfer of the property. It also requires a covenant in the deed that all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of the transfer.

H.R. 2179 would amend Section 120(h) to: clarify what property transfers it applies to; clarify when remedial action has been taken; clarify the ability to use removal actions; and clarify the authority to subdivide and transfer property whether or not it is on the National Priorities List. It also requires a Report to Congress, within 30 days of enactment, on the manner in which the Defense Department plans to carry out environmental restoration activities on military installations to be closed under the Base Closure and Realignment Acts or otherwise.

This legislation would improve DoD's ability to transfer property which poses no health or environmental threat to the local community that we believe enhance local redevelopment without diminishing DoD's responsibility to clean up contamination from hazardous substances.

The full benefits of clarification of broader authority for removal actions to expedite necessary cleanups would be constrained by the CERCLA time and dollar limits on removal actions. We believe that, for Federal agency removal actions, the limits should be site related, not arbitrary administrative limits developed to manage Superfund.

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE: ISSUES
Working Draft
June 13, 1991

As revised by the Defense Environmental Response Task Force at its meeting of June 19, 1991

(Task Force additions appear in italics)

Congress charged the Defense Environmental Response Task Force with making findings and recommendations on two categories of issues relating to environmental response actions at bases that are being closed: a) ways to improve interagency coordination; and b) ways to consolidate and streamline the practices, policies, and administrative procedures of relevant federal and state agencies in order to expedite response actions. Congress specified that the Task Force make recommendations within existing laws, regulations and administrative policies. The Task Force Charter provides that the Task Force may also recommend changes to those laws, regulations and policies. To assist the Task Force in its deliberations this paper identifies specific issues for potential consideration within the broad framework of the Charter.

ISSUE #1

STATEMENT OF ISSUE

a) **To what extent may facilities on closing bases be used by non-military users while cleanup investigations or other cleanup activities are being undertaken by the Department of Defense (DoD)?**

b) **To what extent may DoD transfer a base in parcels that exclude areas where ongoing remediation is necessary? How should such parcels be delineated?**

c) **To what extent may existing or proposed land uses be a factor in cleanup decisions:**

   i. **if the site is on the National Priorities List (NPL)?**

   ii. **if the site is regulated under the Resource Conservation and Recovery Act (RCRA)? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

d) **To what extent may the practices, policies and procedures for determining allowable uses of the land during and after the completion of remedial action be consolidated and streamlined:**

   i. **if the site is on the NPL?**

   ii. **if the site is regulated under the RCRA? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

BACKGROUND

Statutory Requirements

Environmental Restoration

The Comprehensive Environmental Response, Liability, and Compensation Act ("CERCLA"), 42 U.S.C. §§9601-75, and the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA),

§§42 U.S.C. 6901-6992K, are the principal federal statutes governing the cleanup of defense sites contaminated by hazardous substances. CERCLA §120 specifically addresses the responsibilities of federal agencies. Under CERCLA §120(a), federally owned facilities are subject to and must comply with CERCLA to the same extent as nongovernmental entities. In addition, 10 U.S.C. §2701(a)(2), specifically notes that environmental restoration activities must be conducted consistent with and subject to CERCLA §120. Section 120(a) requires EPA to use the same criteria to evaluate federal sites for the National Priorities List (NPL), the list of highest priority sites under CERCLA, as it does for private sites. EPA interprets §120(a) to mean that the criteria to list federal facilities should not be more exclusionary than the criteria to list non-federal sites. See EPA, Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10525 (Mar. 13, 1989).

CERCLA also establishes certain minimum procedures that must be followed when federal agencies transfer contaminated property. Section 120(h)(3) of CERCLA provides that when the federal government transfers real property on which any hazardous substance was stored for one year or more, or known to have been released, or disposed of, the federal government must provide a covenant in the deed. The covenant must warrant that all remediation necessary to protect human health or the environment with respect to any hazardous substance remaining on the property has been taken before the date of the transfer, and that the United States will take any additional remedial action found to be necessary after the date of transfer.

Some entire bases are listed on the NPL, including five on the 1988 closure list. In other cases, only a discrete site within the base is listed on the NPL. There are

contaminated sites on other bases, that are not listed on the NPL. CERCLA §120(a)(4) requires response actions on non-NPL sites to comply with state laws to the extent that state laws apply equally to response actions at non-federal facilities. Some bases contain facilities currently regulated under RCRA or state hazardous waste regulatory programs (or both); these facilities will need to be closed in accordance with those statutes. HSWA requires a treatment, storage, or disposal facility (TSDF) that has released hazardous waste into the environment to undertake "corrective action" to clean up the release. Where a base, or portion of a base, is both listed on the NPL and subject to state-delegated RCRA authorities, conflicts may arise regarding a particular proposed remedial action.

Transfer of Land

Other statutory authorities also apply to real estate owned by military departments that must be considered in the context of transferring land at a base that is being closed. Section 204(c) of the Base Closure Act, for example, reiterates that the National Environmental Policy Act (NEPA) applies to the actual closure or realignment of a facility and the transfer of functions of that facility to another military installation. Other statutes impose procedural requirements; 10 U.S.C. §2662(a), for example, provides that the Secretary of a military department may not enter into certain real estate transactions, including leases and other transfers of property where the value exceeds $200,000, until 30 days after he has submitted a report of the facts surrounding the transaction to Congress. Title 10 of the United States Code, §2668(a), authorizes the Secretary of a military department to grant easements for roads, oil pipelines, utility substations, and other purposes including "any ... purpose that he considers advisable."

Under the Base Closure Act and the Federal Property and Administrative Services Act, a federal agency receiving property from another federal agency must pay the estimated fair market value for available facilities. See Federal Property and Administrative Services Act, 40 U.S.C. §571 et seq.; Section 204(b) of the Base Closure Act, Pub. L. 100-526, 102 Stat. 2627; Federal Property Management Regulations, 41 C.F.R. §§101-42 to -49. Exceptions to this general rule are allowed for intra-DoD transfers of real property and if the Administrator of the General Services Administration and the Director of the Office of Management and Budget both agree. 41 C.F.R. §101-47.203-7. Regulations implementing this exception allow no-cost transfers for certain specified purposes including public parks and recreation areas; historic monuments; public health or educational purposes; public airports; and wildlife conservation. Id. In addition, the McKinney Act, 42 U.S.C. § 11411, requires DoD to give non-profit organizations that assist the homeless priority in leasing unutilized and underutilized property.

Section 204(b) of the Base Closure Act requires the Secretary of the military department contemplating a property transfer to consult with state and local governments to consider any plan for the use of the property that the local community may have. Pub. L. 100-526, 102 Stat. 2627. States and local governments are generally given priority over private individuals in acquiring surplus federal property. 41 C.F.R. §101-47.203-7.

Issues Surrounding Transfers and Conveyances

Some bases identified for closure contain facilities that are in demand for non-military use. DoD may desire to lease, or otherwise transfer use of, such facilities to non-military users before the base is closed. In some cases the facility may be within an "area

of concern" identified by DoD as needing either investigation to determine the need for environmental restoration or actual restoration. The U.S. Environmental Protection Agency (EPA) and state environmental regulatory agencies will have different interests in the site depending on the state of knowledge about the site, the regulatory posture at the site, and the stage of the investigation or restoration. It may be necessary to limit or restrict the non-military use in order to ensure that it does not interfere with the ongoing investigation or cleanup. Differing controls or limitations on interim use of facilities may be appropriate during the phases of investigation and restoration.

The procedures for determining interim and final uses of the affected land are likely to differ depending on whether the cleanup is conducted under CERCLA, RCRA, or some other framework. In addition, the intended interim or final use of the land may or may not be a valid consideration in determining cleanup standards, depending on which of these statutes governs the cleanup decision. The extent to which planned land uses affect cleanup decisions is likely to be highly controversial. If higher levels of residual contamination are allowed after cleanup because, for example, the planned use is industrial, measures must be taken to ensure that future changes in land use do not expose the public to unacceptable risks from the residual contamination.

Contamination on many bases is limited to relatively small discrete areas. One issue raised in such cases is whether the uncontaminated areas may be transferred as separate parcels, with the Department retaining the contaminated areas until remedial action is completed.

A corollary issue is how to define a contaminated area, particularly where groundwater may be contaminated and the extent of that contamination (i.e., size, direction of flow, and speed of the plume) is unknown. It may be difficult to determine precisely the boundaries of an "area of concern" prior to completion of cleanup. Another related question is whether, and under what circumstances, DoD may transfer uncontaminated surface above contaminated groundwater, or contaminated surface above contaminated groundwater for which surface remediation is complete. Also, the issue of defining and transferring uncontaminated areas is complicated by the fact that activities during the remedial design and remedial action could reveal that contamination extends to an area that had already been transferred by easement, lease, or some other land use transfer mechanism.

Restrictions such as prohibitions on well drilling or other subsurface activity (if subsurface contamination is an issue) may be appropriate. DoD could also sell or otherwise transfer parcels of property with a right of entry for monitoring or with other use restrictions. How restrictions are implemented will be critical to the protection of public health and safety, success of the cleanup, and resolution of future conflicts between the military department and its transferees. Restrictions on use are effective if they are made a part of the deed and "run with the land" so that later owners cannot extinguish or ignore them. Such restrictions also decrease the marketability of the land, making it more difficult to obtain purchasers. Lenders may be hesitant to lend money to purchase land which has had use restrictions placed on it.

Impediments to transfer resulting from threats of liability under CERCLA §§106 and 107 cannot be ignored. Potential transferees (including lessees) of property from DoD could be considered "owners or operators" of a CERCLA site liable for the costs of response at the site. At Pease Air Force Base in New Hampshire, this problem was resolved by legislation providing complete indemnification to the State of New Hampshire and lenders for any liability associated with releases caused by the Air Force at the base. Indemnification will likely be a recurring issue, since agencies do not have the authority to indemnify a purchaser themselves.

DoD has noted that bases may not be "nearly as valuable to the private sector" as they are to DoD. (See Statement of James F. Boatright, Deputy Assistant Secretary of the Air Force, before the Defense Base Closure and Realignment Commission, at 3 (May 10, 1991)). Moreover, the commercial real estate market is still in a slump, id. at 4, which will likely impede any large-scale transfers of property for some time. Factors that could affect the value of a particular piece of property at a military installation include:

(1) impact of closure on local economy
(2) ability of local market to absorb a large tract of land in a short time period
(3) age and possible negative value of improvements on land
(4) availability of public benefit conveyances
(5) set asides for wetlands, critical habitats, or contaminated areas

Id. at 9.

Other factors that may affect land values include the degree of encroachment of non-military uses upon the base (e.g., military flight paths, weapons uses, training needs that affect local communities); the condition of the base facilities and its improvements; the facility's suitability for other uses without significant expenditures; and the value of existing improvements that can add to a property's marketability.

OPTIONS

a) Identify the circumstances in which, and the criteria and restrictions under which, facilities on closing bases may be leased or otherwise transferred for use by non-military users while cleanup investigations or other cleanup activities are being undertaken.

i) Identify and develop criteria for the use of innovative real estate transactions to accomplish such transfers.

ii) Identify and develop criteria for the use of conservation easements or other potections for ecological resources for parcels that have significant value as natural areas.

iii) Develop a policy to govern the use of parcels within an environmental "area of concern" during the time investigation and cleanup is ongoing, including provisions regarding protections from liability, access rights, compliance with applicable health and safety plans, and subsequent transfers.

~~b) Clarify applicable statutes, regulations and policies to indicate that portions of bases for which there is no contamination or likelihood of contamination may be transferred independent of contaminated parcels.~~

~~c) Identify the differences in the policies, practices and procedures for determining allowable uses of land during and after cleanup when the site is on the NPL, a RCRA regulated site, or neither. Reconcile those differences.~~

~~d) Reconcile and combine oversight and regulatory responsibilities under CERCLA and RCRA at bases being closed or realigned.~~

~~e) Identify and develop criteria for the use of innovative real estate transactions.~~

~~f) Identify and develop criteria for the use of conservation easements or other protections for ecological resources for certain properties being sold or transferred.~~

~~g) Develop a policy to govern the use of parcels within an "area of concern" during the time investigation and remediation is ongoing, including provisions regarding access rights, compliance with applicable health and safety plans, and subsequent transfers.~~

b) Investigate the potential for redefining the boundaries of NPL sites on military bases from including the entire base to an area determined by the source and extent of contamination.

c) Determine the extent to which applicable statutes, regulations, and policies provide that portions of bases for which there is no contamination or likelihood of contamination may be transferred independent of contaminated parcels.

ISSUE #2

STATEMENT OF ISSUE

a) **To what extent may the practices, policies and procedures for determining cleanup standards be consolidated and streamlined:**

   i. **if the site is on the NPL?**

   ii. **if the site is regulated under the RCRA? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

b) **To what extent may the practices, policies and procedures for executing the cleanup be consolidated and streamlined?**

   i. **if the site is on the NPL?**

   ii. **if the site is regulated under the RCRA? or**

   iii. **if the site is not on the NPL and is not regulated under RCRA?**

BACKGROUND

The roles and responsibilities of state environmental regulatory agencies and EPA vary depending on whether a site is on the NPL, is regulated under RCRA, or neither. Each of these three legal categories provide distinct opportunities for consolidating and streamlining the cleanup process. In particular, the procedures for determining the cleanup standards for an NPL site will likely differ from the procedures for determining the cleanup standards for a TSDF regulated by a state that has received RCRA corrective action authorization from EPA. Similarly, the procedures for implementing a remedial action at an NPL site differ from the procedures for carrying out a corrective action at a TSDF in a state that has a fully delegated RCRA/HSWA hazardous waste regulatory program. Moreover, the procedures for determining and implementing cleanup decisions at non-NPL, non-RCRA sites may differ from both of these systems.

Two sections of CERCLA are directly applicable to the questions of determining and implementing cleanup standards at federal facilities. Section 121 of CERCLA, addressing cleanup standards, is the primary statutory authority for determining cleanup standards at all sites listed on the NPL. Section 121 delineates the nature of the remedy to be chosen and requires that a chosen remedy protect human health and the environment. Section 121 also provides that legally applicable or relevant and appropriate more stringent state standards (ARARs) may apply in determining the proper level of cleanup.

As already noted, CERCLA §120 specifically addresses the responsibilities of federal agencies for cleanup of hazardous substances. CERCLA §120(a) requires federally owned facilities to comply with CERCLA to the same extent as nongovernmental entities. CERCLA §120(e)(2) provides that for federal sites that are listed on the NPL, EPA plays a significant role in remedy selection. The section directs the federal agency concerned to enter into an IAG with EPA for the "expeditious completion . . . of all necessary remedial actions" at the facility. Executive Order 12580 specifies the procedures to be followed prior to the selection of the remedy by EPA. Exec. Order 12580, §10, 52 Fed. Reg. 2923, 2928 (1987).

For federal sites not on the NPL, CERCLA §120(a)(4) mandates that state laws concerning response actions apply. Arguably, all of the procedures contained in the NCP may apply even to federal sites not on the NPL. Section 120(a)(4) raises the possibility that §121 guidelines on state standards must be followed even for those federal facilities listed on the NPL.

Section 120(i) of CERCLA states that nothing in CERCLA §120 "shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." Section 120(i) states only that corrective action authorities apply to federal facilities; it does not specify the extent to which those authorities, found in RCRA §3004(u), will apply if CERCLA response activities are being conducted at the same time as corrective action activities at a federal facility.

OPTIONS

a) Identify the differences in practices, policies and procedures for determining cleanup standards under CERCLA, RCRA and other applicable laws, including state laws~~; reconcile those differences~~.

b) Identify the differences in practices, policies and procedures, *including DoD contracting procedures*, for executing cleanups under CERCLA, RCRA and other applicable laws, including state laws~~; reconcile those differences~~.

~~e) Interpret CERCLA §120(i) in conjunction with §121 so that RCRA §3004(u) requirements do not delay CERCLA cleanup actions.~~

~~d) Reconcile and combine oversight and regulatory responsibilities under CERCLA and RCRA at bases being closed or realigned.~~

c) Investigate the potential to expedite the process of determining cleanup standards through the use of standard or generic responses to recurring types of contamination, such as petroleum releases. In particular, investigate the potential for generic RI/FSs and RCRA Facility Investigation/Corrective Measures Studies.

d) *Investigate the potential for combining the land use planning process for base reuse, environmental assessment of base closure under NEPA, and cleanup studies such as an RI/FS or RCRA Facility Investigation/Corrective Measures Study.*

e) *Investigate the potential for expediting cleanup through improved contracting policies and procedures.*

f) *Evaluate DoD's resource availability for restoration activities.*

ISSUE #3

STATEMENT OF ISSUE

Are there sites for which remediation is not technologically feasible, or for which the cost of remediation is simply prohibitive? If so, what uses, if any, can be made of such sites, and what mechanisms are needed to protect the public in perpetuity from the risks associated with such sites?

BACKGROUND

This issue most frequently arises at military installations or former military installations that are contaminated by munitions residue. There are many such sites around the country with some degree of contamination. Two installations scheduled for closure under the 1988 Base Closure Commission report, Jefferson Proving Ground and Fort George G. Meade, have significant amounts of munitions residue. For example, at Jefferson Proving Ground alone, it is estimated that more than 23 million rounds of munitions have been fired, and over 1.5 million rounds remain as high-explosive duds.

Munitions residue that contaminates military installations exists in many forms. The simplest form is the inert fragmentation/casing which remains after the high explosive fill has detonated. On the other end of the spectrum are munitions containing high explosives that malfunction (duds) and may be on the surface or (most probably) many feet underground. Some munitions have been recovered as deep as 30 feet beneath the surface. With the proper stimulus, these duds may detonate. In addition to these two types of munitions are many other practice/training devices that may or may not contain an explosive charge.

The regulatory status of unexploded ordnance under RCRA and CERCLA is not clear. In fact, there are differing interpretations among EPA and the States of RCRA storage, treatment and disposal requirements for the manufacture, testing, handling and disposal of ordnance, munitions, and other weapons. DoD is currently pursuing an amendment to the U.S. Senate Federal Facilities Compliance Bill (S. 596) that would allow the development of alternative regulations to address the RCRA issue.

Not every military installation, or part of an installation, creates a munitions contaminated area to the same degree. For example, several bases may all use one bombing range. At other bases, only small arms ammunition may have ever been used. Therefore, the scope of contamination may not be easy to determine, and a records search by the services may be needed in order to determine the location and extent of unexploded ordnance. However, records may be inaccurate or non-existent, especially for actions that occurred years ago.

The feasibility and cost of remediation depends on the future intended use of the property and the level of cleanup necessary for the intended use. Surface clearing may be adequate for pastures or wildlife preserves. (Surface clearing has been proposed at Ft. Meade where munitions contaminated property is being considered for use by the Department of the Interior as a wildlife refuge. However, strict controls on human access will also be required.) DoD safety standards do not permit custody transfer of lands contaminated with explosives that may endanger the public, when the contamination cannot be remediated with existing technology and resources. Cleanup of the same property for residential or commercial use may be prohibitively costly, if not technologically infeasible.

This is because more land must be excavated to recover dud munitions buried beneath the surface that may be detonated by construction and excavation. Clearing land of ordnance not only requires specialized equipment, it can also be very dangerous and extremely labor intensive.

Where adequate clean-up for residential or commercial use is not feasible, DoD needs mechanisms to protect the public from residual risks on sites which are transferred. First, past land use (and potential hazards) must be clearly identified to future owners. Second, restrictions on future land use must be clearly identified to future owners and somehow retained with title for all subsequent transactions. Restrictions should be commensurate with the residual unexploded ordnance hazard.

Even with restrictions on future use, liability questions remain. DoD is still liable for cleanup resulting from DoD activities prior to transfer. In cases where public access is restricted, what happens if there are trespassers or access is required for legitimate reasons, e.g., firefighting? Can DoD ensure that it will not be liable for contamination created by future users?

Remediation costs are proportional to the depth of cleanup. This variability of cost is best illustrated by the estimated remediation costs for Jefferson Proving Ground (95 square miles near Madison, Indiana) according to various levels of cleanup.

ESTIMATED COSTS FOR VARYING LEVELS OF EXPLOSIVE REMEDIATION

(Estimates provided by Jefferson Proving Ground)

CLEANUP LEVEL	COSTS
Surface Cleanup	$550 Million
Restricted Cleanup	
3 Feet Deep	$2.8 Billion
6 Feet Deep	$3.8 Billion
10 Feet Deep	$5.0 Billion
Unrestricted Cleanup (Technology for unrestricted cleanup is currently not available)	>$5.0 Billion

Special Concerns and Considerations

Present DoD policy requires that plans for leasing, transferring or disposing of DoD real property where ammunition or explosives exists, or is suspected to exist, be submitted to the DoD Explosives Safety Board for review and approval. DoD regulations (DoD 6055.9-510) specify that contaminated property cannot be transferred until "rendered innocuous."

Restricting a cleanup to surface contamination may not ensure that the surface remains uncontaminated over time. Freezing and thawing of the soil and other physical factors may result in subsurface ordnance migrating to the surface. Therefore continuing remediation may be necessary, since all remediation tends to be temporary in lands which have been heavily contaminated by penetrating ordnance like aircraft bombs and artillery.

The location of buried ordnance may not be known. Therefore, it may be difficult to certify that "clean" sites are in fact really clean. This has occurred at Jefferson Proving Ground where large amounts of World War II munitions were found in the course of excavating a supposedly clean area.

Ordnance cleanup is inherently dangerous. The need to characterize and remediate a site may conflict with requirements to minimize health and safety risks to cleanup personnel.

In addition to lack of technologies to remediate the site, technologies may also not be available for conducting investigations of the site. For example, detectors may not be capable of detecting ordnance buried deep beneath the surface or in wetlands.

The excavation required for a complete cleanup would likely generate significant undesirable environmental impacts. Removing 10+ feet of soil over a large area would generate impacts similar to strip mining. However, in areas heavily contaminated by penetrating ordnance, even this level of cleanup might yield temporary results, as ordnance items later work their way to the surface.

In most cases, installations contaminated with high explosive munitions residue will not be suitable for commercial or residential use, not only because of the cost or lack of cleanup technologies, but also because it may be impossible to guarantee that a site is in fact "clean."

OPTIONS

~~a) Separate highly contaminated areas from "clean" areas (known as "parceling"), so that part of the land that experienced little or no contamination might be easily cleaned, verified and released.~~

~~b) Perform surface cleanups sufficient to allow activities where both cleanup and human access and exposure is limited, e.g., wildlife refuges or certain types of industrial activities not involving construction or excavation.~~

~~c) Establish mechanisms to protect the public in perpetuity from residual risks at sites where remediation is at a lesser level.~~

~~d) Retain title in DoD and designate the area as a wildlife refuge, bird sanctuary or similar use not involving public access.~~

~~e) Use funds from the Base Closure Account to research and develop technology for explosive ordnance disposal.~~

a) Provide a list of bases and formerly used defense sites at which munitions contamination is an issue.

b) Investigate whether any other sites or types of contamination at closing bases are technologically or economically infeasible to clean up.

ISSUE #4

STATEMENT OF ISSUE

To what extent can overlapping or duplicative regulatory responsibilities and functions be combined or delegated to a single regulatory authority?

BACKGROUND

Existing law allows EPA to delegate to states the primary responsibility under RCRA/HSWA for overseeing corrective action at TSDFs, but does not allow similar delegation of responsibility under CERCLA to oversee remedial actions at NPL sites. The potential for delegation of corrective action oversight under RCRA is largely unrealized, since few states have met EPA's criteria for authorization.

Although CERCLA does not provide for delegation of that program to individual states, CERCLA §121(f) calls for "substantial and meaningful involvement by each state in initiation, developments and selection of remedial actions to be undertaken in that State." EPA's proposed revisions to the National Contingency Plan (NCP) in 1988 included policy options to allow NPL sites to be "deferred" to states to facilitate more rapid cleanup and to conserve the federal fund. Amidst growing controversy over this proposed expansion of states' role at NPL sites, the EPA Administrator informed a Senate committee in June 1989 that EPA would defer action on this proposal, and the new NCP includes no such option for states. Nevertheless, many states take an active role in federal cleanups of NPL sites, often assuming "state lead" under cooperative agreements with EPA. Most states also now operate their own cleanup programs for remediating non-NPL, non-RCRA sites.

Delegation of the RCRA regulatory program to the states is intended to eliminate duplication of effort by agencies that have overlapping areas of responsibility. The argument is that delegation will expedite cleanups at TSDFs, including those located on bases that will be closed. Delegation of RCRA corrective action authority to more states might expedite cleanups at a significant number of bases subject to closure. When EPA delegates RCRA §3004(u) authority to individual states, it could perhaps adjust the delegated authorities to account for the special circumstances encountered at federal facilities.

OPTIONS

~~a) Determine why more states have not satisfied the criteria for delegation of RCRA/HSWA corrective action authority. If delegation is being delayed for reasons unrelated to the established criteria, remove those impediments. Assist states to meet the criteria.~~

~~b) Consider the benefits of a single environmental agency (federal or state) having regulatory responsibility for all hazardous substance cleanups at closing bases.~~

a) Research whether barriers to consolidating in a single environmental agency (federal or state) regulatory responsibility for all hazardous substance cleanups at closing bases are administrative or statutory.

~~c) Authorize delegation to states of authority to oversee cleanup actions at NPL sites where the state demonstrates capability to do so.~~

d) *Investigate specific areas where it is possible to* reconcile and combine oversight and regulatory responsibilities under CERCLA and RCRA at bases being closed or realigned.

ISSUE #5

STATEMENT OF ISSUE

To what extent may proceeds from property transactions be used to fund cleanups?

BACKGROUND

The 1988 Base Closure Act (P.L. 100-526) authorized closures to begin in January 1990 and end by October 1995. The statute allows DoD to use the proceeds from the sale of land at these closing bases to offset the costs of such closings if the sale occurs by October 1995.

Cleanup of many closing bases will extend beyond five years and final transfer of some portions of those bases, therefore, may not occur until after the five year deadline passes. Moreover, funds currently budgeted for cleanup of contaminated sites at closing bases are insufficient to clean up all such sites. Until fiscal year 1991, cleanup of contaminated sites at bases slated for closure was primarily funded under the Defense Environmental Restoration Account (DERA), DoD's overall account for environmental restoration at all bases. DERA has $1.1 billion authorized for Fiscal Year 1991. In the National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Congress moved all funding for cleanup activities at closing bases from the Defense Environmental Restoration Program (DERP) at active bases to the Base Closure Account, which was provided with $100 million to fund the costs of cleanup at the bases on the 1988 closure list. Congress took this action because of its concern that cleanup at closing bases should not compete with cleanup activities at active bases for DERA funds under DoD's worst-first priority system.

Applying the proceeds from the property transactions to the cleanup of other contaminated sites would supplement the funds appropriated for cleanup and expedite cleanup of all such sites. For example, a trust account might be created with the proceeds from the lease or sale of land at a site, to be used to pay the costs of long-term operation and maintenance of a groundwater pumping and treatment system required as part of the cleanup at that site.

An example of the use of a trust mechanism to fund future clean-up activities is found in the consent decree entered in connection with United States of America v. Stauffer Chemical Company, et al., Civil Action No. 89-0195-Mc, (D. Mass.). Pursuant to the consent decree, the parties allocated responsibility for conducting and paying for cleanup activities and agreed to the establishment of two trust mechanisms and an escrow account through which past and future cleanup activities would be financed.

The defendants responsible for conducting future agreed-upon cleanup activities on the site agreed to establish a trust (the "Remedial Trust") and provide the trust the money necessary to ensure the uninterrupted progress and timely completion of the required cleanup work. These defendants will remain jointly and severally liable for any failure of the Remedial Trust to comply with the terms of the consent decree.

A second category of defendants agreed to establish a second trust (the "Custodial Trust") and to convey to such trust title to their real property interests in the site. Under the terms of the consent decree, the Custodial Trust is responsible for managing the property, which includes:

- implementing land use restrictions that would maintain the integrity and prevent the unauthorized disturbance of the caps and other structures that are to be constructed at the site as part of the cleanup process.
- -- permitting access to the site for cleanup activities.
- -- subdividing the property and locating potential purchasers.
- -- negotiating and executing the sale or transfer of the property.
- -- arranging for the sale or transfer proceeds to be delivered to the escrow account established by the consent decree (the "Escrow").

If any property included in the site is unsalable, the Custodial Trust is to establish a further trust to hold and operate the property in accordance with a plan developed by EPA in consultation with the Commonwealth of Massachusetts. The Custodial Trust is not to sell any real property included in the site until after certification of completion of the remedial action, except in limited circumstances where future cleanup and control of the property has otherwise been assured by EPA and the Commonwealth.

The bulk of the proceeds in the Escrow are to be applied to reimburse the United States for response costs incurred prior to the entry of the consent decree and to reimburse the defendants responsible for conducting future cleanup activity for their respective costs. The defendants responsible for conducting and paying for future cleanup activity are also jointly and severally responsible for any failure by the Custodial Trust, any further trust established pursuant to the consent decree, or the representative of the Escrow to comply with the terms of the consent decree. The Custodial Trust and its trustees are not to be considered owners or operators of the site property for liability purposes solely on account

of the Custodial Trust's ownership and disposition of such property in accordance with the consent decree, so long as the Custodial Trust does not conduct or allow others to conduct any activity on the property other than activities permitted by the consent decree.

OPTIONS

a) ***Investigate the feasibility of using a custodial or other type of trust*** funded by the proceeds from land transfers to fund long-term cleanup activities at closing bases.

~~b) Remove the five-year limitation on use of land transfer proceeds for cleanup at closing bases.~~

Understanding on Environmental Coordination and Cleanup at Robins AFB, Georgia

Meetings were held in Atlanta and Robins AFB, Georgia, called for and led by Congressman Richard Ray on 14 and 15 February 1991 and attended at Congressman Ray's request by senior management officials of the Georgia Environmental Protection Division, the Environmental Protection Agency and the United States Air Force. The purpose of the meetings was to identify ways to achieve early environmental cleanup actions at Robins AFB as part of its Installation Restoration Program. As a result, a high level workgroup was formed to make suggestions for expediting the ongoing cleanup, consistent with the existing Interagency Agreement between all parties under Section 120 of the Comprehensive Environmental Response, Compensation and Liability Act and where practicable to suggest other initiatives that could be useful for other installations.

The workgroup, consisting of the Deputy Regional Administrator, EPA Region IV; the Chief, Land Protection Branch, Georgia Environmental Protection Division; and the Director, Warner Robins Air Logistics Center Environmental Management Office, has met and has developed several recommendations for expedited implementation at Robins AFB. Additional initiatives will be developed for use at Robins AFB with the goal of enhancing and accelerating base cleanup consistent with all applicable state and federal laws and regulations. The workgroup or designees of the respective members will meet from time to time as may be necessary to accomplish this goal.

It is the understanding of all parties that this workgroup has been and will continue to be given the fullest support by all levels of the Agencies involved. The workgroup will endeavor to make periodic reports of significant achievements and successful initiatives.

Specifically, it is understood by all parties that the workgroup shall have full discretion to suggest changes to any activity, procedure, organization, guidance, or policy that may result in expediting or enhancing environmental cleanup, and that workgroup suggestions will be given careful consideration at the levels of decision required for implementation. The group will give special attention to measures that will streamline processes and eliminate unnecessary delay, such as duplicative efforts or failure to share or use available expertise of the agencies involved, while at the same time being fully protective of health and the environment and giving ample opportunity for public review and comment.

Where initiatives that could benefit other installations are noted, these may be made the subject of special reports, separate from any periodic reports, that can be forwarded for review and implementation by the appropriate agencies, so that the efforts of this group may benefit the nationwide environmental program of the Air Force and the Department of Defense, as well as the EPA and the State of Georgia.

SPECIFIC COMMITMENTS TO EXPEDITE CLEANUP ACTIONS

RECORD OF DECISION: The Environmental Protection Agency Region IV (EPA), Georgia Environmental Protection Division (GEPD), and the U.S. Air Force (USAF) will work toward completing the Record of Decision by 30 June 1991, vice the original scheduled date of October 1991. To meet this date, the parties will work jointly to accelerate preparation of the Remedial Action Plan with a target date for start of the public comment period by 25 April 1991.

LANDFILL 4: The Air Force will expedite efforts with a goal of beginning field work on remedial actions within six months after the Record of Decision is signed. EPA Region IV and the Air Force will work together to resolve the issue of the need for a Section 404 permit so construction of a runon control system can begin as soon as possible.

WETLANDS: EPA and the Air Force will work jointly to define the required scope of the wetlands study. EPA personnel will do the initial reconnaissance field work during the first week of April 1991. The Air Force will complete the remainder of the field studies in early 1992, depending upon the results of the reconnaissance survey.

SHALLOW GROUND WATER AQUIFER: The Air Force will expedite field testing with a goal of completing the remedial investigation report by the end of 1991. EPA, GEPD and the Air Force will expedite the review and revision of the report. The Air Force will review the wetlands study results and the initial data from the groundwater study to evaluate the benefit of installing extraction wells to provide a barrier to reduce the contaminant burden on the wetlands.

OTHER ROBINS AFB IRP SITES: The Air Force has formulated an action plan to cleanup and close 16 sites in 1991. GEPD and the USAF have discussed interim and corrective actions. GEPD and the USAF will work together to assure the documentation supports site closure.

REPORT TO CONGRESS ON LIABILITY, BONDING, AND INDEMNIFICATION ISSUES FOR DEPARTMENT OF DEFENSE RESTORATION PROGRAM AND HAZARDOUS WASTE CONTRACTS

Office of the Deputy Assistant Secretary of Defense
(Environment)

Response Action Contractors' Liability Issues

Regarding the Defense Environmental Restoration Program

Conclusions and Recommendations

Conclusions:

The Department of Defense (DoD) faces a major challenge to cleanup its contaminated sites quickly, effectively and without excessive cost to taxpayers. The DoD cleanup and remedial program relies on the architectural and engineering services and the design and construction capabilities of private sector remedial action contractors (RACs). The RAC community expresses reservations about its members' future willingness to undertake this work for the DoD because of perceived uncertain, but believed potentially large, risk to their firms inherent in DoD's remedial action work. In order to better understand the substance and basis of these concerns the Department of Defense has endeavored to work with representatives of the RAC community, other private sector contracting entities, as well as representatives knowledgeable about the practices and concerns regarding the insurance and surety sectors of the nation. The study concludes that contractors have the following deeply held perception of the current liability situation:

- RACs, because of joint strict and several liability under federal and state law, may be found liable when they are not at fault.

- The resulting probability of insolvency through imposition of liability without fault is uncertain and therefore unacceptable.

    - RACs are unable to secure adequate insurance due to the insurance industry's reluctance to become involved where the risk is so uncertain and potentially large.

    - RACs are also hampered in obtaining performance bonds required by the Miller Act for DoD construction contracts. Surety companies are reluctant to write bonds. The uncertain and potentially large risk for the situation has decreased availability and increased costs which are ultimately reflected in DoD's costs.

- RAC's believe they are assuming risks that properly go to DoD as the generator of hazardous waste and owner of the site.

These perceptions have serious implications for the continued progress of the DoD's cleanup program, as DoD may not be able to sustain rapid progress in its cleanup program without a heavy reliance on knowledgeable qualified contractors.

The Department has also concluded the following as to the current status of response action contracting and the legal liabilities of the Department:

- DoD is currently able to get adequate competition for our remediation contracts.

- Some well-regarded companies are not bidding on DoD contracts citing the risk issues as their reason not to compete.

- DoD is not able to determine, based on this study, what impact the contractor's perceived liability exposure is having on their bid pricing of DoD contracts.

- There is no evidence that quality of work on DoD contracts is being affected.

- The current liability picture particularly discourages contractor participation in innovative remedies as they place potential additional risk on the contractor. A contractor's prime defense to their perceived liability exposure is to use standard, conservative measures wherever possible, thus favoring an excessively conservative approach to remediation.

- RACs express a willingness to be liable for their failure to perform adequately on their remediation contracts.

- DoD as waste generator, facility owner, and overall manager of its remediation effort is and should be ultimately responsible for future problems associated with its remediation efforts, however, it should have a legal remedy against a non-performing contractor.

    - As a waste generator and owner of the contaminated site DoD is in a different liability relationship with its contractors than EPA with its contractors. As such liability shifting rules developed by EPA for dealing with its contractors may not be appropriate for DoD.

- Private firms hiring RACs for private cleanup work engage in risk sharing strategies with RAC contractors which may be adaptable to DoD contracts.

    - Different types of remediation projects have different inherent risks and therefore may call for different risk sharing strategies.

    - Appropriate risk sharing strategies should result in reduced cleanup cost to the Department and the taxpayer, without increasing the ultimate risk to the treasury.

    - Adoption of risk sharing strategies may require regulatory and legislative reform.

Recommendations:

Based on the foregoing conclusions, the Department is concerned remedial action contractors' perceptions may lead in the future to reduction in competition, escalation in costs, lowering of quality, and increased risk to the public. We are also very conscious that any recommendation we adopt for action or inaction, will have economic consequences. Any choice inevitably confers competitive advantage on some contractors and disadvantage on others. We must make sure we understand the nature and implications of the incentives and disincentives our choices imply. We must encourage responsible and professional behavior by our contractors. We must avoid creating incentives for behavior that diverts government resources from the primary goal of cleanup. Ultimately, whatever strategies we adopt should improve the Department's ability to perform effective cleanup in a timely manner at a responsible cost to the taxpayer.

Based on information developed in doing this report, the Department is implementing changes in its contracting strategies and policies within its control to resolve some of these issues. These include better acquisition planning including varying types of contract strategies, reducing amounts of bonds required on construction contracts or use of rolling or phased bonds, allowing irrevocable letters of credit in lieu of bonds, and retaining certain work elements under DoD control (e.g. signing hazardous waste manifests). The environmental and engineering arms of the military departments will continue to examine their current contracting practices with a view to recommending changes in guidance, policy, regulations, and legislation to enhance the effectiveness of our environmental and remedial action contracting. We have tasked them to ensure the scope of their study addresses appropriate and equitable risk sharing between the DoD and its contractors in the cleanup program, and to make specific recommendations for action to be taken. The DoD is now also engaged in a comprehensive review of the Federal Acquisition Regulations so as to ensure adequate treatment of environmental requirements.

Two recommendations merit further consideration. The first would resolve the extent of liability of a surety to a remedial action contract where their only involvement is in providing a bond. This issue was addressed in the last Congress by amending section 119(g) of the Comprehensive Response Compensation and Liability Act to specifically broaden coverage for sureties at National Priorities List sites. Extending this principle to all DoD sites, whether or not on the NPL, would help bring sureties back into writing bonds for DoD cleanup contracts at a reasonable prices. This should broaden competition for contracts, improve timeliness, and reduce overall costs to the Department. This should not work a disservice to innocent third parties, as ultimately it is the Department that is responsible for the remediation. The prime purpose of the surety is to ensure the Department receives the fiscal benefit of the contract.

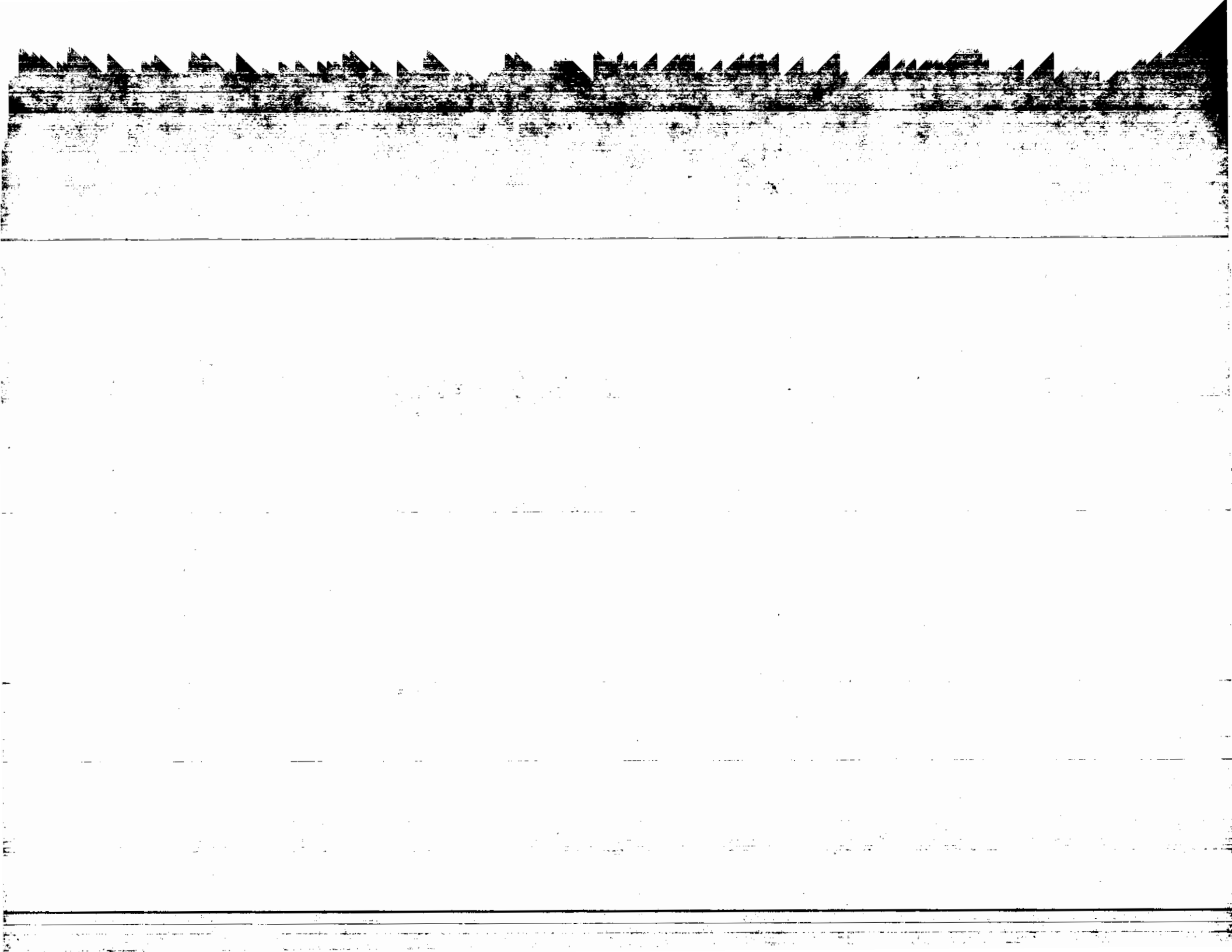
A more wide-sweeping risk sharing concept evolved from discussions during the preparation of this report. This concept would involve limiting a Response Action Contractor's liability to outside persons. The Department and any other true

potentially responsible parties would be designated as those solely responsible for damages to innocent third parties for damages arising out of a remediation action at a DoD site--logical application of current law as to generators and operators of hazardous waste facilities. The DoD's contracts with its RACs would then provide for recovery by DoD from the RAC if the damages resulted from the RAC's negligence. This concept is similar to the latent damages clause currently used in construction contracts.

The time for preparation of this report was short considering the complexity of the issues. Among the areas that still need substantial further analysis are the total cost implications of various risk sharing strategies as compared with the long term liabilities of the government. We will continue working with the contractor community and other interested parties to explore these and other recommendations and solutions to improve the Department's clean-up program.

APPENDIX 1

SAME Forum Proceedings



SOCIETY OF MILITARY ENGINEERS

ENVIRONMENTAL CONTRACTS FORUM

30-31 JANUARY 1991
BOLLING AIR FORCE BASE

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

EXECUTIVE SUMMARY

On 30 - 31 January 1991, the executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting.

During the forum, the following key issues were raised:

a. There is a risk to the remedial action contractor (RAC) performing environmental work. Part of this risk are the unknowns associated with the work. Another part is the potential for third party liability suits resulting from the performance of such work.

b. RACs are unable to obtain professional performance liability insurance for hazardous waste site cleanup projects. The insurance industry is reluctant to provide such insurance due to the high risk of liability associated with the performance of such work. Available insurance only covers the period of work performance; not the period during which RACs are most susceptible to third party liability suits.

c. RACs are unable to obtain surety bonds required for Federal government hazardous waste cleanup projects because the surety bond industry sees a high risk from liability in issuing such bonds. Available bonds are generally for projects of less than $5M value. Some companies are self-bonding in order to meet governmental requirements.

d. RACs feel that the Department of Defense (DOD) is responsible for the presence of the hazardous material on the site and therefore, should be responsible for their portion of the risk associated with site cleanup. RACs believe that DOD should indemnify RACs performing work against third party liability to cover the government's portion of the risk.

In response to the concerns raised by RACs, DOD representatives indicated that they would consider the following potential solutions to resolve the issues raised:

a. Change the laws so that RACs are excluded as a potentially responsible party for liability suits resulting from cleanup actions.

b. Revise the Federal Acquisition Regulations (FAR) to extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program.

c. Limit the statute of limitations for contractors on environmental cleanup projects and limit the contractor's liability for a project.

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine equitable distribution of the risk between the contractor and the government as a part of the contract.

come to grips on these issues, the DOD's cleanup efforts may not succeed and to him that was unsatisfactory. He indicated that although the forum may not reach closure on these issues, he expected that progress would be made during these two days.

C. AGENDA TOPICS

1. An Assessment of the Risks and Potential Liabilities of Environmental Response Action Contractors, Under Federal and State Law, at Department of Defense Facilities, and the Effects of These Liabilities on Implementation of DOD's Environmental Remediation and Restoration Program.

The industry topic leader discussed, through the use of an example cleanup effort, the risks and potential liabilities that are experienced by a RAC performing work in support of the DOD hazardous waste site cleanup efforts. Some of the problems cited were: site sampling techniques did not cover 100 percent of the area under consideration, and, as a result, there might be ground water leakage paths of which the RAC would be unaware; porosity of the bed rock in an area may preclude total cleanup of toxic chemicals, and these chemicals may leach out after cleanup has been completed; the technology chosen for the cleanup (although agreed to by the parties) may not be effective; today's technology, seen through the eyes of a jury in the future, may be considered to be negligent.

The topic leader indicated that, when bidding on a task, the RAC will examine the risks associated with the proposed effort and make a decision of bid or no-bid accordingly. Insurance available to the RACs is expensive and, because it only covers the current year and will not be available when potential law suits would be expected, is worthless. The contractor must look at the chemicals, the geology, the flow paths of contaminants, and the location of the populace relative to the cleanup site when bidding on a job. There would be a considerable difference of risk between a potential job in the deserts of Utah and one on Long Island. RACs are reluctant to use innovative technology in hazardous waste site cleanup efforts because of the greater risk to the company from a law suit. By experience, the RACs have learned that if water becomes contaminated, property loses value, some damages (personal or property) may occur, and people are going to sue.

In response to a question from a DOD representative, the RAC attendees estimated that $1M of insurance would cost about $250K per year. Once the work is completed, the policy is terminated, and there is no further coverage. The point was raised by a contractor that even if a job was performed exactly to specification, the RAC could still be taken to court, and even if the RAC convinced the court that it was neither negligent nor contributed to the condition instigating the suit, the defense costs for the RAC would be substantial.

One contractor indicated that if he had to work for the government without indemnification, he would take efforts to decrease the risk, such as drill additional wells to more fully define groundwater flow. This would unnecessarily raise the cost of doing the work. When asked, a RAC representative indicated that only five percent of the bid covers potential risk (due to competition), but this did little to cover the potential risk costs.

The RAC representatives asserted that they were dealing with an unknown liability and with areas in states with differing laws. As a result, they might not be able to adequately determine the risks

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

A. INTRODUCTION

The executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base on 30 and 31 January 1991 to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting. In attendance at this forum were representatives of the Office of the Deputy Assistant Secretary of Defense (Environment), Army, Navy, Air Force, and Coast Guard and executives representing remedial action contractors (RACs) that perform environmental cleanup services for the Department of Defense and private industry. A list of attendees for this forum is provided as Attachment A to this report.

This forum was co-chaired by Captain James A. Rispoli, CEC, USN, Vice President, Environmental Affairs, Society of American Military Engineers and Mr. Russ Milnes, Principal Deputy to the Deputy Assistant Secretary of Defense, (Environment).

Prior to this forum, invitees were asked to submit discussion papers on any aspect of the topic issues. Suggested discussion topics included: what are the liability concerns; what are the experiences with regard to liability and bonding; how is the risk of performing environmental work assessed; and how do the problems of liability and bonding affect competition. Seven papers were submitted in advance or during the forum. These papers were provided as attachments to the draft proceedings of the forum.

B. OPENING REMARKS

Captain Rispoli opened the forum by outlining the objective of the Environmental Contracts Forum, which is to facilitate an ongoing frank and open discussion of programmatic and contractual issues between industry and the military services. He indicated that this was the third session of this executive forum, and that SAME had been asked by the Office of the Deputy Assistant Secretary of Defense (Environment) to further address the issues of liability, indemnification, and bonding to assist them in obtaining views so that DOD might prepare a report to Congress. To increase the dialogue, CAPT Rispoli indicated that additional contractors had been invited to participate. CAPT Rispoli stated that proceedings of the forum would be issued. These proceedings would not provide any quotes or attribution. He asserted that the forum was not a place for debate, but was a means to discuss the issues so that all in attendance could listen and learn. He asked if there would be any objections in having submitted papers published as a part of the forum proceedings. No objections were raised.

Mr. Milnes addressed the forum stating that the only means of solving environmental cleanup liability problems was through an open forum. He indicated that the Department of Defense (DOD) has pledged to comply with its environmental obligations. The installation restoration effort is important, and as the DOD moves from the study phase, it recognizes that action must be taken to ensure site cleanup progresses smoothly. He emphasized that the DOD wants to finish the cleanup business. Mr. Milnes stated that his office wants to come to grips with the hazardous waste site cleanup contract issue. Performance bonding is an issue; legislative fixes may be possible, but he did not see this as a solution. He explained that if the DOD and the cleanup industry do not

2. The Availability, Costs, and Limitations of Commercial Insurance to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors

An insurance industry representative topic leader stated that insurance underwriters have problems with insuring projects which have an environmental risk. There are inherent reasons: the long latency period of toxic exposure and the multiple potential causes of bodily or property harm associated with environmental projects. The insurers must establish premiums today for liabilities which will occur ten or more years in the future.

Although liability standards are provided in Section 119 of CERCLA (dealing with negligence), 23 states have laws which are contrary to this section. Contractors may be required to shoulder more liability than they deserve. New, exotic bodily injury theories are being applied. These include: medical surveillance (if an individual is exposed, he or she should be monitored); immunotoxicity (long term exposure can break down the body's immunity making people more susceptible to diseases such as cancers); advance risk of future harm (exposure may increase the possibility of future bodily harm); and mental anguish (the fear of getting a disease as a result of exposure). Once considered remote as reasons for winning a suit, these theories now make environmental work in several states uninsurable.

Recently, the insurance industry has been involved in coverage dispute cases. Policy holders/ insurers have asked the courts to look at contracts and determine if an environmental aspect exists. Even though the insurers have thought that a contract has no environmental aspect, courts have frequently decided that it did. Pollution exclusion clauses have not been upheld in court. Since the insurance industry does not have faith in drafting future policies, they are simply not insuring architect-engineers. There is a specialty market for insurance, but there are very few players, and insurance is expensive.

Some A-Es are forming risk retention groups, which is a form of self-insurance. Although this is a potential solution, it does not appear to be working. It is expensive. Many companies do not seem to be ready to insure the practices of their competitors.

The topic leader was asked what type of cap the insurance industry felt would provide adequate coverage for environmental work. The topic leader indicated that he did not have a response to this action. An attendee indicated that the EPA currently has under review a $50M cap on indemnification to the RACs. The topic leader was asked if there had been any claim against a RAC. The answer was that he did not know of any; there is not a large claims history. This may result from the long latency period for toxic chemical claims. Cleanup efforts have been ongoing for a only few years; only 50 sites have been cleaned up.

The topic leader was asked if this was going to be a new market; were pollution incidents insurable? The response was that as a result of changes to Superfund, specialty coverage may occur. A question as to whether the Federal government would subsidize this type of insurance, brought the response of probably not. Is there a group to step in and develop a market to sell this type of insurance? The answer was, not at this time; one of the problems is that insurance companies are paying on liabilities which they do not believe they insured.

A RAC representative raised the point that there is no guarantee for professional liability insurance. The insurer may chose not to issue or renew the insurance. Insurers will not cover

for a cleanup in certain states, and therefore may choose not to bid. They indicated that in performing some work, they were staking the survivability of their corporation. When asked, the RACs explained that, in working with the private sector, the RAC shares the risk with the client. This protects the contractor. The point was raised that the owner of a waste site owns the waste, and the RAC is helping to clean it up. Therefore, the site owner must share a good portion of the risk.

The issue of strict liability was raised by the RAC representatives. If anyone has a connection with a hazardous waste site, they are liable. Proper behavior has not excused liability.

When working for the Environmental Protection Agency (EPA) on orphan sites, there is a greater risk to the RAC. The EPA indemnifies the RAC under Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This indemnification only covers negligence and not strict liability. The RAC must look at the state laws when deciding to accept a risk.

Another issue raised was that in some instances, a DOD activity required a RAC to sign hazardous waste manifests. This action places liability on the RAC for transporting of wastes. If the RAC had known it would be required to do this, it would not have bid on the job without indemnification. A DOD representative indicated that, generally, the DOD signs the manifest as the generator. The RAC representatives indicated that even if the contractor does not sign the manifest, but arranges for transport, the contractor could be liable, a potentially responsible party (PRP). Even if the contractor doesn't arrange the transport, but is on site, it may be sued. The contractors emphasized that defense costs are a real-time cash flow problem and a real risk even if the contractor is not involved or is innocent.

The problems for the RAC were summarized as follows:

a. There is an inherent risk associated with doing environmental work. RACs are dealing with anomalies which are inherently difficult to model.

b. There is an environmental risk of third party liability.

c. There is no incentive for innovation. Before innovation will be employed by contractors, there must be an agreement between the client and the contractor, and the beneficiary of the innovative practice is required to assume liability. Innovation is prohibitive in a regulatory atmosphere. There is generally no innovation in the U.S.

d. The architect-engineers (A-Es) are being expected to accept the liabilities of others. Liability insurance is not available in the market. If it is available, it is only for the period of the job.

e. Requirements vary from state to state. There is a bright spot for the RACs in that there is more flexibility shown when dealing with states than when dealing with the Federal government. Some states may change the specifications on their cleanup projects to permit innovative technology. Many see some states assuming the liability of PRPs. State regulators are a part of the Record of Decision (ROD), and this permits flexibility in dealing with the states.

Surety bond companies normally underwrite construction efforts. However, many of the contracts for site cleanup are design-build efforts with bonding required for both phases. The topic leader stated, "Today's state of the art technology is tomorrow's malpractice." Surety companies are reluctant to guarantee design technology which is normally covered by professional errors and omissions insurance policies (which, today, is probably not available to the RAC for these risks).

While discussing the availability and cost of surety bonds, the topic leader indicated that the cost of surety bonds has not increased for hazardous waste site cleanup projects. It is about one percent of the construction cost. Initially, hazardous waste site cleanup contracts were thought to be service contracts; then they were required to be construction contracts. About two years ago the surety bond market started drying up. The availability of surety bonds is a major issue. Some available bonds require 100 percent collateral. Some large construction companies are self-bonding. Since the passage of Section 119 to CERCLA, three to four companies have reentered the hazardous waste site bonding market. The market has opened up slightly, but the underwriters are not fighting for business. Only the major providers are coming back into the hazardous waste site cleanup bonding arena, and they are only bonding work on National Priority List (NPL) sites (covered by Section 119 of CERCLA).

The topic leader indicated that the surety bond companies need the same liability protection as the insurers. The more protection that they receive, the more surety companies will reenter the market. Surety companies, as a rule, will not back innovative engineering (too much risk).

A question was raised if any RAC surety bond company had been held to be a PRP? The answer was no, but the industry was concerned because of New Jersey common law interpretations. Some waste site cleanups are being bonded because they are being considered as non-hazardous (due to relatively low risk). This raises the issue of how hazardous is hazardous?

An Army representative indicated that they had received more than four qualified bidders on a recent job. People are apparently getting bonds. There is competition. The stage of not getting responsible contractors bidding has not yet been reached. One of the RAC representatives indicated that the project referred to by the Army may have been a small project. People will still bid a $5M project. The break point comes for projects greater than $10M, where there may be insufficient bonding money left.

The topic leader indicated that the surety bond industry is seeking clarification relief that such bonds only cover performance in accordance with the specifications and the payment of bills; bonding does not cover design, third party torts (bodily or property injury), or the performance of designs. A few, new, aggressive companies are issuing bonds for less than $5M; however, some of these companies may be backing off. Bonds being issued require high collateral. Companies cannot look at the forming of subsidiaries to do bonding to decrease the liability, due to the requirements of remaining on the Department of the Treasury list of acceptable sureties for Federal construction projects.

The topic leader asserted that the surety bond business is a very small portion of the insurance market. In the past, it has rendered a small, but reliable profit. Now it is a big risk. The industry is only issuing bonds on a case-by-case policy and then only to long-term customers.

"prior acts". RACs are paying premiums but are not receiving future coverage. The topic leader indicated that if states had negligence statements similar to Section 119 of CERCLA, then insurance companies might become more interested in providing such insurance. There are presently no magic solutions.

The topic leader was asked the insurance industry's plan of action. The response was that the insurance industry is "slugging out" solutions on a case-by-case basis. The industry has not been able to agree on alternatives to the current situation. A formal definition of "pollution exclusion" is a possibility. A general discussion on possible approaches (solutions) followed. A law similar to Price-Anderson which would be applicable to the toxic waste cleanup industry was mentioned as a potential solution. This solution would create three layers of protection in the event of liability: the insurance layer, the owner/operator layer, and the government layer.

3. Near and Long Term Environmental Restoration Contracting Strategies.

Each of the service representatives made a short presentation on environmental restoration contracting strategies. Described were current efforts, current problems, and actions being taken to clean up identified hazardous waste sites.

4. The Availability, Costs, and Limitations of Corporate Surety Bonds to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors.

The topic leader from the insurance industry indicated that there were considerable problems with the issuance of corporate surety bonds. Contractors must post a surety bond for Federal work under the Miller Act. At this time, there are few bonds available for work on hazardous waste sites.

The topic leader described the problems of issuing bonds for such tasks. Surety bonds are underwritten only to cover the performance of a contractor and the payment of suppliers for construction work. They are written based on the quality of the contractor (ability to do good work, quality of people on site, equipment, how well the contractor has done on similar efforts, and the availability of contractor finances to fulfill the contract requirements). Underwriters normally develop a long-standing relationship with the contractor. Liability from third party suits is not normally considered (this is normally covered by commercial general liability insurance). Recently, however, surety bond issuers have come under attack in the court room because they are the only "deep pocket" remaining in a law suit (RACs are normally people rich, but asset limited).

There has been a lack of indemnification for surety bond issuers for hazardous waste site work. Anyone involved in hazardous waste site work (including the surety bond underwriters who are only covering contractor performance and supply payments) have been found to be liable. If the RAC defaults on such work, the surety principal would be required to hire a completing contractor and, consequently, may be construed to have contracted for the removal of hazardous waste and subjected itself to liability.

Another issue with hazardous waste site bonding is the bond termination date. Normally, a bond is terminated when all work has been satisfactorily accomplished on a project. Due the possibility of long time periods associated with hazardous waste site cleanup action (including the prospect of having to reinitiate work), the bonding company may be required to pay claims long after work has been completed on a project.

the larger the number of contractors involved in a project, the greater the degree of risk to any one contractor. If their work is uninsurable (as it frequently is), the RACs could lose their company as the result of third party liability action. They asserted that they have walked away from jobs when they could not receive indemnification. They stated that the risks they were concerned about were those which they could not control. Any work on an environmental site may end up with a law suit. Only five percent of law suits on environmental projects result in a judgment, but contractors have to pay defense costs to defend good work. The area outside of negligence (strict liability) is of concern. The RAC representative declared that indemnification would not change the quality of their work.

The RAC representatives were asked, if nothing is done with regard to indemnification for DOD work, what is the probability of their doing work? The response was, they would do feasibility studies but would probably not perform any remedial action work without indemnification. They stated, the only companies that the DOD would be able to hire without indemnification would be those with nothing to lose.

A question was raised regarding when indemnification is needed. The answer was, during cleanup and detailed design because these were the riskiest tasks. These efforts were less controllable. During studies, the contractor was further away from being named as a PRP.

One of the contractors summarized his thoughts. He indicated that environmental work was extremely risky. This was due to the application of the concept of strict, joint, and several liability. It was also due to the lack of standards which define negligence; the highly litigious arena involving environmental work; the current state of the art of environmental work; and the long latency periods for hazardous/toxic material exposures (trying to defend oneself 10 to 15 years later is difficult). These risks are currently funded by: insurance (the insurance companies won't participate); fees (not a practical idea because fees are small, risks are great); and the net worth of the service provider (about 20 percent of annual revenue). As a result, this work is becoming unattractive, and, in the future, may be more unattractive. The following recommendations were made:

a. A uniform standard of liability is needed. State laws must be preempted.

b. There should be a comparative standard for negligence instead of strict liability (if 70 percent negligent, then 70 percent liable). This was defined by another contractor as comparative responsibility. The government owns the land, put the waste there, and should bear a significant portion of the responsibility.

c. Liability should be capped to the profit of a job.

d. Statute of limitations should commence after completion of the work and run for four years.

e. The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable.

f. Risk apportionment should be a part of the contract negotiations.

5. Further Discussion on Industry's Liability Concerns with Regard to DOD Environmental Restoration Work and Potential Solutions to Address These Concerns.

A DOD representative led this topic to generate further discussion on the key issues and to explore potential solutions to these issues. The topic leader indicated that DOD was looking for solutions that would result in good (technical and timely) cleanups of its hazardous waste sites, at a good price, and maintain a good contractor base which earns a fair profit and is a viable community. The RAC representatives indicated that this would be possible if there was equitable risk sharing between the RACs and the DOD.

It was suggested that value-engineering clauses in contracts be utilized. Some contractors indicated that this effort doesn't work very well, due to lack of timeliness in the government's response. This lack of timeliness causes contractors to stop trying. A DOD representative indicated that in situations in which a technology is approved in the ROD, there is reluctance to consider value-engineering proposals because it may mean reopening the ROD. A Navy representative indicated that his service welcomes value-engineering. The services indicated that when they become aware of roadblocks, they would take action to eliminate them.

A question was raised whether the RACs normally revalidated the remedial investigation/feasibility study (RI/FS) when contracted to perform remedial design/remedial action (RD/RA). The RACs agreed that they would revalidate the data obtained by another contractor. The degree of revalidation would depend upon the contractor who performed the RI/FS. Such revalidation could cost up to 20 percent of the RD/RA effort.

The Navy's Comprehensive Long Term Environmental Action, Navy (CLEAN) contract was discussed. The RACs were asked why they bid on these contracts since they did not know the cleanup effort involved. The RACs said that cost-plus (rather than fixed fee) contracting of CLEAN was a plus. They remarked that they would be better able to define the work and get a good price to perform a full scope of each task. As long as the cleanup effort was on the base, the possibility of third party liability was low. The closer to the site boundaries, the greater the risk associated with a project. Under CLEAN, each task is negotiated, and the contractor can evaluate the risk for each task. Only one percent of the projects in a CLEAN contract are anticipated as being a problem.

In a discussion of contracting strategies versus risk, the RAC representatives indicated that third party liability is independent of the contract type. They did not look at fixed price contracts in the environmental area because there are too many unknowns and too much time and effort is spent in contract modifications. They wanted to be able to address, in the contract, the care to be taken in determining the risk of the project.

The RAC representatives were asked, what percentage of contracts are high risk? The response was, that a large percentage of environmental effort requires third party liability and therefore, is a high risk. One company representative indicated that his company will not perform any work without some form of indemnification. Defense costs for liability suits are the big problem. There is no method of predetermining how juries will apportion costs.

The RAC representatives reiterated that they have the ability to negotiate risks for commercial projects. That ability does not currently exist in dealing with the DOD. They also indicated that

The RAC representatives concluded this discussion by stating that contractors are responsible and want to be held responsible for those actions over which they have control. They do not, however, want to be solely responsible for liabilities resulting from a site cleanup.

D. MEETING ASSESSMENT

CAPT Rispoli asked if all people who would make decisions regarding these issues were represented in this forum. Participants indicated that there were no other groups which should be represented as a part of the forum. The forum participants felt, however, that following their review of the proceedings and incorporation of their comments, the proceedings should be provided to select environmental groups for comment.

CAPT Rispoli indicated that the draft proceedings would be circulated to SAME and the Office of the Deputy Assistant Secretary of Defense (Environment) and then be sent with all submitted papers to forum participants for comment prior to finalization. The forum attendees agreed with these procedures.

E. MEETING PROCEEDINGS

The draft proceedings of the meeting were provided to all attendees on 21 February 1991. Comments were received from a US Army Corps of Engineers representative, the NUS Corporation representative, and from the American Insurance Association representatives. There comments have been incorporated into the proceedings.

The discussion continued with the RAC representatives indicating that a negligence standard exists in CERCLA, and they want a similar law modification for state laws and the Resource Conservation and Recovery Act (RCRA). They do not desire strict liability to apply to them. The overriding issue is that the RACs are concerned that they must assume responsibility for what they did not initially cause. The responsibility should be adjudged to the people who put the waste in the land.

The DOD topic leader asked what the DOD could do to help the contractors. There were four areas of potential change: the law, which would be most difficult to change; the regulations (DOD indicated that they would work with the EPA to determine how the regulations might be changed); policy; and the FAR/contract (DOD indicated that they could directly impact these last two areas and achieve the quickest results).

Indemnification of contractors is now addressed in Public Law (P.L.) 85-804 and FAR 52-228.7. Under P.L. 85-504, the contractor must identify the nature of the risk and then the Contracting Officer must raise the issue to the service Secretary for authorization. To support indemnification of contractors for environment risks would make each service's effort unique. The FAR clause is based on radioactive material risks and excludes construction. A change to the FAR appears to be appropriate, but it would have to be based on a change in the law. DOD representatives considered that such a change might be accomplished as a part of the Defense Reauthorization Act.

The following potential solutions were identified for evaluation by DOD in response to the issues raised by the RAC representatives regarding their risks:

a. Change the laws so that the RACs are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine an equitable distribution of the risk between the contractor and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

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March 28, 1991

Joseph C. Dobes
Director, Safety and Environmental Protection Division
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2611 Jefferson Davis Highway, Suite 3000
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Re: Minutes of the Society of American Military Engineers January Conference

Dear Mr. Dobes:

Thank you for sending the draft minutes from the January 30-31, 1991 meeting of the Society of American Military Engineers. I was pleased to attend and discuss the issue of surety bonds for hazardous waste cleanup projects. As we discussed on the phone recently, I have only a few comments on the draft minutes, and you took care of the specific items while we spoke.

However, I also have a general comment which I wanted you to have in writing for the record. As you may remember, I was unable to stay for the entire program, and thus, missed the creation of the recommendations and potential solutions contained in the minutes. All of the recommendations and potential solutions developed by the attendees of the conference are excellent ideas. However, I was concerned that surety was not specifically included in some of the comments.

For example, recommendation "e" states that "The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable." This is an instance where the RAC's surety should specifically be included in the recommendation. Just such a provision is part of the Superfund amendment passed last year, and has been essential to the increase we have seen in the availability of surety bonds for those contracts covered by that amendment. The ideas contained in the recommendations should apply equally to the RAC and its surety.

The potential solutions also refer only to the contractor, while applying the solutions to the surety as well will be necessary to increase the sureties' ability to underwrite

bonds for these types of projects. Thus, it is my recommendation that the potential solutions be amended to read as follows (underlined portion is the proposed amendment):

a. Change the laws so that the RACs and their sureties are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor and surety work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor or surety liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors and their sureties on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's and surety's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's and surety's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and surety who takes over for a contractor and determine an equitable distribution of the risk between the contractor or surety and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor or surety must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

These minor changes in the recommendations and potential solutions would express the necessity of protecting the surety of a response action contractor to the same extent as the contractor. Without this equity, it is most likely that bonds will continue to be difficult to obtain for all hazardous waste cleanup projects not covered by the Superfund amendment implemented last year.

Thank you for allowing us to submit these follow-up comments. Please let me know if there is anything else which I can do to assist you in putting together the final version of the minutes.

Very truly yours,

Lynn M. Schubert
Senior Counsel

LMS/lms/jdltr.sam

cc: Captain James A. Rispoli
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APPENDIX 2

Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

US Army Corps of Engineers
Water Resources Support Center
Institute for Water Resources

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

JULY 1990

IWR REPORT 90-R-1

Unclassified
SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE

Form Approved
OMB No 0704-0188
Exp Date Jun 30, 1986

1a REPORT SECURITY CLASSIFICATION U[illegible]assified	1b RESTRICTIVE MARKINGS
2a [illegible]CURITY CLASSIFICATION AUTHORITY	3 DISTRIBUTION / AVAILABILITY OF REPORT Approved for public release; unlimited
2b DECLASSIFICATION / DOWNGRADING SCHEDULE	
4. PERFORMING ORGANIZATION REPORT NUMBER(S) IWR Report 90-R-1	5. MONITORING ORGANIZATION REPORT NUMBER(S)
6a. NAME OF PERFORMING ORGANIZATION USACE, Institute for Water Resources 6b. OFFICE SYMBOL (If applicable) CEWRC-IWR	7a. NAME OF MONITORING ORGANIZATION
6c. ADDRESS (City, State, and ZIP Code) Casey Building Telegraph & Leaf Roads Ft. Belvoir, VA 22060-5586	7b. ADDRESS (City, State, and ZIP Code)
8a. NAME OF FUNDING / SPONSORING ORGANIZATION USACE, Directorate of Military Programs 8b. OFFICE SYMBOL (If applicable)	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c. ADDRESS (City, State, and ZIP Code) Pulaski Building 20 Massachusetts Avenue, NW Washington, DC 20314-1000	10. SOURCE OF FUNDING NUMBERS PROGRAM ELEMENT NO. / PROJECT NO / TASK NO / WORK UNIT ACCESSION NO

11. TITLE (Include Security Classification)
Hazardous and Toxic Waste (HTW) Contracting Problems - A Study of the Contracting Problems Related to Surety Bonding in the HTW Clean-up Program

12 PERSONAL AUTHOR(S)
[illegible]rp, Francis, M.

13a. TYPE OF REPORT	13b. TIME COVERED	14 DATE OF REPORT (Year, Month, Day)	15 PAGE COUNT
final	FROM _____ TO _____	1990/April	

16. SUPPLEMENTARY NOTATION

17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB-GROUP	Bonding, Miller Act, Service Contracts Act, Davis-Bacon Act, CERCLA, FAR , HTW, Surety, Performance Bond

19. ABSTRACT (Continue on reverse if necessary and identify by block number)

This study attempts to determine the impact of performance bond availability on the successful accomplishment of Hazardous & Toxic Waste (HTW) projects.

20. DISTRIBUTION / AVAILABILITY OF ABSTRACT	21 ABSTRACT SECURITY CLASSIFICATION
[illegible]NCLASSIFIED/UNLIMITED ☒ SAME AS RPT. ☐ DTIC USERS	

22a NAME OF RESPONSIBLE INDIVIDUAL	22b TELEPHONE (Include Area Code)	22c OFFICE SYMBOL
Francis M. Sharp	(202) 355-2369	CEWRC-IWR-N

DD FORM 1473, 84 MAR — 83 APR edition may be used until exhausted. All other editions are obsolete.

SECURITY CLASSIFICATION OF THIS PAGE

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

Prepared by

U.S. Army Corps of Engineers
Water Resources Support Center
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Commissioned by
Environmental Protection Agency
and
U.S. Army Corps of Engineers
Environmental Restoration Division

July 1990

IWR Report 90-R-1

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The interviews elicited the perceptions of the HTW surety and contracting community regarding their concerns about risks in the HTW Cleanup program. Many of these concerns are of potential risks that are hypothesized, but have not yet occurred. However, these risks are perceived and acted upon as real.

The study findings, which centered on Corps executed projects, indicate that the surety industry is making performance bonds available to certain of the major firms competing for HTW work. However, it appears that industry's reluctance over the potential liability associated with such work has prompted the industry to move toward limiting bonding to firms having other substantial business with the surety, or major financial assets available, and a history of past performance on HTW projects. This surety industry reticence has precluded some firms from being able to secure needed bonding and has also lessened the opportunity for firms wishing to break into the Federal HTW marketplace. The resulting concern of both EPA and the Corps is that bonding availability not curtail qualified firms' ability to compete for HTW projects to such an extent that the prices for the remedial action work is arbitrarily and excessively increased.

There is no single solution to remedy the problems encountered in the study. Rather, there are a number of individual actions that may be instituted, some at a fairly low institutional cost that will help to alleviate the situation. The government should mitigate the concerns of the contractors and the sureties while maintaining appropriate protection of the government's interests.

The solutions to the cited problems in HTW bonding include the following:

- Requirement for zero based acquisition planning involving an interdisciplinary team to develop plans that incorporate techniques such as risk analysis in structuring the project contracting plan. Analysis will include consideration of the extent of risks assumed by the government will effect potential project cost savings, increased competition for contracts and opportunities for more firms to compete in the HTW program. Policy guidance

I. SUMMARY

The EPA and the U.S. Army Corps of Engineers ("Corps") have experienced difficulties in contracting Hazardous and Toxic Waste (HTW) cleanup projects. The HTW cleanup industry has expressed concern that it could not obtain surety bonds required as a prerequisite for competing for remedial action construction projects. It was reported that Treasury Department listed corporate sureties, which provide the guarantee bonds for Government projects, had imposed stringent limitations on the provision of performance bonds which assure the government that the cleanup project will be completed. Essentially, the bonds guarantee that the surety will either complete performance or pay the Government its costs associated with completing the project to the limit of the penal amount of the bond. Various contracting industry firms stated that they have not been able to secure bonding for some projects. Those that have obtained bonds had a difficult time doing so, and some firms that had obtained bonds for previous projects were unable to obtain bonds for a subsequent project. The surety industry indicated its reluctance to guarantee performance on HTW projects primarily because of its concern for possible long-term liability exposure and changing state-of-the-art design requirements associated with such actions.

The EPA and the Corps commissioned the Institute for Water Resources to gather information on the subject; to analyze the data to determine the extent of the existing bonding problems; and to offer recommendations which could be implemented in an effort to alleviate problems noted. A survey was conducted of Corps district offices, the HTW cleanup industry, surety firms, and trade associations, to determine the extent and nature of the problem. A few survey activities extended to EPA and state offices involved in HTW work.

The study examined 24 ongoing remedial action and completed Corps HTW construction contracts. Statistics were gathered from actual Corps records on the contractors and sureties that participated in these contracts. In addition, a sample of the universe of HTW contractors and sureties was interviewed along with industry association representatives. The responses to these interviews appear later in this paper. They were analyzed to arrive at conclusions concerning industry views and perceptions of the surety problem.

II. BACKGROUND

A. BONDING PROBLEMS

Performance bonds are used in the construction industry to insure the completion of construction projects. These bonds are mandated by the Miller Act for all Federal construction projects. While bonds are normally required only for construction contracts; in some instances, concern for assuring performance has led to the industry being required to guarantee performance on work elements that are characterized primarily as service rather than construction. In general, a 100% performance bond has been required by the Corps on construction contracts.

The Corps, EPA, and the states have been told by sureties and HTW contracting firms about the inability of contractors to obtain performance bonding for HTW cleanup projects. Bond availability problems and contractor concerns have increased over the past year. In some instances firms responding to Government HTW contract announcements have not been able to secure performance bonds. Some firms have also reported that they will not compete for HTW construction contracts because they know that they cannot obtain the required surety bonds.

While the inability to secure bonding may occur in other types of construction contracting and is not exclusive to the HTW field, the frequency of non-bonding occurrences and the fact that they involve companies that are of a size and financial stature not normally concerned about such matters, is itself a cause for concern. Even more disconcerting is the fact that firms which are most experienced in accomplishing HTW work are in some instances being precluded from competing for such work by their inability to secure the required bonds.

B. STUDY GOAL: DETERMINE EXTENT OF THE BONDING PROBLEM AND PROPOSE SOLUTIONS

EPA's Office of Emergency and Remedial Response and the Corps Directorate of Military Programs, Environmental Restoration Division, commissioned a study to determine the extent of the bonding problem and identify action which could be taken to alleviate bonding problems noted. The Institute for Water

will be issued on the appropriate factors to be taken into consideration in accomplishing this analysis.

- Analysis of the option of dividing the project into work elements with an appropriate level of bonding in each.

- Clarify the government's policy on indemnification of contractors and sureties.

- To the extent of its authority, each government agency will define its specific responsibility for the risk aspect of the cleanup project where appropriate (e.g. accept responsibility for performance specifications).

- The government will specifically accept the responsibility for project design where the performance specifications have been met.

The thrust of this study was specifically centered on the bonding issue. While the stated problem of many of the respondents was bonding, the underlying issue is the uncertainty about risk in general as it applies to the HTW Cleanup program. There is uncertainty by sureties and contractors concerning risk and liability. Surety bonds for performance, liability insurance and indemnification questions are closely related and difficult to separate when dealing with HTW risk questions.

There are two categories of options available to address these solutions. First, short term steps can be taken internally by the Corps and EPA that involve revising internal agency procedures to alleviate the contracting problem. Changes to government-wide construction procurement regulations, e.g. standard bond forms, should be pursued with the FAR Council. Finally, longer term actions could be carried out which concentrate on potential legislative revisions to the liability and indemnification provisions in the superfund statute.

III. PROBLEM DEFINITION

When surety bonding problems are added to the hurdles that firms must face when competing for multi-million dollar projects, the number of firms meeting all the construction contract requirements could be reduced even further. This study attempts to determine the impact of performance bond availability on the successful accomplishment of HTW projects. The survey of surety bonding in the HTW program entails the examination of various institutional and procedural factors involved in Superfund and related HTW cleanup contracting programs. While there was general consensus that the potential liability and uncertainty surrounding such liability was the root cause for the limited bonding available, it is not clear that this was the only factor affecting availability. The surety industry's willingness to provide bonding was also linked to its independent evaluation of a number of factors relating to an individual contractor's financial and performance history. Construction firms were not asked why they may not have bid for or obtained contracts. Since proprietary information concerning the financial status of companies is not readily available and companies were queried only about the problems they had in obtaining surety bonds in the survey, and not about their financial status, the study was not able to establish that the liability issue was the only reason for sureties refusal to bond.

A. APPLICABLE LAWS, REGULATIONS AND OTHER FACTORS

There are several laws and regulations that affect contract cleanup activity in the HTW area. They are listed in the following table:

Resources (IWR), a Corps research agency located at Fort Belvoir, VA, was selected to do the study. The study was initiated in late November 1989. IWR conducted a series of personal and telephone interviews of HTW industry contractors, as well as HTW industry associations. In addition, personnel from insurance and surety industry firms, surety associations, states, EPA, and the Corps were interviewed about the issue. A listing of the interviewees appears in Appendix A.

The interviewees were questioned regarding difficulties experienced in the HTW bonding area. They were also asked for their views on the nature and magnitude of any bonding problems and requested to provide suggestions on actions that could be taken to rectify the situation. IWR also gathered references, such as seminar papers, letters of concern to various agencies, testimony before Congress, government forms and regulations, and other relevant documents. A body of background material concerning the problem was assembled. The study also collected information concerning contracting for HTW cleanup, in particular information regarding the difficulties in the acquisition of surety bonds by contractors.

justified for service contracts. HTW cleanup projects may contain activities classified as either construction or service. According to CERCLA Section 9604, these classifications are governed by decisions issued by the Department of Labor (DOL). These decisions will control the wage rates applicable to the particular activities; that is Davis-Bacon for construction activities and Service Contract Act for service activities. In many cases, it is impossible to create an HTW contract comprised totally of construction or non-construction activities. Therefore most HTW contracts are made up of a combination of these activities. Where construction and service activities are combined in the same contract, the procuring agency generally will treat the contract as being under either a service or construction contract based on the classification of the predominant work. A recent letter (31 May 90) from DOL to McLong, advises that construction Davis Bacon Wage Rates must be included if there is a "substantial" amount of construction work involved. Contracting officers have varied in their decisions on bonding requirements for contracts involving both classifications of work. In some instances, performance bond requirements were applied only to the extent of the value of the construction work; in others the requirement was applied to the total value of the construction and closely associated service work. In these latter cases, the decision was usually criticized by contractors unable to secure bonding as being unduly restrictive of competition and unnecessary to protect the Government's performance interests. Moreover, where the CO determines that the contract is principally service related, he may treat the contract as a service contract and require no bonding.

The Contracting Officer (CO) is responsible for the initial determination of whether a contract should be service or construction based on the CO's understanding of the applicable rulings issued by the DOL. On occasions, DOL has overturned a CO's decision and has caused the Government additional expense by requiring the CO to include Davis-Bacon Wage Rates and, at times, paying additional wages retroactively. The Corps experienced one instance where a service contract classification associated with excavation of HTW contaminated soil was reversed by DOL to a construction classification following contract completion. This decision resulted in a significant contract price increase in order to provide an equitable adjustment to the contractor for the higher wage rate payments that had to be made to workers on

Table 1

STATUTES AND REGULATIONS PERTAINING TO HTW CONTRACTING

ACT	DESCRIPTION
Miller Act Construction Contract Bonding Requirement	Requires Federal agencies awarding construction contracts to utilize payment bonds to assure that the prime contractor pays his subcontractors and performance bonds to guarantee completion of work in accordance with the contract specifications.
McNamara-O'Hara Service Contract Act (SCA)	Defines the types of activity classified as service contracts for the purposes of Federal government procurement.
Davis-Bacon Act (DBA)	Applies to all Federally funded construction projects. Designates the Secretary of Labor as the sole authority on the classification of wage rates for construction projects.
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by Superfund Amendments & Reauthorization Act (SARA)	CERCLA enacted to eliminate past contamination caused by hazardous substances pollutants or contaminants released into the environment. Authorizes EPA to recover cleanup costs. SARA enacted to strengthen CERCLA and tighten cleanup target dates. Requires use Davis-Bacon wage rates for construction projects funded under section 9604(G) of CERCLA.
Federal Acquisition Regulation (FAR)	Pursuant to the requirements of Public Law 93-400 as amended by Public Law 96-83: provides uniform policies and procedures for contracting by Federal executive agencies.

The procedure for obtaining performance and payment bonds from individual or corporate sureties for HTW cleanup contracts is incomplete without examining the background of the bonding requirement. The 1935 Miller Act specified that all construction contracts by the Federal Government would be covered by performance and payment bonds. The purpose of the performance bond is to insure that the project is completed in the event that the originsl contractor defaults.

The requirement for performance bonds varies with each project and is affected by the type of project being undertaken. A bond is required by the Miller Act on all fixed-price construction contracts over $25,000, but must be

Acceptable surety may be provided from a number of other sources in addition to the more familiar corporate and individual surety bonds. These other sources are listed in the Federal Acquisition Regulation (FAR) as including "United States bonds or notes",..." certified or cashier's check, bank drafts, Post Office money order, or currency".[1] Corporate surety bonds are provided by surety firms that have been approved by the Treasury Department. These firms cannot provide bonding beyond certain dollar limits established by the Treasury. Individual surety providers are, as the name implies, individuals who pledge their personal assets as guarantee. The corporate bond is the primary guarantee utilized in performance and payment bonding of both HTW and non-HTW work.

Over the past two years, interest in the use of individual sureties increased sharply as contractors anxious to compete for all Federal construction projects, but unable to acquire a corporate surety bonding commitment, sought to satisfy the Government's bonding requirements from the only source available. Reports suggest these bonds were made available at significantly higher cost. Unfortunately, the individual surety's assets available to secure the bond obligation all too frequently were insufficient in value to cover the penal amount of the bonds. In each instance where the contractor proposing the individual surety was disqualified, due to the non-responsibility of its proposed individual surety, the CO made an award to the next higher bidder which in every case provided a corporate surety bond. New regulations instituted in February 1990 place more stringent requirements on the use of individual surety bonds.

2. The Service Contract Act. The McNamara-O'Hara Service Contract Act (41 USC 351-358) (SCA) covers all Federal government service contracts exceeding $2,500, whose principal purpose is the furnishing of services to the Federal government through the use of service employees. Since the term "service" is not as explicitly defined within the SCA as the term "construction" is in the Davis-Bacon Act (DBA), the DOL's implementing regulations (29 CFR Part 4) are keyed to the terms "service employees" and "principal purpose."

the project. The Corps of Engineers is very sensitive to avoiding disputes with DOL arising from failure to use construction wage rates. EPA is equally concerned that the proper rate be used by the Corps.

1. Miller Act Construction Contract Bonding Requirements. In order to fully address the performance bonding requirement and its relationship to the contracting industry, we must first examine the Miller Act. The Miller Act requires performance and payment bonds for any contract over $25,000 for the "construction, alteration or repair of any public building or public work". P&P bonds are required on all FFP construction contracts and/or delivery orders over $25,000. The percentage needed for performance bonds is flexible. However, these bonds are not necessary for cost reimbursement contracts and/or delivery orders. The level of bonding required is determined by the Contracting Officer based on the level of risk associated with the project and the resulting need to protect the Government's interest. The performance bond guarantees the Government that the building or work will be completed in accordance with the terms and conditions of the contract or the Government will be compensated. The payment bond guarantees that subcontractors and suppliers of the prime contractor will be paid for their work. Performance and payment bonds are usually issued by the same surety for a particular project. These bonds protect against contractor non-performance. They are not intended as insurance for contractor actions which may prompt third party liability suits, or as a substitute for pollution or any other type of insurance. A third bond, generally required by agency or acquisition regulations where the contract solicitation is a formally advertised sealed bid, is the bid bond. The bid bond protects the Government by providing a penal amount that will be forfeited by the surety of the lowest responsible bidder if the bidder fails to accept the award or to provide the required performance and payment bonds after award has been made. Bid bonds generally are provided by the same surety that provides the performance and payment bonds for a particular contract. The surety's decision to issue the bonds appears to be controlled by the contractors bonding capacity and its analysis of the risk associated with each particular contract. Hence, it would seem that difficulties reported in contractors' ability to acquire bid bonds are in fact directly connected to the same factors causing those contractors inability to acquire performance bonds.

c. The construction work is physically or functionally separate and is capable of being performed on a segregated basis from the other work required by the contract.

3. Davis-Bacon Act. The Davis-Bacon Act (40 USC 276) (DBA) covers all Federally funded or Federally assisted contracts in excess of $2,000 for "construction, alteration or repair of public buildings or public works."[2] The Secretary of Labor's authority to rule on questions of statutory coverage under DBA is derived from Reorganization Plan No. 14 of 1950 (5 USC App. USC p. 1050 (1982).

a. Applicability determinations issued by the Secretary's designate, the Administrator of the Wage and Hour Division, is binding rather than advisory in nature. Thus, when the DOL decides that the contracting agency made an erroneous determination not to incorporate the DBA provisions in a covered contract, the agency must either modify the contract to incorporate the required wage decision and provisions or terminate the contract (29 CFR 1.6).

In their determinations of DBA applicability relating to HTW work, the DOL relies on the regulatory definitions set forth at 29 CFR, Part 5. Thus, the statutory terms "construction, alteration or repair" refer to: "... all types of work done on a particular building or work at the site thereof, including without limitation, altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work and hauling soil to an incinerator by the employees of the construction contractor or subcontractor...." DOL has defined "Building" or "Work" as follows: "... construction activity as distinguished from manufacturing, furnishing of materials, or services and maintenance work. The terms include without limitation, buildings, structures and improvements of all types, such as... excavating, clearing and landscaping." DOL, in its review of one environmental restoration project, has indicated that the term "landscaping" includes activities such as planting trees, lawns and shrubs in conjunction with other work, but also elaborate landscaping activities such as substantial earth moving and/or rearrangement of the terrain. DOL advised further that

Inasmuch as the scope of possible service contracts is extensive, section 7 of the Act lists specific contracts outside the Act. Included among these exemptions are contracts for "construction, alteration and/or repair, including painting, or decorating of public buildings or public works." While DOL's regulations (29 CFR 4.130) contain a number of illustrative service contracts, none of those listed relate specifically to environmental restoration (HTW) projects.

The principal purpose emphasis is key inasmuch as a contract may be principally for services, but may at the same time involve more than incidental construction.

Existing DOL regulations do not define incidental construction. Guidance on this issue, however, may be derived from advisory memoranda issued by the DOL's wage and hour administration relating to construction projects comprised of different categories or schedules (building, heavy, highway and residential). As a general rule, DOL advises contracting officers to incorporate a separate schedule when such work is more than incidental to the overall or predominant schedule. "Incidental" is here defined as less than 20% of the overall project cost. DOL notes that 20% is a rough guide, inasmuch as items of work of a different category may be sufficiently substantial to warrant separate schedules even though these items of work do not specifically amount to 20% of the total project cost. This same rationale may apply to contracts involving services and construction.

Under such circumstances, both the SCA and the Davis-Bacon Act (see below) may apply. In this regard FAR 22.402(b)(1) prescribes that the DBA will apply when:

a. The construction is to be performed on a public building or work.

b. The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the DBA. The term substantial defines the type and quantity of the construction work and not merely the total value of the construction work as compared with the total contract value.

law was enacted to eliminate the contamination created by the indiscriminate disposal of organic and inorganic chemicals and other pollutants. The Act also allows EPA to force potentially responsible parties (PRPs) to perform the remediation or recover cleanup costs from the PRPs.

SARA (Superfund Amendments and Reauthorization Act of 1986) (P.L. 99-499) was enacted to re-authorize and strengthen the CERCLA. It was perceived at the time that cleanup activity was not proceeding quickly enough. SARA, therefore, set targets for beginning cleanup work. EPA was required to begin cleanup activities at 175 sites by October 1989 and an additional 200 sites by October 1991. CERCLA, as amended by SARA, specifies the basic guidelines for Superfund liability. Strict and joint and several liability are the foundations of both the 1980 and the 1986 Acts. These liability concepts are a powerful tool that can be used by the government to promote voluntary PRP response actions and to recover cleanup costs from any party found as having contributed to the contamination.

Strict liability is liability without fault. Thus, even if the firm is not negligent, the firm may be liable. The basis of joint and several liability involves the concept that, even if the firm is only responsible for a portion of the contamination, the firm may be held liable for all costs expended in the cleanup effort.

Recognizing that the strict and joint and several liability standard of CERCLA might prove onerous to remedial action contractors that are needed for cleanup efforts, Congress specifically excluded response action contractors from liability under Federal laws except for cases involving negligence. Gross negligence or willful wrongdoing are not covered. Furthermore, in section 119 of SARA, Congress authorized indemnification for remedial action contractor negligent liability associated with releases of hazardous substances. Indemnification for strict liability where it exists at state level is not authorized. There is no specific reference in either CERCLA or SARA on the availability of Section 119 indemnification to surety guarantors on Superfund projects. However, EPA has, at least in one instance, indicated that it would make indemnification available to a surety following a

these activities standing alone may be properly characterized as construction, alteration or repair of a public work.

Section 9604(G) of CERCLA also specifically stipulates the wage rates to be paid on Response Action Construction projects are to be as determined by the Secretary of Labor in accordance with the Davis-Bacon Act as follows:

> "Sect. 9604(g)(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.
>
> (2)The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40 of the United States Code."

b. The essential point of the foregoing discussion of the Service Contract and Davis-Bacon Acts is that although the public policy objective (labor standard protection) of the statutes are similar, there are significant differences between the two which affect the cost of doing business. Clearly, the DOL's authority to require contracting agencies to retroactively modify contracts to add one set of wage rate provisions and/or delete another, will have consequences for project costs. In view of DOL's authority to issue determinations as to what comprises "construction" for purposes of the DBA, there may also be consequences for the coverage and extent of the bonds required under the Miller Act.

4. Superfund Statute. Inasmuch as considerable concern was expressed by the surety industry regarding its potential for liability arising from bonding of HTW projects, a brief discussion of the superfund statute is included in this section. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510)(CERCLA), commonly referred to as the Superfund law, authorized $1.6 billion to clean up abandoned dump sites. The

needs are established, and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

B. HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PRACTICES

The Corps contracts with industry for construction and other services, e.g., architect-engineer services, research and development services, and supplies.

The decision on whether to use a firm fixed price (FFP) contract, cost plus award fee (CPAF), cost plus fixed fee (CPFF), or a combination of fixed price and cost depends on whether complete specifications can be provided in the solicitation. Other factors determining the decision are the size of the project, incremental funding, urgency, and the type of design required for implementation.

Prior to issuing a delivery order against an indefinite delivery type, umbrella contract (Pre-Placed Remedial Action (PPRA) or Rapid Response (RR)) or requesting a proposal from a contractor, a written determination must be made describing the type of project (service, construction, or both) and the type of delivery order to be issued (FFP, CPAF, CPFF, or mixed).

C. CORPS HTW PROJECT DATA PRESENTATION, ANALYSIS AND FINDINGS

1. Introduction. The study analyzed data relative to the Corps HTW contracting experience for Superfund projects. The prime offices responsible for HTW contracting within the Corps are the Omaha and Kansas City Districts. Contracting records from these districts for the years 1987 through 1990 were assembled and examined. The Tables and Charts on the following pages summarize information on the 24 Superfund contracts carried out in the 1987-89 time period. A summary of the charts is shown below.

performance default on the same basis as such indemnification would be offered to any remedial action contractor provided the surety assumes substantially the same role as the original contractor. Some corporate sureties point to this liability potential as the basis for their refusal or reluctance to actively provide bonding for HTW work. These sureties urge that it be made clear that the surety performance bond is a guarantee of performance only and in no way is intended to serve as insurance for potential third party liability suits. Likewise, they urge that the application of the Section 119 indemnification to the corporate surety involved in a HTW project be clarified.

5. Federal Acquisition Regulation. HTW contracts, like other Federal government procurement procedures, are controlled by the Federal Acquisition Regulation (FAR). The Federal Acquisition Regulation provides uniform policies and procedures for all Federal executive agencies. These policies and procedures define construction and other government procurement activities. In addition, they specifically define contracting instruments such as performance and payment bonds (see Appendix B). The development of the FAR is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400) as amended by Pub. L. 96-83 and OFPP Policy Letter 85-1, Federal Acquisition Regulation System, dated August 18, 1985. The FAR is prepared, issued, and maintained, and the FAR system is prescribed jointly by the Secretary of Defense, the Administrator of General Services Administration (GSA) and the Administrator of the National Aeronautics and Space Administration (NASA). These agency heads rely on the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council) to perform this function. Agency heads are authorized to independently issue agency acquisition regulations provided such regulations implement or supplement the FAR.

By definition, the term "acquisition" refers to acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal government through purchase or lease -- whether the services or supplies are already in existence or must be created or developed, demonstrated, and evaluated. Acquisition begins at the point when agency

while the waste containment, innovative technology projects and alternative water supply products have high-low bid ratios of around 1.2. This information also would support the case for less competition in the bidding for HTW projects through time.

c. Bidding Competition Climate. To determine if the bonding issues had contributed to any reduction in the competition for HTW projects, the bids for the 24 projects conducted by the Corps in the 1987 through 1989 period were examined. The number of bids was reduced from 6.2 on the average in early 1987 to 4.6 in late 1989 as shown in chart 3A. The number of bids also tended to lessen somewhat as the size of the project increased. This is illustrated in chart 3B. The latter phenomena is also experienced on all large construction projects. Chart 3C shows that the type of project also influences the number of bids received. Waste containment projects received the most bids--seven on the average--followed by alternative water supply and soil and waste water treatment projects. The least number of bids was received by the innovative technology projects. These projects received an average of only two bids. The data does not support a finding of significant cause and effect of bonding problems on the bidding for cleanup projects, but it does indicate a trend toward fewer bids for HTW projects.

The state lead EPA HTW projects have experienced similar problems in performance bonding as the Corps districts. The Texas Water Commission issued a second invitation for bids on a project due to limited competition and excessively high bids. The first attempt was unsuccessful due to the inability of four of the five contractors to obtain bonds and the final bid being excessively high. The EPA recommended contractual changes in the second attempt, and these changes resulted in a successful outcome with a contract being awarded at a substantial reduction in contract price. The changes recommended by EPA were as follows:

Allowing the use of an irrevocable letter of credit or a conventional bond in lieu of a performance bond.

Reduction in the security amount of the performance bond.

Bid Information	Bid Open Date	Project Size	Project Date
Award Amount/ Gov. Estimate	1A	1B	1C
High Bid/ Low Bid	2A	2B	2C
Number of Bids	3A	3B	3C

2. Analysis and Findings.

a. Ratio of Award Price to Government Estimate. Chart 1A illustrates the trend in the ratio of award price to the government estimate over the study period from 1987 to 1989. The ratio of award amount to government estimate rose from .8 to 1.2. In addition, the ratio of award amount to government estimate tended to increase with the size of the project, as shown in chart 1B. The type of remedy that was utilized also affected the award/estimate ratio. Award ratios of 1.3 were observed for the waste containment projects, on the average, as opposed to .85 on the other extreme for alternative water supply projects as displayed in chart 1C. The remainder of the projects were around the 1.0 area. The conclusion drawn from this information is that there is a tendency for large projects to run at a higher ratio of award/estimate and through time. This tends to lend credence to the fact that there is a tight market for HTW contracts.

b. High to Low Bid Ratio. An analysis of the contract data indicated that out of the 24 projects four contracts involved situations where the initial bid winner was not awarded the bid due to inability to secure bonding. These four contracts totaled about $31 million. $3.9 million additional costs were incurred because of the necessity to utilize the next lowest bidder. This was an average of a 14% increase in costs for the four contracts. The ratio of high bids to low bids has been found to drop from around 2 to 1 in 1987 to 1.3 to 1 in 1989 as illustrated in chart 2A. The range of bids also tends to decrease with the size of the project. Chart 2B shows this tendency. The high-low bid ratio also varies by the type of project. The collection and disposal of waste products has a large variation in the ratio of the bids

TABLE 2A

CORPS HTW CONTRACTS

HIGH BIDS COMPARED WITH LOW BIDS

$1,000,000s

BID DATE	ST	PROJECT NAME	REMEDY TYPE	TYPE CONTRACT	HIGH BID	LOW BID	HI BID/ LOW BID
6/04/87	PA	Lackawanna Refuse	CA	IFB	40.0	15.9	2.5
3/23/88	MA	Nyanza Chemical Waste Dump	CA	IFB	14.5	8.3	1.7
5/17/88	MA	Charles George Landfill	CA	IFB	23.3	13.8	1.7
6/07/88	NJ	Lang Property	CD	IFB	4.7	2.7	1.7
6/07/88	NJ	Metaltec Aerosystems	CD	IFB	7.5	2.4	3.1
8/02/88	OH	New Lyme Landfill	CA	IFB	18.5	13.7	1.4
10/06/88	PA	Bruin Lagoon	CA	IFB	9.4	4.0	2.4
10/12/88	PA	Heleva Landfill	CA	IFB	7.8	5.0	1.6
10/18/88	IN	Lake Sandy Jo	CD	IFB	3.9	2.4	1.6
11/16/88	NJ	Bog Creek Farm	TW	RFP	14.4	13.9	1.0
12/06/88	CA	Del Norte Pesticide Storage	TW	IFB	2.0	1.2	1.7
2/02/89	NJ	Bridgeport Rental/Oil Svcs.	TW	IFB	85.0	52.5	1.6
3/28/89	NJ	Caldwell Truck Co.	AS	IFB	0.3	0.2	1.5
6/22/89	NH	Lipari Landfill on-site	TW	IFB	28.0	16.0	1.8
7/11/89	MD	Kane & Lombard St. Drums	CA	IFB	5.4	5.4	1.0
7/24/89	NY	Wide Beach Development	IT	RFP	17.4	15.6	1.1
8/01/89	KS	Cherokee County Storage Tanks	AS	IFB	0.7	0.6	1.2
8/01/89	DE	Delaware Sand/Gravel Landfill	CA	IFB	2.4	1.5	1.6
8/02/89	RI	Western Sand & Gravel	AS	IFB	1.2	0.9	1.3
8/23/89	MA	Baird & McGuire	TW	IFB	13.5	11.3	1.2
8/31/89	NJ	Montclair W orange Sites	GV	IFB	0.4	0.2	2.0
9/06/89	MD	S.Md.Wood Treating	CO	IFB	3.4	2.6	1.3
9/19/89	NJ	Helen Kramer Landfill	TW	IFB	73.0	35.9	2.0
9/19/89	PA	Moyers Landfill	CA	IFB	33.9	28.5	1.2
				TOTAL:	410.6	254.5	1.6

KEY: REMEDY TYPE

TW- Treatment of wastes (soil and water)
CA- RCRA Cap
CO- Collection and disposal of wastes
IT- Innovative technologies
AS- Alternative water supply
GV- Gas venting
CO- Containment of wastes

IFB- Invitation for bids
RFP- Requests for proposals

Deletion of the handling of hazardous material in the first phase of the project and shifting it to the second phase and deletion of a test burn of contaminated soil, thus removing the sureties' objections to bonding the first phase.

The writing of separate bond agreements for the two project phases and the precise definition of what liability is covered by the performance bond and the time limits of liability.

Reducing the dollar cap on the retainage for the last phase of the project from $6 million to $2 million and reducing the time the retainage is held from 60 to 18 months.

Giving the surety the right to choose the option of whether to complete the project or forfeit the bond if the contractor defaults on the performance bond.

Providing the requirements for the surety to obtain indemnification in case of contractor default and the surety assuming project completion.

d. Distribution of HTW Contracts. There is considerable variation in the distribution of contracts among HTW contractors. In the Kansas City District, about 400 firms are on the bidders' mailing list for all construction, including HTW contracts. In 1987 through January 1990, 24 contractors competed in the HTW program, and 14 received contracts. According to Corps District personnel, the same few companies continually appear in the final bidders' lists for HTW contracts.

Charts 5 and 6 list the contractors that have worked on Corps HTW construction projects and their market share of the total competed Corps HTW outlay or activity. Five contractors, individually or in partnerships, have received 78% of the HTW contract dollars (Chart 5). Five of the 14 firms obtained about 58% of all the projects (Chart 6). The firms receiving awards are, for the most part, large firms with experience in waste handling in general. They are not the only firms with the qualifications and credentials to do the work, nor are they the only firms that have expressed interest in the hazardous and toxic waste projects. There are many contractors interested in participating in these projects. There appears to be legitimate concern that contracting impediments, such as bonding, might lessen further the Government's ability to expand contractor participation. Contracting impediments must be carefully considered as to their relative significance.

TABLE 2C

CORPS HTW CONTRACTS

PARTICIPATING CONTRACTORS AND SURETYS

BID DATE	ST	PROJECT NAME	CONTRACTOR	SURETY NAME
6/04/87	PA	Lackawanna Refuse	Chem Waste	Federal Ins.
3/23/88	MA	Nyanza Chemical Waste Dump	Tricil	Seabd St Paul Maine
5/17/88	MA	Charles George Landfill	Tricil	Seabd St Paul Maine
6/07/88	NJ	Lang Property	Sevenson	Wausau
6/07/88	NJ	Metaltec Aerosystems	Sevenson	Wausau
8/02/88	OH	New Lyme Landfill	Sevenson	Wausau
10/06/88	PA	Bruin Lagoon	GeoCon	INA
10/12/88	PA	Heleva Landfill	Chem Waste	Federal Ins.
10/18/88	IN	Lake Sandy Jo	Weston	none, escrow
11/16/88	NJ	Bog Creek Farm	Chem Waste	Federal Ins.
12/06/88	CA	Del Norte Pesticide Storage	U A Anderson	Great America
2/02/89	NJ	Bridgeport Rental/Oil Svcs.	Ebasco	Seabd St Paul Maine
3/28/89	NJ	Caldwell Truck Co.	Ellas Constr.	Wausau
6/22/89	NH	Lipari Landfill on-site	Bechtel	Aetna Cas.& Surety
7/11/89	MD	Kane & Lombard St. Drums	GeoCon	INA
7/24/89	NY	Wide Beach Development	Kimmons	individual
8/01/89	KS	Cherokee County Storage Tanks	Pitt/Desmoines	INA
8/01/89	DE	Delaware Sand/Gravel Landfill	Weston	Indiana Lumbermans
8/02/89	RI	Western Sand & Gravel	R H White	Wausau
8/23/89	MA	Baird & McGuire	Barletta	Wausau
8/31/89	NJ	Montclair W orange Sites	Summa Env.	Intl. Fid. Ins.
9/06/89	MD	S.Md.Wood Treating	Weston	Indiana Lumbermans
9/19/89	NJ	Helen Kramer Landfill	IT, Davy	Natl. Union
9/19/89	PA	Moyers Landfill	Chem Waste	American Home

TABLE 2B

CORPS HTW CONTRACTS

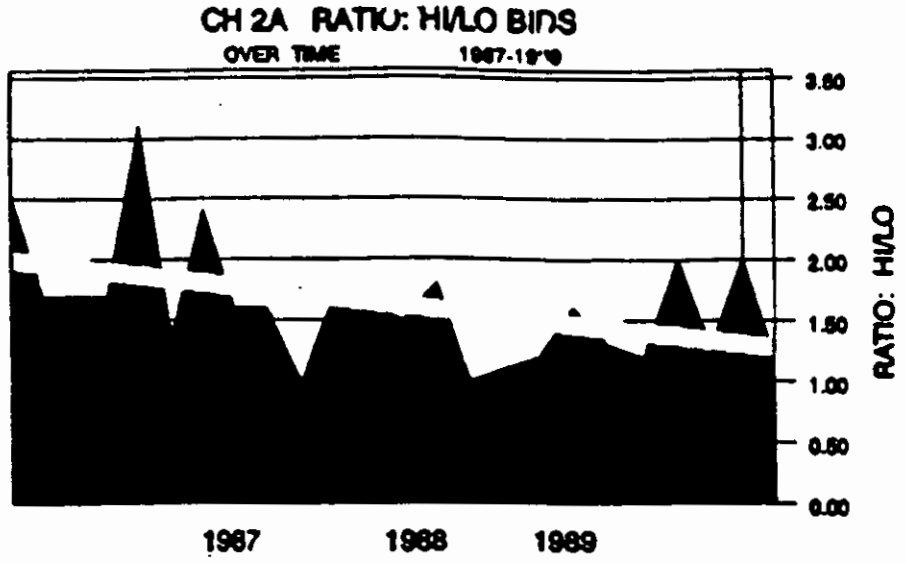
COST OF PROJECT COMPARED TO GOVERNMENT ESTIMATE

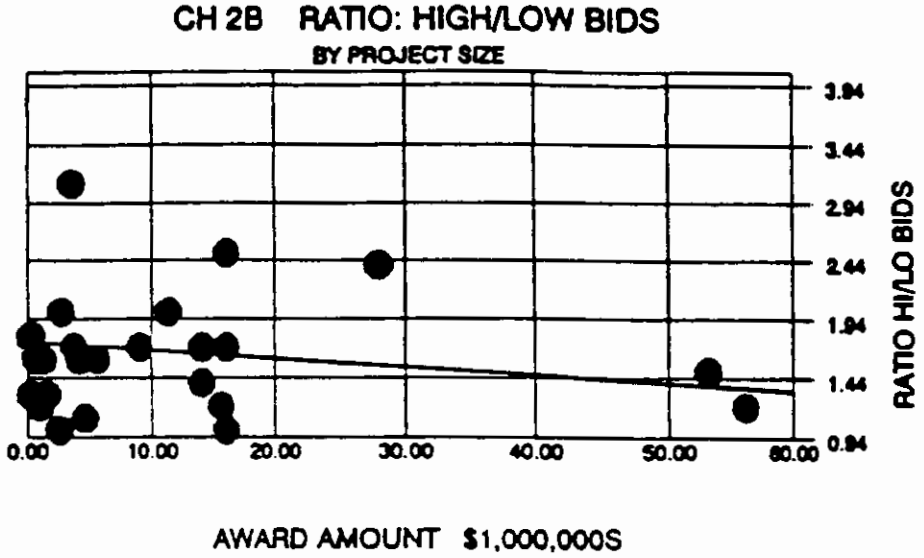
NUMBER OF BIDS PER PROJECT

BID DATE	ST	PROJECT NAME	PROGRAM	GOVT EST	AWARD AMT	AWARD AMT /GOVT EST	NO. BIDS
6/04/87	PA	Lackawanna Refuse	SF	23.0	15.9	0.7	7
3/23/88	MA	Nyanza Chemical Waste Dump	SF	13.0	8.6	0.7	13
5/17/88	MA	Charles George Landfill	SF	15.0	15.6	1.0	6
6/07/88	NJ	Lang Property	SF	4.1	3.6	0.9	6
6/07/88	NJ	Metaltec Aerosystems	SF	3.5	3.4	1.0	5
8/02/88	OH	New Lyme Landfill	SF	12.0	13.7	1.1	5
10/06/88	PA	Bruin Lagoon	SF	5.0	4.0	0.8	5
10/12/88	PA	Heleva Landfill	SF	4.7	5.4	1.1	8
10/18/88	IN	Lake Sandy Jo	SF	2.3	2.4	1.0	3
11/16/88	NJ	Bog Creek Farm	SF	14.0	14.0	1.0	4
12/06/88	CA	Del Norte Pesticide Storage	SF	1.3	1.2	0.9	11
2/02/89	NJ	Bridgeport Rental/Oil Svcs.	SF	42.0	52.5	1.3	5
3/28/89	NJ	Caldwell Truck Co.	SF	0.2	0.2	0.8	9
6/22/89	NH	Lipari Landfill on-site	SF	21.0	15.8	0.8	4
7/11/89	MD	Kane & Lombard St. Drums	SF	4.0	4.5	1.1	1
7/24/89	NY	Wide Beach Development	SF	15.6	15.6	1.0	2
8/01/89	KS	Cherokee County Storage Tanks	SF	0.7	0.6	0.9	2
8/01/89	DE	Delaware Sand/Gravel Landfill	SF	1.2	1.5	1.3	3
8/02/89	RI	Western Sand & Gravel	SF	1.0	0.9	0.9	9
8/23/89	MA	Baird & McGuire	SF	9.6	11.3	1.2	5
8/31/89	NJ	Montclair W orange Sites	SF	0.2	0.2	1.0	3
9/06/89	MD	S.Md.Wood Treating	SF	2.0	2.6	1.3	7
9/19/89	NJ	Helen Kramer Landfill	SF	36.0	55.7	1.5	4
9/19/89	PA	Moyers Landfill	SF	25.0	28.0	1.1	4
			TOTAL:	256.4	277.2	1.12	AVG.

$1,000,000s

SF- SUPERFUND


CH 2A RATIO: HI/LO BIDS
OVER TIME
3.50
3.00
2.50
2.00
1.50
1.00
0.50
0.00
RATIO: HI/LO
1987
1988
1989


CH 2B RATIO: HIGH/LOW BIDS
BY PROJECT SIZE
3.94
3.44
2.94
2.44
1.94
1.44
0.94
RATIO HI/LO BIDS
0.00
10.00
20.00
30.00
40.00
50.00
60.00
AWARD AMOUNT $1,000,000S
AWARD AMOUNT

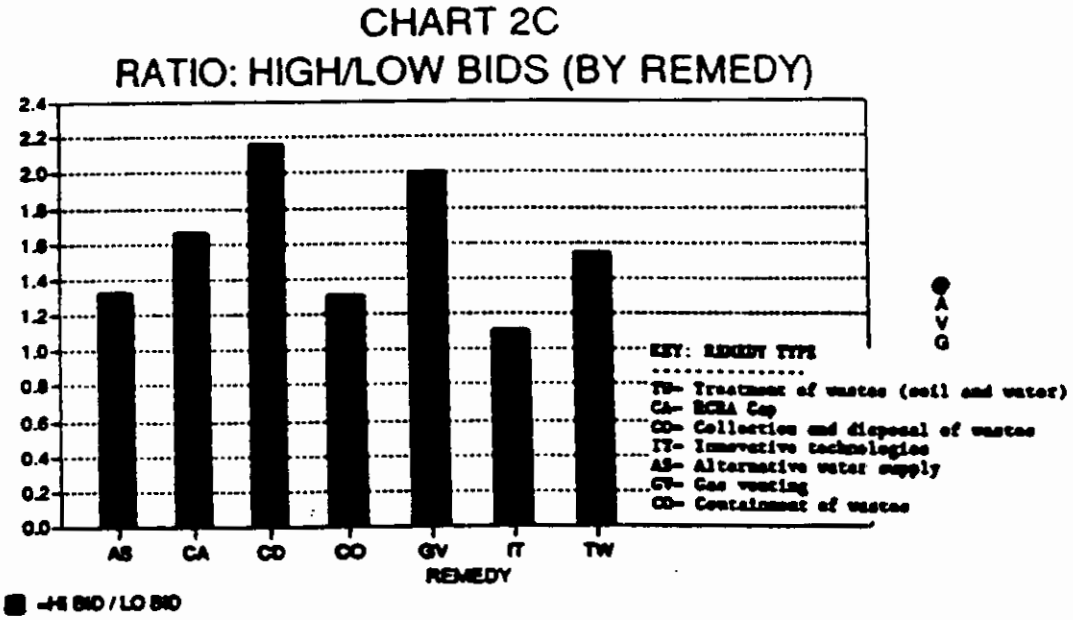
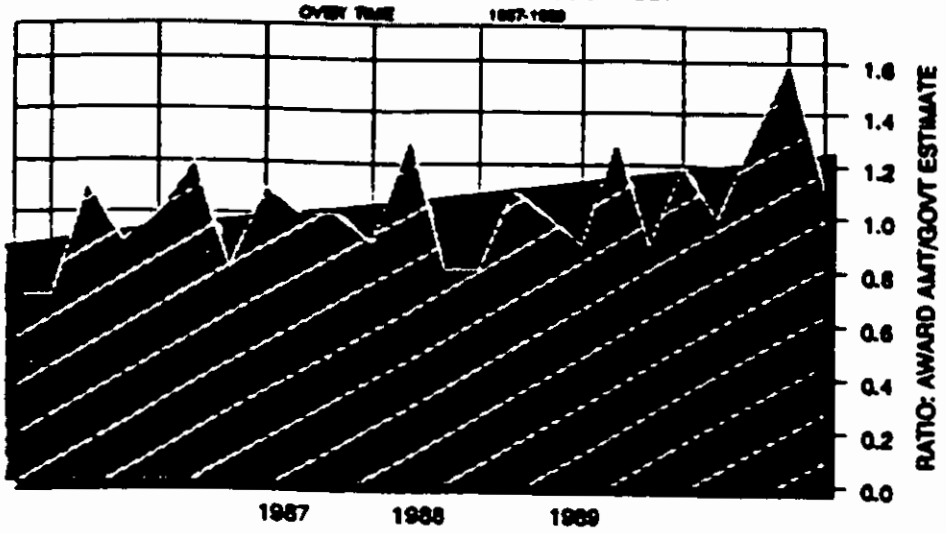


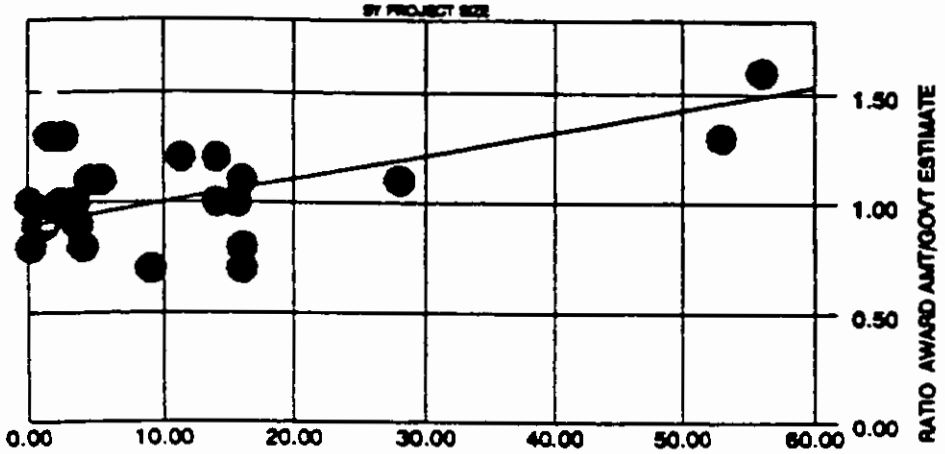
CHART 2C
RATIO: HIGH/LOW BIDS (BY REMEDY)
2.4
2.2
2.0
1.8
1.6
1.4
1.2
1.0
0.8
0.6
0.4
0.2
0.0
AS
CA
CO
CO
GV
IT
TW
REMEDY
AVG
KEY: REMEDY TYPE
TR- Treatment of wastes (soil and water)
CA- RCRA Cap
CO- Collection and disposal of wastes
IT- Innovative technologies
AS- Alternative water supply
GV- Gas venting
CO- Containment of wastes
HI BID / LO BID

CH 1A RATIO: AWARD AMOUNT/GOVT EST



AWD/EST AWD/EST REGRES

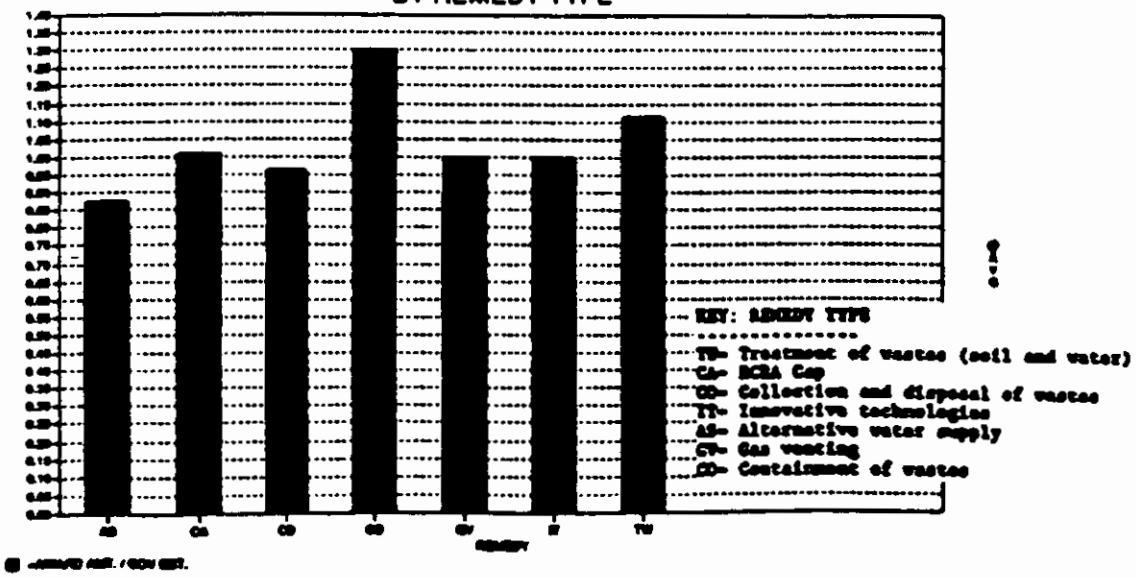
CH 1B RATIO: AWARD AMOUNT/GOVT ESTIMATE

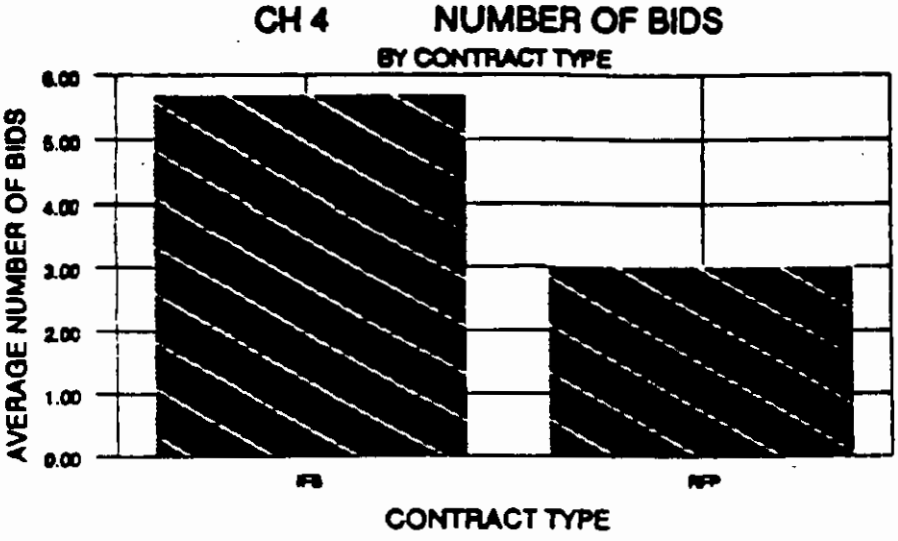


AWARD AMOUNT $1,000,000S

AWARD AMOUNT # BIDS NO. BIDS REGR

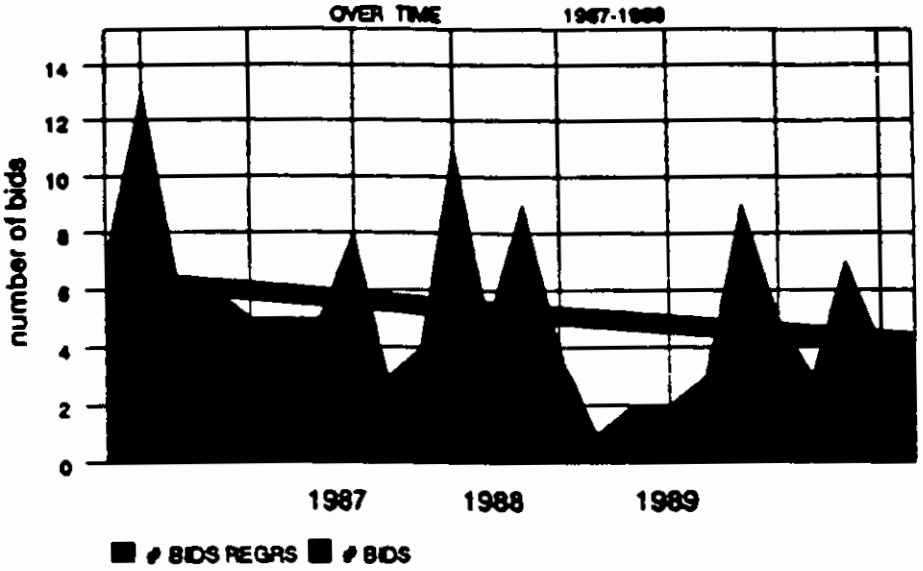
CHART 1C RATIO: AWARD AMOUNT/GOVERNMENT ESTIMATE
BY REMEDY TYPE





IFB = INVITATION FOR BIDS
RFP = REQUEST FOR PROPOSALS

CH 3A · BIDS PER PROJECT



CH 3B NUMBER OF BIDS (BY AWARD AMOUNT)

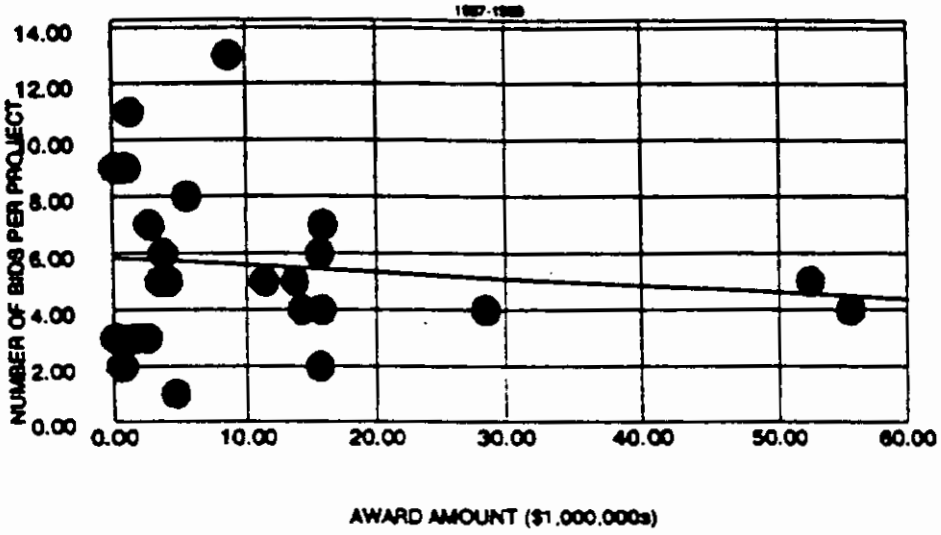
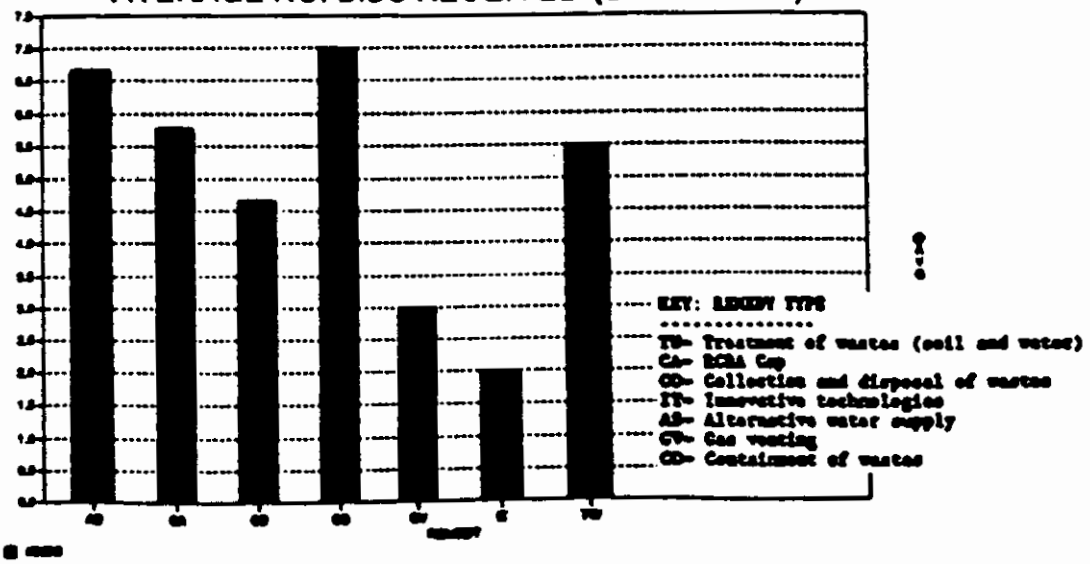


CHART 3C

AVERAGE NO. BIDS RECEIVED (BY REMEDY)



e. Surety Firm Participation. The material from the Corps districts indicates that no HTW project requiring bonding was precluded from being placed under contract because of nonavailability of bonding. Some firms, however, were disqualified from competition because of their inability to provide acceptable surety. These instances usually involved contractors' use of individual sureties that after examination were found to have insufficient assets to protect the Government's interests. Where this occurred, award went to the next lowest bidder providing acceptable bonding. All contracts were eventually awarded despite problems reported by certain contractors. The surety industry participation in the Corps HTW program during 1987-1989 is depicted in Charts 7 and 8. Chart 7 indicates the percent of sureties' dollars shares covered by each surety firm. Six firms received 83% of the project dollars. Chart 8 shows the percent of sureties' project shares covered by each surety firm. Seventy-one percent of the projects were covered by five sureties.

D. HTW INDUSTRY BONDING PROBLEMS AND PERCEPTIONS

1. Contracting Industry Perceptions. From the point of view of the contracting industry, a major problem in the HTW program is that many contractors competing for contracts are unable to obtain the required surety performance bonds for construction contracts.[3] Some contractors are unable to secure bonds due to the surety's perception of liability risk at HTW projects; others because contractors have exhausted their bonding capacity. Noncompeting firms maintain close contact with the surety industry and routinely seek information relative to bond availability. They are aware of the surety industry's stated reasons for not providing surety bonds. But, contractors assert that corporate surety decisions on providing bonding are not uniform. Consequently, bonding may be provided in some instances based on the surety's relationship to the contractor rather than on purely objective standards. Noncompeting firms do request mailings concerning HTW project solicitations, but they do so only to keep up to date on HTW activities or they anticipate involvement as a subcontractor. On HTW contracts around 100 firms request plans but fewer than seven usually bid.

Remedial action contractor (RAC) associations point out that there are many firms that are interested in participating in the HTW cleanup program,

CHART 5 CORPS HTW PROGRAM
CONTRACTORS' SHARES ($280 MILLION TOTAL)

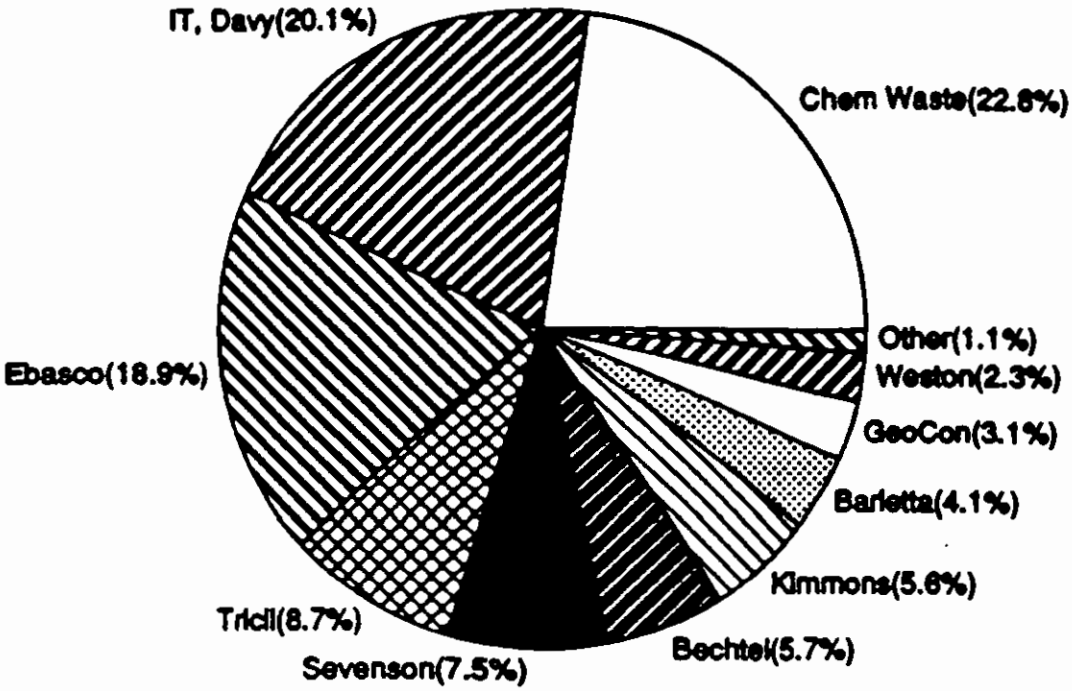
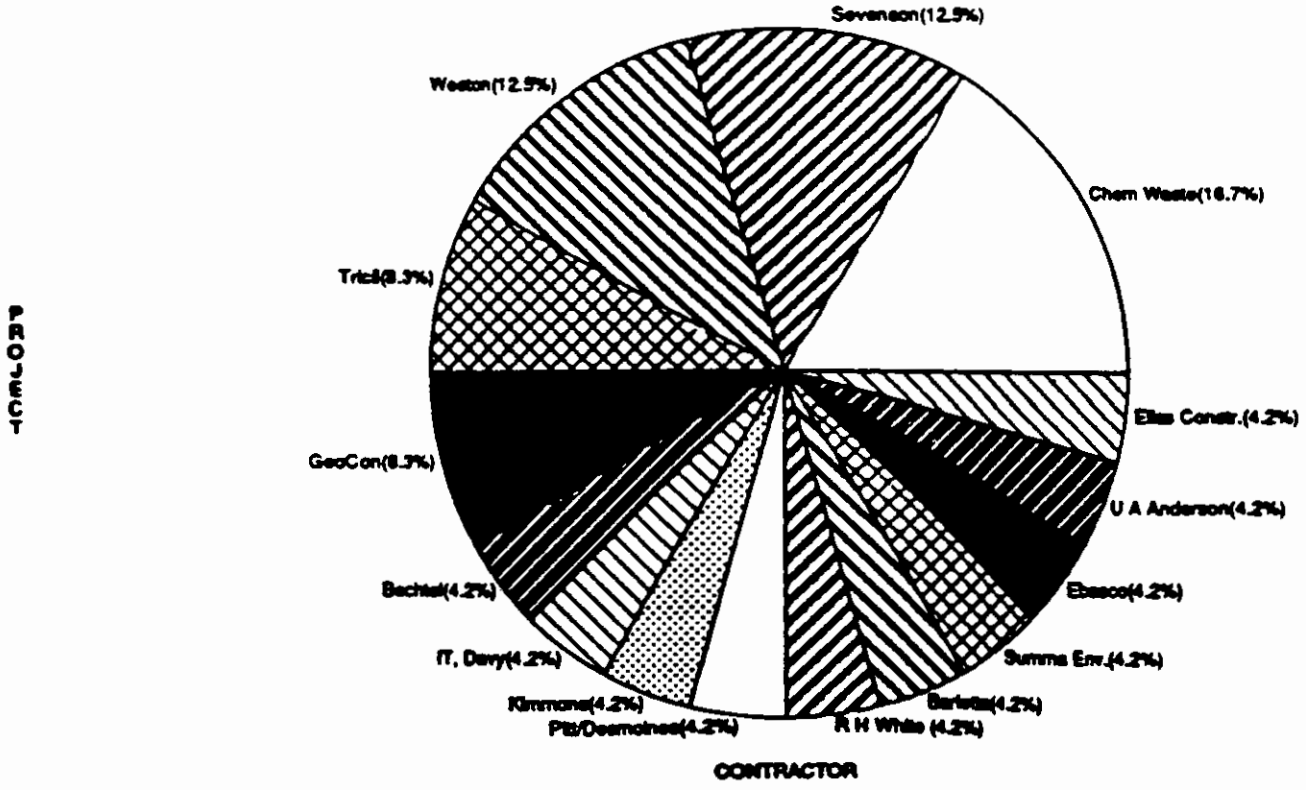


CHART 6
CONTRACTORS' SHARES (24 PROJECTS TOTAL)



however, only a few are consistently able to meet the bonding requirements necessary to continually compete for contracts. Some companies stated that they did not even participate in bidding on HTW projects for reasons of liability and the inability to obtain performance surety bonds in the HTW area. On formally advertized sealed bid procurements inability to obtain performance bonding normally has the added effect of precluding the contractor from being able to provide the required bid bond, without which the bid is considered nonresponsive by the Government and not considered for award.

The HTW industry stated that the number of contractors bidding on HTW treatment projects is fewer than those bidding on non-hazardous and toxic waste projects, in part due to the bonding problem.[4] One contracting firm pointed out that the HTW program is comparatively small in relation to the entire engineering and construction industry activity in this country. Many firms reported that they have elected not to participate in the HTW cleanup program when they experienced difficulties in securing bonds or anticipated complications in that area.

Contractors perceive that the problems in contracting in the HTW area to some extent are due to the Government's use of contracting procedures developed for non-HTW construction and service contracting. HTW work involves a perceived increase in the possibility of liability in excess of traditional construction projects. There is also a strong perception in the surety and insurance industry that the odds of incurring liability given recent asbestos litigation are much greater than before. Contracting firms felt that the laws, regulations, standard Government procurement forms and procedures on HTW contracting efforts were not totally appropriate. They recommended more careful scrutiny of the acquisition process to assure avoidance of inappropriate applications.

The contractor respondents were also of the opinion that the total contract amount of indefinite delivery covered hazardous and toxic waste contracts engaged in by a contractor would be assessed by the surety when upper bonding limits were decided upon for a contractor. This concern prevails in spite of the fact that the Federal government only requires bonding for delivery orders written against indefinite delivery contracts.

CHART 7 CORPS HTW PROGRAM 1987-9
SURETIES' SHARES ($280 MILLION TOTAL)

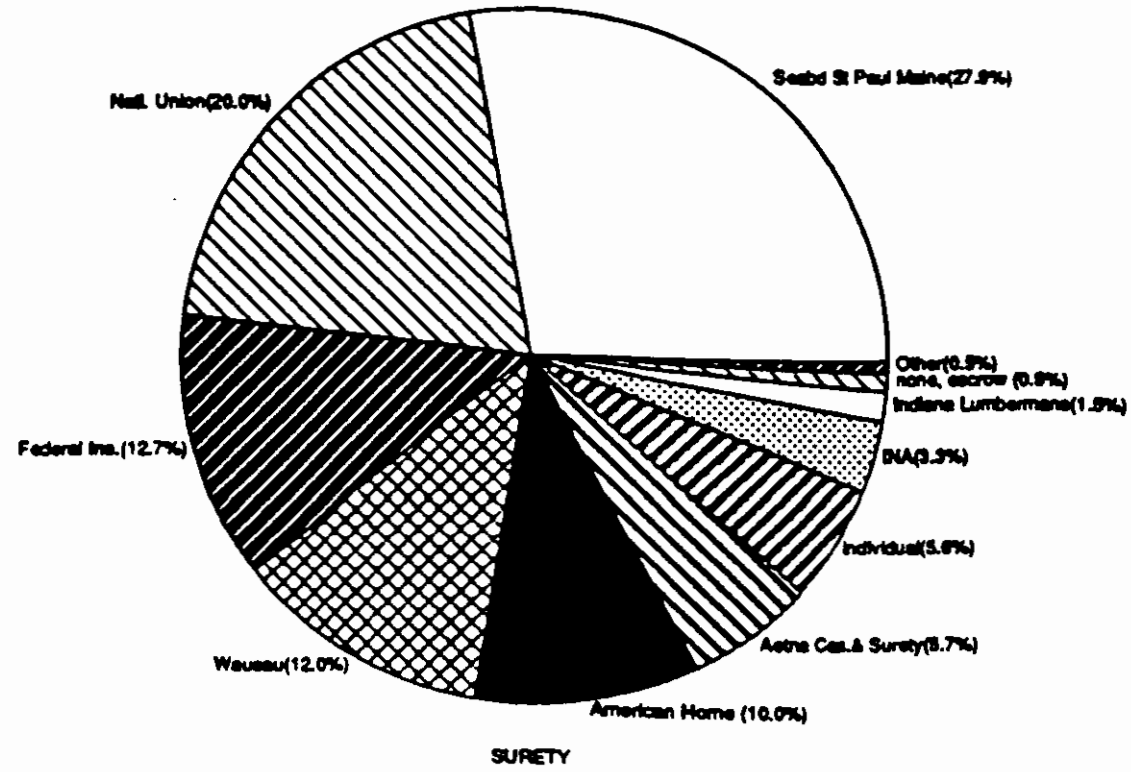
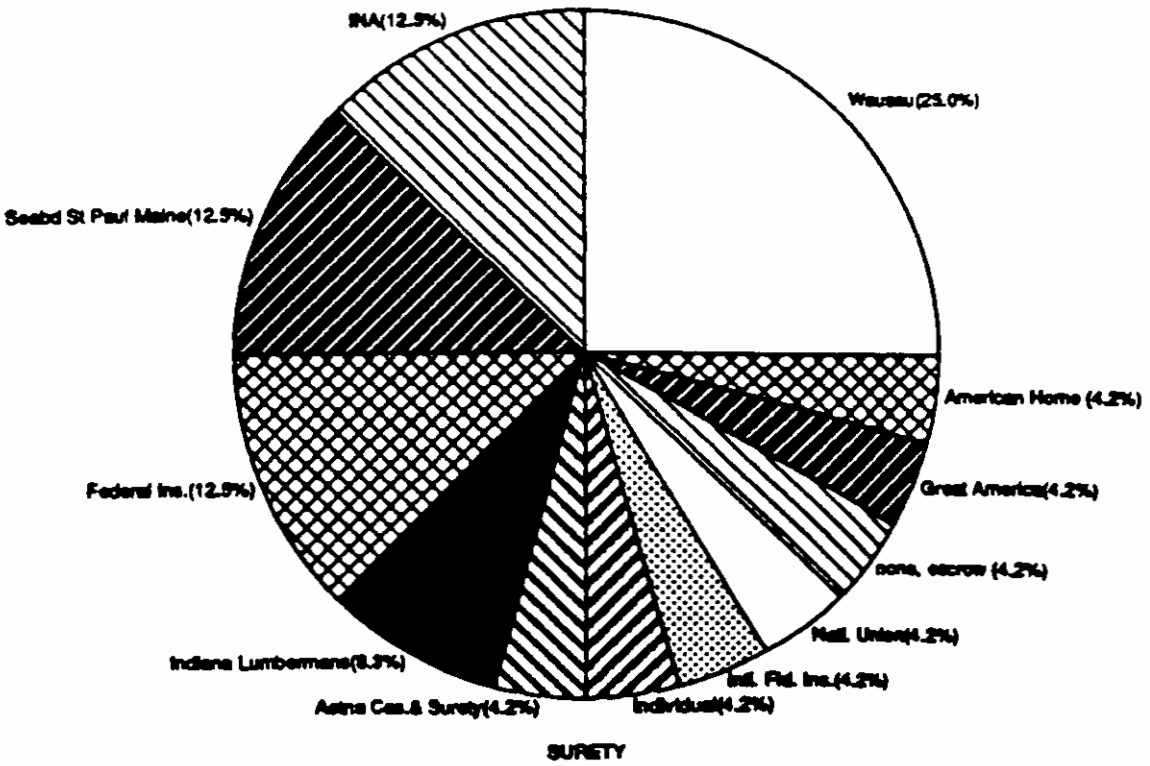


CHART 8
SURETIES' SHARES (24 PROJECTS TOTAL)



necessary to satisfy corporate sureties and secure surety bonds. The results of a survey conducted by the Environmental Business Association (TEBA) showed that half of the 45 firms surveyed were unable to successfully compete for a project due to the lack of adequate bonding or had decided not to bid on contracts due to problems with securing performance bonds.

2. Surety Industry Bonding Perceptions. The problems that are perceived by the surety bond community are summarized in a document entitled "Hazardous Wastes and the Surety."[5] This document, revised in November 1989, was continually mentioned in the interviews as the "bible" of the HTW industry concerning hazardous and toxic waste. This document delineates the issues concerning sureties in handling HTW. Some of the factors that are of particular interest and concern to the sureties follow:[6]

a. The sureties believe that design of any sort is not traditionally a surety bonded activity. Bonding companies perceive that the risk of bonding design elements of HTW cleanup is even more substantial than what is faced on normal construction projects. This stems from the view that the actual knowledge and experience in the area is limited. Designs may become obsolete very quickly as changes in the HTW processes evolve and generally there is considerable difference of opinion among technical experts on design adequacy. Performance bonds are normally used in construction contracts. In such instances, the design is fixed and technical interpretations are more uniform. However, where design elements and construction are combined in the same contract (e.g. through performance specifications), bonding problems may arise due to the increased risk to the surety associated with the unknowns on HTW project designs. However, bonding firms believe and the government agrees that the builder who specifically carries out U.S. Government-approved and-accepted plans and specifications should not be subject to these potential liabilities - absent knowledge on its part that the specifications were defective which was not brought to the Government's attention. This builder is implementing an accepted and approved design, and, therefore, is not responsible for the technology nor the methods used to carry out the cleanup.

b. Technological unknowns, particularly those in an area with potential liability such as the toxic cleanup program, are worrisome to the

This had particular concern to contractors that had been awarded large, indefinite delivery contracts. They feared that sureties might use the total contract maximum, rather than actual work orders issued, to compute their bond capacity limitation.

Tables 2A-C illustrate the experience of the Omaha and Kansas City Corps districts. There were a small number of bids received on several HTW projects. This low number of bids is not necessarily due to the lack of interest in the projects. According to several HTW organizations interviewed, including the Hazardous Waste Action Coalition, Environmental Business Association, Associated General Contractors, National Solid Waste Management Association and the Remedial Contractors Institute, the key factor contributing to lower competition for some HTW projects is the inability of many contractors to secure bonding. It should be noted that in many cases firms cannot obtain bonding despite a proven history of competence in doing such work, strong financial assets and profitability and sound leadership and experience in the firm.

In some cases it was reported by both contractors and government contracting agencies that projects have been delayed due to the shortage of contractors who can obtain bonding and related surety problems. Contracting representatives for both the Corps and the states advised that they have had administrative delays as a result of contractors not being able to obtain appropriate bonding. This additional work has resulted in the slippage of project schedules.

The resulting shortage of qualified firms that are able to consistently arrange surety bonding may be reflected in higher costs to the government. Bonding's limitation on competition, with only four or five final bidders in many cases, may have resulted in higher contract bids than would otherwise be expected. Tables 2A and 2B illustrate the experience of two Corps districts in bid prices and number of bidders.

Smaller contractors, in particular, may be screened out of the HTW cleanup program market due to their inability to secure surety bonding. Several contractors stated that they do not have the extensive financial equity

pollution liability insurance coverage. The same concerns regarding the unknown risk of involvement in the HTW market are equally important to sureties that must decide whether to provide needed bonding for the program. The following summarizes some of the findings contained in these papers on the shortcomings of present coverage for HTW projects:

1) Present HTW construction contractors' pollution insurance coverage has only limited spatial or geographic coverage. Some policies cover only on-site liabilities. In some cases, HTW liability may be off-site due to hazardous substances being carried beyond the borders of the site by wind, water runoff, or underground seepage.

2) Claims-made insurance only. The insurance coverage is on a claims-made basis and does not cover the period after the completion of the project unless the contractor continues to carry the insurance. Moreover, even where a contractor may choose to continue coverage, it may not be able to do so because of the insurance company's decision to no longer make such coverage available. The short time period (one year) covered by claims-made insurance precludes coverage over the long period of 20 years or so in which claims may be made in the HTW area. In claims-made insurance, the policy is only in force during the period when premiums are being paid. With respect to HTW cleanup, this would be normally the period of contract performance including any contractually required warranty periods.

3) Low dollar limits. Surety organizations state that the upper dollar limits in presently available pollution liability coverage are insufficient to cover the risks associated on HTW projects. The comparatively low limits of the insurance policies outlined in the document would only be adequate for smaller HTW projects where proven technology would be employed on an isolated site.

4) There is a concern by surety firms that they will be targeted by third party liability plaintiffs in the event other parties whose actions may have caused the injury are judgment proof. The lack of sufficient insurance or indemnification for the HTW remedial action contractor leads some bond underwriters to be concerned that the corporate surety based on its providing a surety performance bond may be adjudicated to fill the insurance void so that the third party's injury can be compensated. They worry that, after insurance coverage has lapsed or expired, and perhaps after decades have passed, the corporate surety firm which provided the bond may be looked upon

surety community. Bonding companies perceive that the state of technology of the HTW cleanup process is constantly changing and very ambiguous. It is their opinion that little is known about the adequacy of the technology either concerning immediate or long-term experience. Technology may evolve that renders the present method inadequate. Sureties are concerned that this may leave the designer-builder potentially liable if the present HTW legal climate continues.

c. Surety firms have stated that the present unfavorable legal environment, with widespread litigation and large awards, has made insurance companies very cautious about insuring HTW projects. Although vocal in their assertions that they not be treated as a substitute for insurance, they fear that by bonding such work they may in the future be sought out based on a legal theory which would treat them as if they were insurance. The cause for liability, such as the appearance of a disease 20 or more years after exposure to toxic substances, leads to a very uncertain situation for sureties.

d. According to the surety firms interviewed, toxic tort litigation features are an important reason for their present reluctance to participate in the HTW cleanup field. In the toxic tort arena a very long time period (10 or 20 years) between exposure and development of injury is typical. Unlike other prototypical injury situations, toxic liability involves long time periods[7] between the alleged exposure and the discovery of damages. Since this litigation takes place in state courts, the indemnification under SARA is not helpful, nor legally binding on the states.

e. Insurance. The Hazardous Waste Action Coalition, an organization comprised of technical consulting firms in the HTW field, along with Marsh and McLennan, a large insurance broker, held a meeting in Washington, D.C. on September 13, 1989, in which a series of speakers outlined the insurance and indemnification problems confronting the contracting industry. The collected papers of this meeting are entitled "Pollution Insurance/Indemnification Issues for Engineers in Hazardous Waste Cleanup". The papers point out that the present insurance coverage is not adequate in many areas. They also express the insurance industry's concern that potential litigation uncertainties play a major part in their decisions to forego providing

IV. CONCLUSIONS

TRENDS OVER TIME

Twenty four HTW projects were examined in the study. Contract data was assembled for the bidding process on these projects including contractors and sureties participating, bid amounts, project dates, project types and government estimates. The information presented in Tables 2A-C and Charts 1a-c and 3a-c summarize the relationships of these factors and shows the trends in these elements over the past few years. The information was analyzed with emphasis on the relationships between award amount and government estimates, the ratio between high and low estimates and the number of bids received. The respective shares of the HTW market for contractors and for sureties were also examined.

There tends to be an increasing trend in the ratio of contract award amount to government estimate over time. The average ratio has climbed from .8 to 1.2 over approximately a two year period. This has transpired while the ratio of high bids to low bids has been falling from 2 to 1.3 and the number of bids received on the average for each project has dropped from 6.2 to 4.6. This information suggests a decrease in competition for projects in the HTW field over the time period and to an apparent increase in price at the same time. The decreasing ratio of high to low bids over the same period also is an indication of a changed competitive situation.

Relationship of project size. The relationship of the project size and these various factors was examined. As the projects increased in size, the ratio of the award amount to the government estimate increased from .9 for small projects to 1.5 in the $60 million dollar range, indicating the lessening of competition for large contracts where few contractors can compete. At the same time the average number of bids per project decreased with the size of the project, reflecting the fact that few contractors are currently available to compete for these large HTW projects. The average of 6 bids for smaller contracts was reduced to 4.5 on the contracts in the range of $60,000,000 at the higher end of the scale. These findings, although not

by the courts as the insurer of last resort or a "deep pocket."[8] This unknown risk has led some corporate sureties to forego involvement in the HTW market. Surety bond producers that have made such a decision indicate that they would be more likely to participate in the market if the applicability of SARA indemnification to the surety was clarified. Moreover, that the performance surety bond be clearly represented as being intended by the Government solely as a guarantee of performance by the contractor and not in anyway as protection for the contractor's tortuous injuries to third parties.

f. Greater risk to Government. In response to claims by some contractor interests that bonding could be substantially reduced for certain categories of HTW work, surety sources stated that risks of non-performance increase if construction contracts are awarded either without surety bonds or with lower rated surety performance bonds. Surety officers contacted in the survey pointed out the trade-offs involved risks to the government if surety bonds were not used on projects that normally would be surety bonded. They emphasized that surety firms perform a valuable service for the government in screening out potential problem contractors from the pool of contractors competing on government construction projects.

g. Indemnification. The sureties and contractors have listed many perceived problems with the present SARA[8] indemnity law. There is dissatisfaction over the amount of indemnification coverage, as well as the extent of the coverage and even what events are indemnified. Sureties find that the definition of what is the maximum dollar coverage of the indemnity is not specific. CERCLA sets the upper limit of the indemnification amount as the funding that is remaining in the Superfund account. However Section 119 says "If sufficient funds are unavailable in the...Superfund... to make payments pursuant to such indemnification or if the fund is repeated. There are authorized to be appropriated such amounts as may be necessary to make such payments. Sureties and contractors are of the opinion that such limitation on indemnification may prove inadequate in the future if there are limited funds available in the Superfund account at the time indemnification requests ripen. The EPA is presently addressing the limit on indemnification problem in proposed draft guidelines for implementing Section 119 of SARA.

government contracting officers, and the contracting and surety industries. The experience is that the market is constricted for contractors in the HTW field and the availability of bonding is a problem. Although all projects have proceeded and none have been stopped by lack of bond availability, the difficulties that have been encountered in the bonding area have impacted the cleanup process by delaying schedules, reducing competition and ultimately thereby, increasing the prices paid for cleanup.

Financial risk. Who is affected? The government, the HTW contractors and the surety industry are all at risk in the HTW cleanup process. A key aspect in this analysis is the assumption of financial risk in the HTW program. Some risk is assumed by the government and some by industry. The problems arise when the financial risks are examined in detail and found to be such that private industry declines to participate due to the perception that it will have to bear what it considers to be more than its share of the risk. Historically, the surety industry has provided performance bonds to cover the risks of nonperformance by construction contractors. However, in the HTW area, there has been a great deal of reluctance to do so for fear of extended liability due to the long term nature of liabilities involved and other factors of uncertainty in the CERCLA area. The projects involved risk uncertainties in terms of the present and the future state of the art of the HTW cleanup technology. The state of the art is constantly changing and improved techniques lead to future pollution standards that may be higher and more stringent.

Physical risk. Who or what is impacted? The environment, cleanup site workers and the local residents are affected by the physical risk. The risks exist during the cleanup of the project, and extend through the warranty and the latent defect period of the cleanup project. However, due to the nature of hazardous waste, the risk may last for years, decades or forever. This problem of unknown risk and uncertain liability must be addressed and the risk to industry must be bounded in order to gain its full participation in the HTW program. In order to reduce the physical risk over the long term, the actions taken involve financial uncertainties and liabilities. The government must assume a certain level of responsibility for these uncertainties. The total

conclusive, indicate a pattern of competition in the field that shows a limited availability of aligible contractors. The expanding HTW cleanup requirement will exacerbate this situation

Relationship of project type. Examination of the relationship of the ratio of award amount to government estimate shows that the ratio is acceptable, except for containment projects where the ratio was 1.3 to 1. The largest spread for the variation of high and low bids was in the projects involving collection and disposal of wastes, 2.2 to 1, while the next greatest variation was for gas venting projects which ran 2 to 1. The heaviest competition was evidenced in the average number of bids (7) received for waste containment projects with the next highest number (6.5) bids for alternate water supply projects. It is noted that the average number of bids received for RFP's was only 3, compared with nearly double that amount for Invitations for bids.

Contractors' project market shares. The shares of the HTW cleanup market (24 Corps projects) are heavily concentrated in a relatively small number of contractors. Chart 5 shows that three firms or joint partnerships have about 60% of the dollar market of HTW projects and 5 of the 15 firms have successfully bid for about 58% of the total number of projects. The rest of the projects are being spread among the remainder of contractors, some of which are quite large. While the total is still small, the concentration of activity in a few firms tends to persist and is not assuring to those aspiring to participate in the program.

Sureties' market shares. Surety bond providers are also unequally represented in the list of sureties shares of the project pie. Five sureties or surety combinations account for 83% of the project bond dollars and five sureties or combinations bonded 70% of the Corps 24 projects analyzed in the study. This illustrates the case that few sureties are interested in providing bonding for HTW projects.

The foregoing experience presented in the contracting information from the Corps Kansas City and Omaha Districts reinforces the story presented by the

the bonding of HTW projects because of perceived new and unanticipated risks being possibly transferred to the surety. These perceived new risks entail additional possible responsibilities for project efficacy, design (performance specifications) and third party suits. It is in this area that the present problems of uncertainty have surfaced and are at this time a subject of considerable concern.

This study indicates that the problem of performance bond availability for HTW construction work may be limiting the number of qualified contractors that can compete for such work. In some cases, the limitation on firms able to compete, when coupled with requirements on the government necessitating a high number of HTW contract awards within a short span of time, may have caused competing firms to be less competitive in their bid submittals.

The data analyzed does not clearly indicate any serious problems at this time. However, the contract information on the twenty-four projects analyzed may be skewed due to a concentration of contracts during September and October of 1989. Although trends are suggested, the data is not sufficient to draw specific conclusions. Continuous observations of award data is necessary to determine if trends are developing.

While not yet resulting in the government not being able to get competition on its HTW projects or to carry through on its remedial action programs, the clear implication of industry comments received is that the concern being expressed by the surety industry over providing bonding for HTW projects may well ultimately lead to a situation where bonding limitations will arbitrarily curtail the extent of competition realized by the government for such work. This concern may threaten the government's ability to successfully acquire the construction services needed.

This report has reviewed both subjective data gained from interviewing various HTW industry representatives and objective data based on bids received by the Corps. While the information from interviews is subjective, it does represent the industry mind set and as such govern industry decision- making. Where there is little or no risk, it is appropriate to try to minimize

level of risk does not disappear; it is merely transferred from one entity of society to another. It is not reasonable to expect private industry to voluntarily participate in a high risk enterprise unless a high premium is paid. Many government programs are structured to reduce this uncertainty in new high tech and experimental enterprises to a level that is manageable by the private sector.

Indemnification, insurance, bonding and contractual agreements are all mechanisms to transfer risk. The present situation in the HTW cleanup area brings this aspect of risk, and who must assume risks for the nation's cleanup, into focus. There is a need in the HTW program for the definition of the risk involved and the assignment of each risk to the proper entity. Guidelines are necessary to spell out and clarify the appropriate responsibilities that will be borne by government agencies and those that are within the purview of private enterprise.

Indemnification is a tool that transfers the risks from private industry to the government. One problem with indemnification in HTW cleanups is the uncertainty of coverage. It is not known at the time of bid openings whether coverage will be available to the contractor or the surety, and, if it is, the maximum amount of coverage is unknown.

Another tool commonly used to manage uncertainty is insurance. Insurance presently available to contractors is inadequate. The maximum amount available is much too low, the time period of coverage is too limited, and third parties are not covered. Thus, the transfer of risk to the insurance industry is quite limited.

The bonding process is another way to transfer uncertainties from the government. It is a traditional way to transfer risk in the construction area where construction occurs over a long time period and commitments must be made for the entire project before the project can proceed. The traditional risk covered by construction performance bonds was that the project be completed as designed, that the contractor assumed responsibility during the construction period, the warranty and the latent defect period. Problems have arisen in

- Contractors want to be able to provide alternate monetary protection to the Government, i.e., letters of credit. While the Government cannot at present accept letters of credit directly, letters of credit can be used as an asset by an individual surety. Regulations would be required to allow the Government to directly accept letters of credit in lieu of surety bonding.

- Sureties want indemnification for both themselves and their contractors should they have to assume responsibility for project execution or design.

- Protection of the Government interest can be achieved by performance bonding, by careful selection of competent contractors or a combination of the two. The Corps has, for the most part, used construction contracting where the primary method of contractor selection is by low bid. Since control over contractor selection is limited, the Government has compensated by demanding 100% bonding. An alternative would be to use an RFP where technical capability, management expertise, experience, and price are considered in contractor selection. With more confidence in contractor capability, a lower performance bond might be appropriate. The government should attempt to mitigate contractor and surety concerns while maintaining appropriate protection of the government interest.

industry fears. The underlying industry concern is risk to the contractor and/or the surety. Factors affecting risk include: indemnification, insurance and bonding. These risk factors influence one another, e.g., if indemnification is available to the surety, then bonding may be more readily available. No single action will solve all the bonding problems. Additional conclusions are listed below:

- The government must select the most appropriate acquisition strategy early in the solicitation process. Risk to sureties, contractors and the government should be considered in addition to other site requirements.
- The government acquisition strategy should address the need to make an early decision whether to use a service or construction contract. In some cases, different contract types may be used for different project phases within the same contract. Miller Act, Davis-Bacon Act and Service Contract Act decisions should be made on their merits and without regard to bonding or cost implications.
- Contracts should be structured, the type of contracts selected and bonding requirements established, to appropriately protect the government's interests. These interests include: insuring that contractors capable of performing the contract remain eligible and that the selected contractor performs as promised.
- HTW cleanup agencies should explicitly decide how much performance bonding is required and how that bonding should be structured. Normal practice is to require 100% performance bonding for construction contracts and zero bonding for service contracts, although the contracting officer can select other percentages. We need to assure that the amount selected is only that needed to protect government interests.
- Sureties only want to assure that the remedial action contractor constructs what was required by the plans and specifications. They wish to avoid design/construct contracts or contracts containing major performance specifications.
- There is a strong perception by the industry that difficulties with bonds is limiting competition. RA contractors report that they have not bid projects due to unavailability of bonding. Sureties indicate that the risk is too large.

its history of performance. In this respect, it supplements the pre-award survey performed by the contracting officer to make his affirmative determination of contractor responsibility. However, in the case of HTW projects, the surety community appears to allow its concern for the unknown risks associated with such work to overshadow its consideration of more conventional factors reflecting the contractor's capability to perform. The study indicated that many sureties foreclosed any consideration of bonding a contractor based solely on the fact that the project was associated with HTW. In doing so, the surety did not analyze the contractor's ability to perform as it would have done on a non-HTW construction project.

B. NON-LEGISLATIVE CHANGES

These options address solutions which can be readily implemented by the various agencies concerned. They primarily focus on issues related to the contracting process. In some cases, they call for clarification of each agency's existing activities. In other instances, they call for new initiatives by the agencies to assure that bonding requirements and the acquisition factors which may have a major impact on the availability of bonding will be given careful consideration during the acquisition planning process. Table 3 summarizes the types of options, their advantages and disadvantages, the lead agency for implementation, and their priority.

In some cases, the options recognize that implementation will necessitate a tradeoff of protection for the Government against contractor nonperformance. The advisability of accepting such a tradeoff will need to be evaluated for each contract. This will be done in light of the risk being assumed by the Government, versus the benefits to be derived from the potential improvement in the competitive climate associated with lowering the bond requirement.

While implementation of these options may promote greater interest in HTW work by both contractors and corporate sureties, increased interest and competition may not necessarily reduce the cost of the work. Moreover, any decision to lessen bonding requirements must be completed with special emphasis being placed on the pre-award survey procedures by the procuring agency.

V. OPTIONS EXAMINED

A. INTRODUCTION

Discussions conducted during the study with industry, contractor, and government personnel raised several possible alternatives that might be taken to increase the availability of bonds to HTW construction contractors. These alternatives fall into two general categories as follows:

- Non-Legislative Changes. Internal Corps and EPA non-legislative changes in procedures related to contracting strategy and implementation of the authorities which each agency already possesses.

- Legislative Changes. includes revisions to regulations which guide each agency but which neither possesses the authority to revise independently; revisions to existing statutes so as to, (1) eliminate requirements that serve to lessen the corporate surety industry's interest in bonding of HTW projects and, (2) to clarify that performance bonds are to be used only to assure that the contractor will complete all contractual requirements and are not a vehicle by which third party claims may be satisfied.

Of the options available to the government to alleviate the bonding problem, many are centered on the concept of management of risk by the government. Financial and physical risk exist in the cleanup process and the government needs to incorporate risk analysis into its planning process to examine the trade offs in costs and benefits of the transfers of these risks between government and the private sector. In the case of bonding HTW cleanup projects, the government must examine the assumption of higher risks in non-performance of contracts for HTW cleanup against the gains of more competition by the cleanup industry and the resultant lower prices for projects.

It should be pointed out that the bonding community generally does perform a service for the Government contracting agency in making its evaluation to bond a particular contractor. In making this decision, it carefully analyses the contractor's financial and technical competence to do the work as well as

1. Improved Acquisition Planning & Bond Structuring. These options require that the procuring agency be especially sensitive to its characterization of the work to be performed under the HTW contract and vigilant to preclude bonding requirements that are excessive to the needs of the Government. If work under one contract is both service and construction and duties are not severable, the largest part of the effort (service or construction) will prevail. HTW contracts involving incineration or other treatment technologies will usually involve work elements in both the construction and service categories of work. The Miller Act bonding requirements apply only to construction, while service work does not require any bonding unless the contracting officer views it as being needed to protect a legitimate Governmental interest.

a. Background. The study found that early soil incineration contracts were considered by a Corps district to be service work requiring no bonding. When a decision by the Department of Labor concluded that hazardous soil excavation for shipment to a landfill constituted construction, a different Corps district treated excavation associated with an HTW incineration project as construction requiring Miller Act performance and payment bond protection. In this latter case, the actual incineration process was classified as being service work. Although as service work there was no need to provide bonding for the work, the contracting officer, concluded that the incineration process was so closely tied to the excavation work that the penal amount of the performance bond should encompass both work categories. This substantially raised the performance bond amount and led to a protest from a firm which was precluded from competing due to its inability to obtain the required bonding. This firm had successfully performed the work required under the original service incineration project. The comptroller general ultimately updated the contracting officers discretion to require 100% of performance bonding for this project.

This incident, as well as indications from a recent Superfund project performed for EPA by the State of Texas, (see page 18) highlight the necessity for the procuring agency to closely analyze its bonding requirements in light of the work to be performed and the extent of protection needed for the

TABLE 9

TYPES OF OPTIONS

Options	Advantages	Disadvantages	Implemented By
NON-LEGISLATIVE CHANGES			
1. Improved Acquisition Planning and Bond Structuring:			
A. Require increased acquisition planning. Incorporate analysis of service contracts vs. construction contracts and incorporate cost type contracts into acquisition plan.	May reduce obstacles, induces more participation by contractors	Use of service contracts with no bonds may increase risk to government. May request use of bonds from USACE. N.O. Procurement.	Each agency
B. Provide Guidance on Bonding Requirements. Reduction of penal amount of bond. HTW Policy Guidance, 2 year test program.	Reduces bond portion project costs, induces more and greater variety of contractors to bid (e.g. smaller firms).	Limits non-performance protection to government, more marginal contractors.	Each agency
C. Clarify performance period.	Same as above.	All bonds must be in place before notice to proceed is issued. Initially difficult to set up guidance. Can be accomplished more simply by reduction of penal amount of bond.	Each agency
2. Clarify surety liability under SARA:			
A. Define third party risk. Bond form and contract modifications including 3rd party exclusion clauses, exclusion of bond as liability insurance substitute. Requires a change in the regulations.	Removal of sureties' stated objections to contractual clauses. Inducement to participate in HTW program.	Will take one and one-half years to implement interagency coordination needed.	Each agency
B. Surety Indemnification. Provide indemnification for sureties if they assume project control.	Induce more surety and contractor participation in HTW program.	May increase Federal liability for indemnification.	EPA
C. Define bond completion period.	Induces more surety and participation in program.	None.	Each agency
3. Indemnification guidelines: Modify proposed indemnification regulations, establish high maximum limits and clarify qualifying requirements.	Limits Federal liability for idemnification.	May discourage participation by sureties, if limits are set too low.	EPA
4. Communication with Industry: Outreach program for contractors and sureties. Technology education program.	May encourage contractors sureties to participate in program.	Effectiveness unknown.	Each agency
5. Limit Risk Potential:			
A. Clarify contract policy on RFP performance specifications and design-build.	Separating out design portion may encourage sureties to participate in program.	Imprecise clause could limit contractor performance obligations more than necessary.	Each agency
B. Use of irrevocable letters of credit vs. bonds.	Enables some contractors to participate in program.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
LEGISLATIVE CHANGES:			
A. Increase separate dollar limit reserves from SARA fund and increase types of coverage for indemnification and types of coverage for indemnification.	Induce more sureties and contractors to participate.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
B. Specify a dollar cap on liability.	Induce more contractor and surety participation.	Federal government assumes more risk.	EPA
C. Preempt state's strict liability sureties. Provide universal indemnity.	Induce sureties and contractors to participate in program.	Reduction of public protection against HTW hazards.	EPA
D. Modify CERCLA or Miller Act. Specify performance bonds area only to assure completion of contract requirements.	Induce sureties and contractors to participate in program.	Reduction of public protection against HTW liability hazards.	Each agency

construction project. While some bonding may be appropriate to cover the risk to the Government associated with paid mobilization costs and potentially higher reprocurement costs on HTW treatment technologies projects, it may appear excessive to require that performance bonding cover 100% of the total contract amount where that includes the cost of the treatment technology service over a significant period of time. In the case of incineration projects, an incinerator is constructed by the contractor, operated over an extended period of time during the cleanup and demobilized and moved away afterwards. The Corps should analyze, in its acquisition plan preparation, the possibility of the Government utilizing the incinerator for continuing the cleanup in the event of contractor default. The contract may be modified to include terms for this contingency. Many alternative contract structures may be utilized. Some specific alternatives are shown below in Table 4. These are merely examples. The contracting officer is within his discretion to require no bonding whatever where the project is predominantly for service.

TABLE 4

Sample Alternative Contract for Incineration

Phase	Erection & Prove Out	Operation Excavation & Stockpile	Operation Incineration Site Restoration. Capping, Landscaping	Demobili-zation of plant and equipment
Alt#1: Single Construction Contract with Davis-Bacon Wage Rates	Full Bond	Very Low Bond	Very Low Bond	Full Bond
Alt#2: Service Contract & Service Contract Rates	Full Bond	No Bond	No Bond	Full Bond

Government. This should be done early in the acquisition process to assure that the competition benefits that might be gained by such effort can be fully maximized. The decision of whether to use a service contract or a construction contract must be made on their respective merits and not on the impacts of securing performance bonding. A separate set of procedures is required to establish the bonding requirement.

In making this bonding determination it is also important to recognize that the surety community's concern regarding the risk associated with HTW work will probably lead to the surety not stepping forward to complete the project in the event of a contractor default. Consequently, it is likely that the Government will benefit only from the surety's providing the penal sum of the performance bond. The Government probably will still need to reprocure the work. Contractors pointed out that sureties were requiring substantial financial commitments from contractors as a prerequisite to providing bonding. This fact would tend to make the surety even more inclined to buy itself out rather than assume the greater risk burden associated with its takeover of the defaulted contract. The reality then appears to be that the performance bond is primarily protecting the Government's financial stake in the contract rather than its interest in not having to deal with reprocurement upon default.

In looking at the character of work to be performed under an HTW contract, it may well be that the nature of the work and the payment arrangements employed by the Government may provide a measure of protection in themselves that could warrant a lower bonding percentage. In the excavation situation, and even more so where we are dealing with incineration service work, many of the payments to the contractor are subject to its performing satisfactorily. A default after partial performance requires that the Government procure another contractor to continue performance. This default situation, however, is substantially different from that faced where we are dealing with a building construction project. In the former case, the work to be completed is relatively easy to determine. This is in sharp contrast to the problem facing the Government where multiple subcontractors and complex design requirements must be determined and taken into consideration in a vertical

from other work that normally would not require bonding if contracted independently. The project should be divided into separate contracts with appropriate bonding for each contract. This would require the use of multiple contract awards to assure that elements of work not requiring bonding are procured separately from construction work elements.

There are drawbacks to multiple contracts. If the requirement is split, it must be determined to be severable. Problems may well be encountered in assuring timely award of contracts. A delay in one award or a failure to insure timely completion of a contract will mean delay for all later contracts. This will require substantially increased administrative oversight and procurement effort on the Government's part because of the greater number of awards to be made. Furthermore, the lack of bonding on what may be key elements of the remedial action will require greater care by the Government in performing its pre-award survey on the contractor's responsibility.

c. Provide Guidance on Bonding Requirements. Uniform guidance needs to be issued on evaluating bonding requirements appropriate for HTW work. It is imperative that any such guidance take into consideration the importance of safeguarding the discretion of the contracting officer in such matters.

d. Clarify Performance Period. Minimize the time period of surety performance and thereby reduce the time exposure for surety coverage. Use time-phased bonding, with incremental reduction in the penal amount through time, as the work is completed. A similar strategy involves the division of the project into phases and a requirement for bonding only on the active part of the project.

The amount of a bond can be reduced by separating the project into parts and only requiring a bond for the amount needed to complete each phase sequentially. All bonds must be secured before issuance of the notice to proceed. This has the same effect as reducing the penal amount of the bonding. Thus, a bond will be rolled over, with the bond terminated on the first part when it is completed, and started on the second part, etc. This

b. Require Increased Acquisition Planning. The contracting process, including the bonding issues, should be integrated into a project acquisition plan. An analysis of the risk trade offs to the Government may be incorporated into the acquisition planning process for HTW projects. Presently the Federal Government requires performance bonds to assure against the uncertainty of project non-performance on construction projects as mandated by the Miller Act. The cost of this protection should approximate the cost of the potential non-performance risk in the long run. The trade offs of this risk may be examined in the acquisition planning process for each project. The process will analyze the benefits and costs of the Government assuming slightly higher risks in project performance and the resultant benefits and costs of improving the competitive climate for HTW contracting and the consequent reduction in contract prices. This may involve the analysis of each phase of the cleanup and the appropriate level of bonding that would afford adequate protection for the Government's interests and still encourage participation by the bonding industry. Careful examination of the contract alternatives, service contracts or construction contracts, should be carried out by an interdisciplinary team, "recommending" to the contracting officer, although final disposition will be made by the Department of Labor. Meetings are being planned for early summer 1990 between EPA, Corps and Department of Labor representatives to clarify the classification of construction and service contracts under the Davis-Bacon and Service contract Acts.

Cost type contracts should be given careful consideration where there are significant technological unknowns associated with undertaking an HTW project. It is not in the program's interest for the contractor to be required to bear an inordinate share of the risk. Requiring fixed priced contracts under such conditions places both the contractor and surety in an unacceptable risk condition and would increase the cost to the government significantly.

Multiple contracts are another action which could be considered by the Government during its acquisition planning to limit the risk potential for the bonding community. The approach would be to structure the contract requirements so as to limit or isolate the activity requiring a surety bond

Discussion with the surety industry raises two specific actions which may result in encouraging greater surety firm involvement in HTW work. The first action arises from the surety industry concern that it not be perceived as an insurer of third party injuries as a result of the bond. The surety performance bond is intended as a guarantee of contractor performance of the work. However, the bond form does not make any specific statement indicating that the surety bond is not intended to provide coverage for third party injury actions which might arise as a result of the contract work performed. The surety industry representatives have indicated that some statement on the performance bond form noting specifically that the bond is not available for coverage of third party injury suits could improve the secondary markets' perception of the risk for HTW projects and thereby improve the willingness of sureties to come into the marketplace and provide bonding for such work.

The second action would clarify, within the invitation or solicitation package, the time at which the performance bond completion requirements will be seen to have been accomplished. For the construction projects, the bond is available for the execution period of non-HTW construction plus the warranty period. It also is available to cover latent defects which may come to light following the end of the warranty period. There is nothing unusual about an HTW project that would require any different coverage period for its performance bond.

b. Define third party risk. Define in the contract which party has responsibility for specific risks. Transfers of risk, usually to the Government will probably be tested in the courts. The government will make explicit that Performance Bonds are not available for third party coverage. This may be addressed in two ways:

- modify the invitation or solicitation package with a disclaimer. This solution can be implemented by the procuring agency.
- modify the performance bond form to include a disclaimer. This would require the approval of the General Services Administration and a revision to the Federal Acquisition Regulation.

plan would place an administrative burden on the project. If additional firms participate, there is a chance of reduced project costs.

2. Clarify Surety Liability.

a. Background. Interviews conducted in the course of the study with contractors and sureties focused on the real concern in the surety community regarding the potential liability arising from their willingness to act as guarantors for HTW projects. This is consistent with the sureties' stand that they are bonding execution of plans and specs, not project performance. This is a perceived danger, not one based on any particular court ruling involving a surety guarantee situation. The perceived liability arises from potential third party injury claims and an ill-defined bond coverage completion period.

The surety's concern for liability results from the trend in cases arising from the monumental asbestos litigations where the courts have sought some deep pocket to compensate the injured party. In some cases, the courts have looked to insurance companies for such relief despite the insurance industry's disclaimer of any liability under their policies. The sureties view themselves as similar to these situations, with potential deep pockets from which injured parties may seek relief. They recognize that they are not insurers of such injury, but have little faith that the courts will take note of the distinction between insurer and guarantor if there is no other financially viable party against which a valid judgement can be executed.

The surety community, similar to the insurance industry, uses a secondary market to spread the risk associated with any particular bond arrangement. This secondary market has made it clear that it is not interested in sharing the risk associated with HTW projects. As a consequence, surety firms are more and more being called upon to undertake greater risk levels for such work. The insurance industry responded to the loss of its secondary insurers by withdrawing completely from the pollution liability coverage market. The surety industry, although still maintaining a reduced presence, does have certain members of its community which have followed the insurance industry lead and chosen to withdraw from providing bond coverage for such work.

obtain adequate competition. In fact, there is some indication that the design and construction firms performing this work have structured themselves to limit the potential financial burden that might be associated with claims made against them in the absence of government indemnification. Once EPA has defined clearly the extent of its indemnification coverage and the requirements for obtaining it, the surety industry may well decide to provide bonding for EPA projects.

Regardless of the final decision on these issues, it is vital that the procedures for implementing the indemnification and for making claims be simplified as much as possible. At this time, there is no written statement of the procedure that will be followed if EPA receives a claim demand notice from an indemnified contractor. Also it is important that the extent of litigation costs and the timing for payment of such costs be defined. The industry is particularly concerned that litigation costs associated with injuries covered by indemnification not become a major drain on its financial assets. The industry is concerned that it will have to carry such costs over long periods of litigation and may well have to forego its recovery from the indemnification pool if a settlement is reached prior to final judgment on the case. It would seem advisable that the claims procedures include some early decision by the Government with respect to the Government taking over responsibility for defense or settlement of the claim.

b. Publish final indemnification guidelines. In completing the indemnification guidelines EPA should consider the following.

- explicitly describe the limits of coverage.
- define the claims procedure including claims for ongoing litigation costs.
- explicitly state under what conditions indemnification for surety firms is available.

4. Communications With the Industry.

a. Background. It is evident from the study that there is not a clear understanding among the surety community's members when advanced technology is used on HTW projects versus when conventional engineered construction is used. While there is no dispute that some HTW work can be

c. Surety Indemnification. Another concern that needs to be clarified is the extent of indemnification, if any, that the surety would be entitled to as a result of providing bonding on the contract. Indemnification for remedial action contractors performing HTW work is permitted by 42 U.S.C. 9619, provided that certain requirements are met. Sureties question the applicability of this indemnification to them. Since it has a major impact on the evaluation of the risk for bonding such work, clarification is needed to allow the industry to adequately quantify its potential long-term risk.

d. Define bond completion period. The government will define the point at which bond completion requirements have been fulfilled. This definition is within the authority of the procuring agencies.

Recently, in reply to a surety's concern over its right to indemnification in the event of a default of the bonded contractor, EPA advised that the surety would be eligible for indemnification if it elected to stand in the shoes of the defaulted contractor and complete performance of the remedial action. A final decision has not been made as to how this will apply to a surety that elects to take on responsibility for performance, but does so through its procuring another contractor. It is clear that this issue must be clarified with respect to the EPA superfund projects.

3. Indemnification Guidelines.

a. Background. There is no defined limit of coverage in EPA's interim guidance on indemnification that can be addressed with certainty by surety or contractor interests in assessing their potential risk. Likewise, the requirements that will need to be met to become eligible for the indemnification are not completely clear with respect to the contractor. They are even more ambiguous regarding the surety. These unknowns appear to exacerbate an already bad situation and provide no incentive for industry to move forward and commit themselves and their assets to support the program.

It is unclear from the data compiled in the study the effect that clarification of this issue will have on the surety and contractor community. DOD, which has not provided indemnification, for its work, has been able to

government could consider more explicitly reduction of the contractors liability as long as the performance specification continues to be met.

Where appropriate assume governmental responsibility for risk. Consider developing specific language that relieves the contractor of third party liability when meeting government-dictated performance specifications. Where performance specifications are provided to the contractor, and the government is solely responsible for the performance criteria selected, the government would accept responsibility for harm to the environment or third party resulting from the use of the performance criteria. An exception to this is where the contractor had knowledge of deficiencies in the performance criteria and failed to disclose such fact to the government.

c. Letters of Credit. Indications from the contractor community received during the study were that allowing the use of letters of credit will give new contractors and those with little experience a chance to get started in the HTW field and build a track record. The letter of credit is not without its detrimental aspects. They may prove to be financially draining to a contracting firm and limit a firm's ability to compete, much as surety bonds do in relation to the firms financial capacity. Again, one must weigh the benefits of increased participation against the chances of problems due to using less experienced firms. To pursue the issue further the agencies should explore the use of letters of credit in lieu of bonds by (1) reviewing the acceptability of individual sureties' use of letters of credit as assets, and (2) determining the feasibility and desirability of modifying the FAR to allow letters of credit.

C. LEGISLATIVE CHANGES

The path for change in the laws governing the hazardous and toxic waste area is long and complex. However, SARA is due to be reauthorized in 1991, so plans may be made for proposed changes to the future legislation. The EPA is the lead agency in the Superfund program and, thus, the agency to initiate activity in the legislative area. Possible changes mainly apply to the indemnification question. They include the following:

hazardous and complex, many projects use proven engineering principles which have a long history of use and acceptance. The extreme caution on the part of the surety industry, limited number of projects constructed and reluctance of sureties to become involved in HTW projects, all mesh together to cause the surety to assume each HTW project is the same despite the considerable variation in the types of projects. A number of projects are water supply construction alternatives that have no direct involvement with hazardous wastes.

b. Outreach Program. To overcome this lack of understanding, the EPA and the Corps could sponsor outreach efforts aimed at bringing both sureties and contractors together for purposes of discussing with industry technical aspects of different types of HTW projects. The agencies should also focus on the different site conditions and various contractual provisions that can distinguish one site from another and the technical aspects of using state of the art technology. While not eliminating all impediments to surety involvement, this could go a long way toward lowering the surety industry's reticence to participate on some of the less complex projects.

5. Limit Risk Potential.

a. Background. Sureties expressed particular concern that the Government not package its procurements, as design-build contracts including the use of performance specifications. In these cases, the surety is concerned that its risks are significantly enlarged from the situation it faces where design has been completed and the contractor need only construct the designed project in order to satisfy performance.

b. Clarify Contract Policy. The government should consider accepting design responsibility where performance specification requirements have been met. Performance specifications are used to some extend in all construction contracts. Incineration and ground water treatment contracts have a very large performance specification component and will remain that way. The government will continue to allow contractors to propose the complex equipment needed to meet specific site treatment requirements. Once the contractor has demonstrated that the equipment meets the performance specification, the

VI. RECOMMENDATIONS

Table 3 lists all options which have been considered as a result of the study. It represents in capsule form the pros and cons associated with each and provides an indication of the potential for increasing competition associated with implementation of the option. It also shows the specific actions which are recommended to be taken by EPA and the Corps as a means of increasing the availability of bonds for HTW work.

A. NON-LEGISLATIVE CHANGES

1. Issue Guidance on Use of Acquisition Planning for HTW.

The most effective strategies for alleviating the scarcity in bonding of the HTW program are those emphasizing improved acquisition planning, both formal and informal, additional risk sharing guidance which gives emphasis to the careful consideration of the bonding requirements, and contract type that will maximize qualified contractor competition. This particular alternative permits immediate implementation by the agencies concerned. It also places the burden on the contracting officer to make appropriate decisions on matters which may impact substantially the competitive climate for a particular invitation or solicitation. Each agency should have this guidance issued by an appropriate office within their headquarters for immediate implementation.

The steps in the recommended acquisition planning process are as follows:

a. Determine appropriate wage rate categories for anticipated required labor.

b. Determine contract type, e.g., service, construction, etc.

c. Decide whether to subdivide the project into phases.

d. Decide on the appropriate performance bonding level based on a risk analysis. Explicitely consider less than 100% bonding for construction contracts and greater than zero for service contracts.

e. Decide on contract method (consideration of cost type contracts in addition to firm fixed price contracts).

The guidance should emphasize that the Miller, Davis-Bacon or Service contract act decisions must be made on their merits without consideration of cost or bonding factors involved.

1. Increase the coverage for indemnification. Expand the types of coverage for liability indemnification and make these available to the surety as well as the contractor.

2. Establish a dollar cap on HTW liability.

3. Preempt state laws covering strict liability, and provide universal indemnity.

4. Amend CERCLA and/or Miller Act to specify that the purpose of performance bonds is to assure the government that the contractor will complete all contractual requirements and obligations. Performance bonds shall not be a vehicle for third party liability claims.

EPA and the Corps should jointly establish an outreach program designed to discuss with the surety and construction industry as to the nature of the HTW program, the realities of the technology being employed on remedial action projects and the contract clause addressing risk. The joint working group, including procurement and PARC representatives, would seek out prominent industry members and associations and urge that a dialogue be initiated on a periodic basis to address specific concerns of the industry stemming from bonding particular types of HTW projects.

5. Limit Risk Potential.

Each agency should immediately issue guidance to assist contracting officers in making their decisions on the amount of risk for the government to assume in the issuance of performance bonds. The guidance should emphasize that performance specifications and design-build contracts should be used only when necessary and solicitations should be clear on what responsibilities the government assumes for the technical criteria of the project. Additionally, the contracting officer should be urged to assure that the contract be structured to reduce bonding requirements, where the risk of non-performance to the government is minimal which can have a detrimental effect on competition from qualified firms. Guidance should emphasize protecting governments' interests. These include ensuring that the contractor performs as promised and all contractors, capable of performing, remain eligible. The agencies should seek approval of a contract clause which will clearly indicate that in professional specifications the government is responsible for establishment of the level of cleanup and the contractor is responsible for the method and means used to achieve this level.

A joint working group should be established between the Corps and EPA to better define the implications associated with proposing a recommendation for a FAR revision to permit the acceptance of letters of credit in lieu of a surety bond.

B. LEGISLATIVE CHANGES

Recommend EPA consider proposing legislative changes for indemnification and third party liability. Analysis of the comments received during the course of this study indicates that legislative changes in these areas will

EPA and Corps representatives should meet with Department of Labor to clarify the contract requirements of the HTW program and the relationship of these to the: Miller Act, Davis-Bacon Act and related regulations.

A program of continuing review of contract actions will insure continued competition in the contracting process.

Emphasis should be placed on appropriate acquisition planning which takes into consideration all factors that relate to the competitiveness of the contract situation.

2. Clarify Surety Liability Under SARA.

EPA should move immediately to clearly define the extent to which it will provide indemnification coverage to sureties on HTW projects. Extending indemnification by the Federal government to sureties should be explored when they fulfill these surety obligations by stepping in and completing the project for the defaulting contractor. Presently this area is not well defined. EPA should also institute, in conjunction with the Corps, an effort to revise the present FAR performance bond form to deal with the concerns raised by sureties on potential for third party actions looking to the bond for injury judgement recovery. A task force composed of appropriate personnel from both agencies should be established to work on having this revision instituted for HTW projects. At the same time, each agency should require its internal procurement elements to assure that wording is included in invitations and solicitations disclaiming any interest by the Government in having the performance bond being available to cover third party injury claims.

3. Indemnification Guidelines.

A new indemnification clause will be implemented by the Corps which will assure the indemnification of HTW contractors in the event that they are not able to secure adequate insurance for firm fixed price contracts. The indemnification will extend to third party liability by the surety.

4. Communication with Industry.

substantially reduce many of the concerns of the surety industry and contractor community in being involved with Superfund remedial action work.

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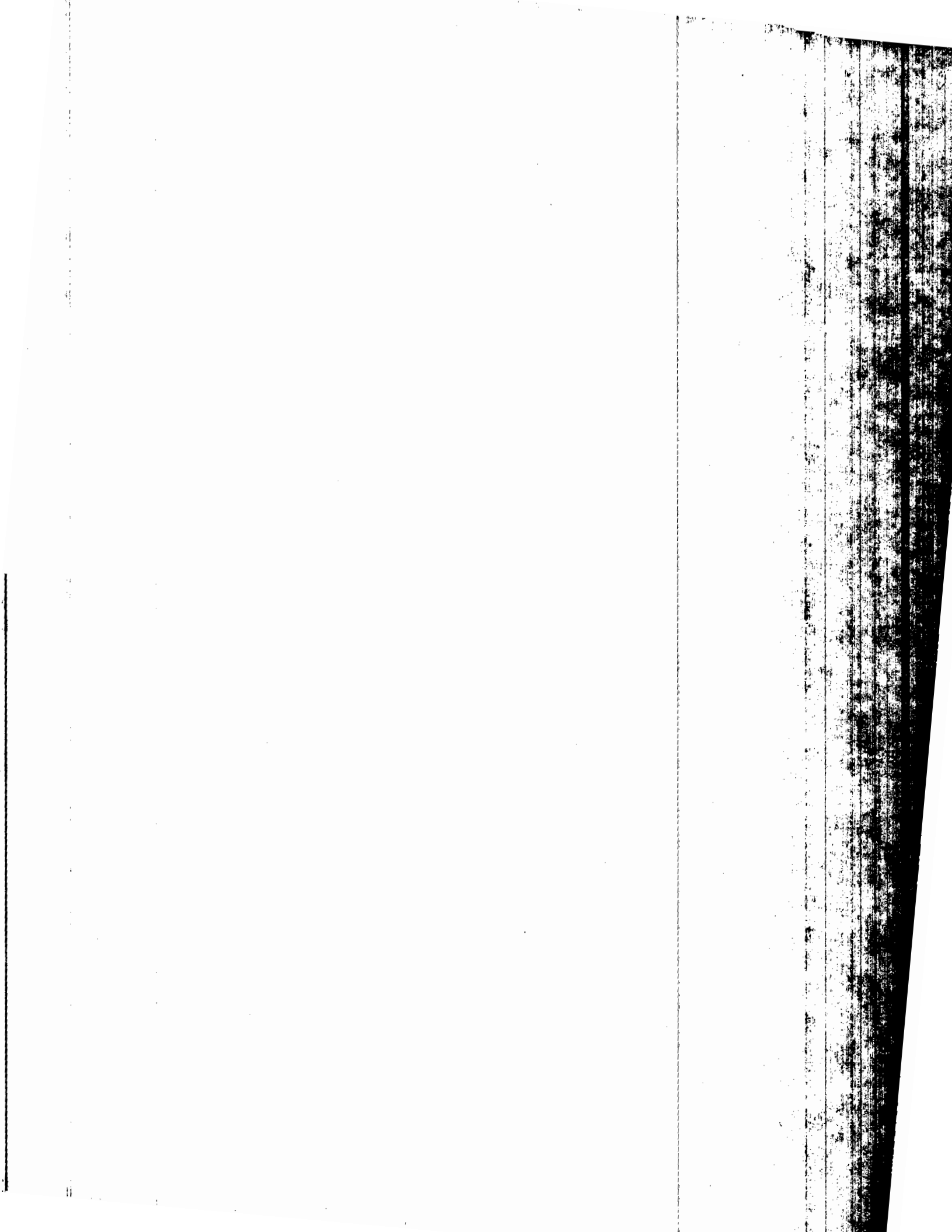
APPENDICES



Appendix A:

List of Contacts

Name	Organization	Address		
Phil Deakin	IT Corp	Washington	DC	
Norman Delbridge	Jones Gp.	Springfield	VA	
Joseph Smith	Jos.J Smith & Assts.	Greenwood	IN	
Craig Muetter	Louisville Dist.	Louisville	KY	
James Malony	Marsh & Mclennan	Columbia	SC	
Myra Tobin	Marsh & Mclennan	N.Y.C.	NY	
B. De Castro	Nat. Solid Wastes Mgmt. Assn.	Washington	DC	
Barbara Haugen	Nat.Assn.Ins. Brokers	Washington	DC	
Ed Putnam	New Jersey Environmental Dept.	Trenton	NJ	
Jim Walker	O H Materials Corp	Finley	OH	
Walter Youngblade	O H Materials Corp.	Finley	OH	
Bruce Miller	Perland Env. Tech. Inc	Burlington	MA	
Michael Quinn	Risk Science Intl. Inc.	Washington	DC	
Dennis Wine	Surety Ass. of Amer.	Iselin	NJ	
James Feeley	Texas Water Comm.	Austin	TX	
E. Schutt	W.R. Grace/Grace Env.	St. Joseph	MI	

APPENDIX A

HTW BONDING STUDY

List of Contacts

Name	Organization	Address	
John Steller	Ill. Dept land Pollution ctrl	Springfield	IL
Lynn Schubert	American Ins. Assn	Washington	DC
Brian Deery	Assn. Genl. Contr/Amer	Washington	DC
Stuart Binstock	Assn. Genl. Contr/Amer.	Washington	DC
Dave Johnson	Assn. Genl. Contr/Amer.	Washington	DC
Jack Mahon	CECC-C OCE	Washington	DC
Greg Noonan	CECC-C OCE	Washington	DC
Chuck Schroer	CEMP-C OCE	Washington	DC
Walter Norko	CEMP-CP OCE	Washington	DC
Sara Bunch	CEMP-RS OCE	Washington	DC
Jim Gibson	CEMP-RS OCE	Washington	DC
Paul Lancer	CEMP-RS OCE	Washington	DC
Noel Urban	CEMP-RS OCE	Washington	DC
Gene Jones	CEMRD-CT	Omaha	NE
Bruce Anderson	CEMRD-OC	Omaha	NE
Norm Spero	CEMRD-OC	Omaha	NE
August Spallo	CEMRK-OC	Kansas City	MO
Joan Chapman	CEMRK-CT	Kansas City	MO
Steven Switzer	CEMRK-CT-K	Kansas City	MO
Frank Bader	CEMRK-ED-T	Kansas City	MO
Lee Fuerst	CEMRK-ED-T	Kansas City	MO
Donald Robinson	CEMRO-CT	Omaha	NE
Cathy Vanetta	CEMRO-CT	Omaha	NE
Kirk Williams	CEMRO-CT	Omaha	NE
Stanley Karlock	CEMRO-ED-E	Omaha	NE
Gary Henninger	CEMRO-OC	Kansas City	Mo
Ann Wright	CEMRO-OC	Omaha	NE
Rick Heinz	CEORD-RS	Cincinatti	OH
Mary Melhorn	CEPR-ZA	Washington	DC
George Wischman	CEPR-ZA	Washington	DC
Richard Corrigan	CH2M Hill	Washinton	DC
S. McCallie	CH2M Hill	Denver	CO
Jim Lane	Corroon & Black	Madison	WI
Peter Bond	Davy Corp	San Francisco	CA
Mike Yates	Ebasco Constr. Inc.	Lyndhurst	NJ
William Bodie	Environmental Bus. Assn.	Washington	DC
Paul Nadeau	EPA HQ	Washington	DC
Tom Whalen	EPA HQ	Washington	DC
Carl Edlund	EPA Reg Off 6 (Dallas)	Dallas	TX
Tom Bosley	Fidelity & Deposit Co.	Baltimore	MD
John Herguth	Foster Wheeler Corp.	Clinton	NJ
Terre Belt	Hazardous Waste Action Co	Washington	DC
Joe Turner	Huntington Dist.	Huntington	WV
John Daniel	IT Corp	Washington	DC

STANDARD FORM 28 (6-64)
PRESCRIBED BY
GENERAL SERVICES ADMINISTRATION
FPR PARA. 1-16.801 (41 CFR 1-16.801)

AFFIDAVIT OF INDIVIDUAL SURETY

(See Instructions on Reverse)

FORM APPROVED
O.M.B. No. 29-R0030

STATE OF
COUNTY OF } ss

I, the undersigned, being duly sworn, depose and say that I am one of the sureties to the attached bond, that I am a citizen of the United States (or a permanent resident of the place where the contract and bond are executed as provided in paragraph 3 of the Instructions on reverse) and of full age and legally competent; that I am not a partner in any business of the principal on the bond or bonds on which I appear as surety; that the information herein below furnished is true and complete to the best of my knowledge. This affidavit is made to induce the United States of America to accept me as surety on the attached bond.

1. NAME (First, middle, last) (Type or print)	2. HOME ADDRESS (Number, Street, City, State, ZIP Code)
3. TYPE AND DURATION OF OCCUPATION	4. NAME OF EMPLOYER (If self-employed, so state)
5. BUSINESS ADDRESS (Number, Street, City, State, ZIP Code)	6. TELEPHONE NO. HOME— BUSINESS—

7. THE FOLLOWING IS A TRUE REPRESENTATION OF MY PRESENT ASSETS, LIABILITIES, AND NET WORTH AND DOES NOT INCLUDE ANY FINANCIAL INTEREST I HAVE IN THE ASSETS OF THE PRINCIPAL ON THE ATTACHED BOND:

a. Fair value of solely owned real estate*	$
b. All mortgages or other encumbrances on the real estate included in Line a	
c. Real estate equity (subtract Line b from Line a)	
d. Fair value of all solely owned property other than real estate*	
e. Total of the amounts on Lines c and d	
f. All other liabilities owing or incurred not included in Line b	
g. Net worth (subtract Line f from Line e)	$

*Do not include property exempt from execution and sale for any reason. Surety's interest in community property may be included if not so exempt.

8. LOCATION AND DESCRIPTION OF REAL ESTATE OF WHICH I AM SOLE OWNER, THE VALUE OF WHICH IS INCLUDED IN LINE (a), ITEM 7 ABOVE

Amount of assessed valuation of above real estate for taxation purposes. _____

9. DESCRIPTION OF PROPERTY INCLUDED IN LINE (d), ITEM 7 ABOVE (List the value of each category of property separately)

10. ALL OTHER BONDS ON WHICH I AM SURETY. (State character and amount of each bond, if none, so state)

11. SIGNATURE	12. BOND AND CONTRACT TO WHICH THIS AFFIDAVIT RELATES (Where appropriate)

SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:

DATE OATH ADMINISTERED (MONTH / DAY / YEAR)	CITY	STATE (Or other jurisdiction)	Official Seal
NAME AND TITLE OF OFFICIAL ADMINISTERING OATH (Type or print)	SIGNATURE	MY COMMISSION EXPIRES	

28-108

Appendix B:

Sample Forms

BID BOND

(See instructions on reverse)

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION
SURETY(IES) (Name and business address)	

PENAL SUM OF BOND					BID IDENTIFICATION	
PERCENT OF BID PRICE	AMOUNT NOT TO EXCEED				BID DATE	INVITATION NO.
	MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS	FOR (Construction, Supplies or Services)	

OBLIGATION:

We, the Principal and Surety(ies) are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has submitted the bid identified above.

THEREFORE:

The above obligation is void if the Principal – (a) upon acceptance by the Government of the bid identified above, within the period specified therein for acceptance (sixty (60) days if no period is specified), executes the further contractual documents and gives the bond(s) required by the terms of the bid as accepted within the time specified (ten (10) days if no period is specified) after receipt of the forms by the principal; or (b) in the event of failure so to execute such further contractual documents and give such bonds, pays the Government for cost of procuring the work which exceeds the amount of the bid.

Each Surety executing this instrument agrees that its obligation is not impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the Government. Notice to the surety(ies) of extension(s) are waived. However, waiver of the notice applies only to extensions aggregating not more than sixty (60) calendar days in addition to the period originally allowed for acceptance of the bid.

WITNESS.

The Principal and Surety(ies) executed this bid bond and affixed their seals on the above date.

PRINCIPAL			
Signature(s)	1. (Seal)	2. (Seal)	*Corporate Seal*
Name(s) & Title(s) (Typed)	1.	2.	

INDIVIDUAL SURETIES		
Signature(s)	1. (Seal)	2. (Seal)
Name(s) (Typed)	1.	2.

CORPORATE SURETY(IES)				
SURETY A	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) (Typed)	1.	2.	

CERTIFICATE OF SUFFICIENCY

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true.

NAME (Typewritten)	SIGNATURE

OFFICIAL TITLE

ADDRESS (Number, Street, City, State, ZIP Code)

INSTRUCTIONS

1. This form shall be used whenever sureties on bonds to be executed in connection with Government contracts are individual sureties, as provided in governing regulations (see 41 CFR 1-10.203, 1-16.801, 101-45.3). There shall be no deviation from this form except as so authorized (see 41 CFR 1-1.009, 101-1.110).

2. A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports.

3. An individual surety shall be a citizen of the United States, except that if the contract and bond are executed in any foreign country, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, or any other territory or possession of the United States, such surety need only be a permanent resident of the place of execution of the contract and bond.

4. The individual surety shall show net worth in a sum not less than the penalty of the bond by supplying the information required on the face hereof, under oath before a United States commissioner, a clerk of a United States Court, or notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal, it shall be affixed, otherwise the proper certificate as to his official character shall be furnished.

5. The certificate of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

U.S. GOVERNMENT PRINTING OFFICE : 1984 O - 437-307 STANDARD FORM 28 BACK (6-84)

PERFORMANCE BOND

(See instructions on reverse)

DATE BOND EXECUTED *(Must be same or later than date of contract)*

PRINCIPAL *(Legal name and business address)*

TYPE OF ORGANIZATION *("X" one)*

☐ INDIVIDUAL ☐ PARTNERSHIP

☐ JOINT VENTURE ☐ CORPORA

STATE OF INCORPORATION

SURETY(IES) *(Name(s) and business address(es))*

PENAL SUM OF BOND

MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS

CONTRACT DATE	CONTRACT NO.

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(re waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Miller Act, (40 U.S.C. 270a-270a), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contract with respect to which this bond is furnished.

WITNESS.

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

PRINCIPAL

Signature(s)	1. (Seal)	2. (Seal)	*Corporate Seal*
Name(s) & Title(s) *(Typed)*	1.	2.	

INDIVIDUAL SURETY(IES)

Signature(s)	1. (Seal)	2. (Seal)
Name(s) *(Typed)*	1.	2.

CORPORATE SURETY(IES)

SURETY A	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.	
	Name(s) & Title(s) *(Typed)*	1.	2.	

CORPORATE SURETY(IES) *(Continued)*

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	

INSTRUCTIONS

1. This form is authorized for use when a bid guaranty is required. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. The bond may express penal sum as a percentage of the bid price. In these cases, the bond may state a maximum dollar limitation (e.g., 20% of the bid price but the amount not to exceed _____ dollars).

4. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)". In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

5. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

6. Type the name and title of each person signing this bond in the space provided.

7. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror".

PAYMENT BOND

(See instructions on reverse)

PRINCIPAL (Legal name and business address)	DATE BOND EXECUTED (Must be same or later than date of contract)
	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPOR STATE OF INCORPORATION
SURETY(IES) (Name(s) and business address(es))	PENAL SUM OF BOND MILLION(S) | THOUSAND(S) | HUNDRED(S) | CENTS CONTRACT DATE | CONTRACT NO.

OBLIGATION

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

PRINCIPAL			
Signature(s)	1. (Seal)	2. (Seal)	Corporate Seal
Name(s) & Title(s) (Typed)	1.	2.	
INDIVIDUAL SURETY(IES)			
Signature(s)	1. (Seal)	2. (Seal)	
Name(s) (Typed)	1.	2.	
CORPORATE SURETY(IES)			
SURETY A — Name & Address		STATE OF INC. / LIABILITY LIMIT $	Corporate Seal
SURETY A — Signature(s)	1.	2.	
SURETY A — Name(s) & Title(s) (Typed)	1.	2.	

APPENDIX 3

Summary Table of State Law Relevant to RACs

CORPORATE SURETY(IES) *(Continued)*

SURETY A	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		

INSTRUCTIONS

1. This form for the protection of persons supplying labor and material, is used when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a–270e). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction regarding adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

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CORPORATE SURETY(IES) (Continued)					
SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) (Typed)	1.	2.		
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) (Typed)	1.	2.		
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) (Typed)	1.	2.		
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) (Typed)	1.	2.		
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) (Typed)	1.	2.		
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) (Typed)	1.	2.		

BOND PREMIUM ▶	RATE PER THOUSAND	TOTAL
	$	$

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorization person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)". In the space designated "SURETY(IES)" on the face of the form insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	California	Haz. Sub. Acct. (CA H&S Code Ch. 60 § 25300-395)	Yes, if RAC is responsible for release (CA H&S Code, 25363) and if RAC causes or contributes to the discharge. (Proposition 65)	Yes, State can indemnify RACs for up to $25 million (CA H&S Code 25364.6(d)(e), expires 1-1-92)	Yes. Indemnification of sole negligence unenforceable in design and construction contracts (CA Civil Code 2782(a))	No. Anti-deficiency statute applies by its terms to RACs
5/89	Colorado	Hazardous Substance Response Fund (Colo. RS 25-16-304.6)	None.	None. Public entity can seek reimbursement for those responsible for a "hazardous substance incident."	None.	No.
5/89	Connecticut	Emergency Spill & Relief Fund (229-451)	Yes, if RAC causes pollution and contamination.	Yes, for any person etc. who contains, removes or mitigates hazardous waste (22a-452)	Yes, for sole negligence in certain construction contexts (52-572k)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Alabama	Pollution Control Grant Fund (§ 22-22a-16)	No 22-229(m) includes wrongful acts, omissions and negligence	No	No	Yes
5/89	Alaska	No	Yes, but RA must have control over hazardous substances. (46.03.822)	No	Yes, but does not apply to RACs (34.20.100)	Anti-deficiency statute is limited to mortgage has no application RACs (34.20.100)
5/89	Arizona	Water Quality Assurance Revolving Fund (49-282)	No	No	Yes, for sole negligence in certain AE	Yes. Section 34-154 precludes public sector indemnities unless funds are appropriated
5/89	Arkansas	Remedial Action Trust Fund (8-7-508)	No. 8-7-420 holds RACs to a negligence standard	No. 8-7-512 requires RACs to indemnify states.	No.	No. DPCE contracts with consultants and contractors have received full state indemnification.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Idaho	Hazardous Waste Training, Emergency and Monitoring Account (39-4417)	No. liability would only be incurred for law violations (39-4401, et seq.)	No.	Yes, for sole negligence in certain construction contents (29-114)	Yes, Constitution restricts debts or liabilities unless specifically authorized (Art 8. §§112)
5/89	Illinois	Hazardous Waste Fund (1022.2)	Yes, for persons who operate a facility used for treatment or storage, or who contract for same (111-1/2, et seq.)	Yes, for RACs working for state with a $2 million cap per occurrence (HB 3207: 111-1/2)	Yes, for own negligence in certain construction contents and (Ch. 29-s61) for transport of hazardous waste (1022.2(g))	Yes, for negligence
5/89	Indiana	Hazardous Substance Response Trust Fund	Yes, potentially under 13-7-12-2 and 13-7-13-1	No.	Yes, for sole negligence in certain construction contents (26-2-5-1) but no if liability insurance unavailable (26-2-5-2)	Yes.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Delaware	Hazardous Waste Management Act, § 6316, allows Department of Conservation to receive funds in carrying out Act.	Yes, if RAC treated or disposed of wastes (7DE Code 6301-6309)	No.	Yes, for negligence of all parties in all phases of design and construction projects (6DE Code 2704).	Yes, sovereign immunity statutes exempt the state from liability (10 DE Code-4001, et seq)
5/89	District of Columbia	None.	No.	No.	No.	No.
5/89	Florida	Hazardous Waste Management Trust Fund (403.725)	Yes, if RAC arranged for disposal or treatment (Fla.Stat.Ann. 403.727)	Yes, for state and local contractors (376.319)	Yes. For acts or omissions in certain construction contexts unless indemnification capped or consideration given.	No.
5/89	Georgia	Hazardous Waste Trust Fund (12-8-68)	Yes, if RAC contributes to the release (12-8-81)	No.	Yes, for sole negligence in certain construction contexts (13-8-2)	No.
5/89	Hawaii	None, but Director has authority, with approval of the Governor, to receive money from the Federal and State government	No, however, Director was authorized in 1988 to bring state into compliance with federal law	No.	Yes, for sole negligence in certain construction contexts. (431.455)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Maine	No, uses Federal Superfund Program (38 § 1366)	Yes, RAC can be considered a "responsible party." (38 / 1361, et seq)	No. RACs may have to indemnify state (38 § 1367)	No.	No.
5/89	Maryland	Const. Mas. Subs (Md Health Env. Code Ann. Tit. 6:201, et seq	No.	No.	Yes, for sole negligence in certain construction contents (8-305)	No.
5/89	Massachusetts	No State funding mechanism	No, but applies with respect to releases or threatened releases of hazardous materials (21 E. § 16(9); otherwise may be strictly liable under 21 E, § 5.	Yes, with $2 million cap and certain restrictions. (21 E § 17)	Yes, voids agreements by subcontractors to indemnify other for injuries not caused by subcontractor (Ch 149 §29C)	No.
5/89	Michigan	Environmental Response Fund (299.609)	No.	No.	Yes, for sole negligence in certain construction contents (691.991)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Iowa	Hazardous Waste Remedial Fund	Yes, if RAC has control over hazardous substance (§558.392), but no (negligence standard) if transport hazardous waste	No.	No.	Yes, no state indemnification if paid to do the work
5/89	Kansas	Environmental Response Fund (65-3454a)	No, liability only for gross negligence or reckless wanton or intentional misconduct (65-3472)	No.	No.	No.
5/89	Kentucky	Hazardous Waste Assessment and Management Fund (224.876)	Yes, if RAC has possession or control over discharge or caused the discharge (224.877)	No.	Maybe. Kentucky Constitution §§ 50-177 arguably bars indemnification	Yes.
5/89	Louisiana	Hazardous Waste Protection Fund (30-2198) and Hazardous Waste Site Cleanup Fund (30-2203)	No. Statutory negligence standard (9-2800.3(a))	Yes, holds harmless state contractors from property damage and personal injuries caused by negligence (30-1149-1)	Yes, applicable to owners of facility or any person liable for discharge or disposal (30-2278)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Nevada	Contingency Fund for Hazardous Materials (459.735)	Yes, if RAC was responsible for spill or controlled the waste (459.750)	No, but RAC may have to reimburse state (459.760)	Yes, for workers' compensation but Courts have broadly construed the statutes to apply to contracts (616.265)	Yes, unless liability funded (353.255 and 353.260)
5/89	New Hampshire	Hazardous Waste Cleanup Fund (147-B:3)	Yes, if RAC arranged for disposal or treatment (147-B:10)	No.	Yes, for negligence for architects, engineers and surveyors (338-A:1)	No.
5/89	New Jersey	New Jersey Spill Compensation Fund (58:10-23.11i)	No, negligence standard for RAC, but work must be in accordance with procedure established pursuant to state and federal laws. (58:10-23.11g(1))	Yes, 58:10-23.11(f). Expires 1/1/90	Yes, for sole negligence in certain construction contents, and for ASs surveyors (2a:40A-1,2)	No, anti-deficiency statute

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Minnesota	Environmental Response, Compensation and Compliance Fund (§ 115 B.20)	No, as long as RAC is working under State or Federal Acts (115 B.03)	No.	Yes, cannot transfer liability to another person (115 B.10)	No.
5/89	Mississippi	Hazardous Waste Facility Sight Fund (§ 115 B.20)	Yes, if it helps create necessity for cleanup	No.	Yes, for own negligence in certain construction contents (31-5-41)	No.
5/89	Missouri	Hazardous Waste Fund (260.391)	Yes, if RAC has control over hazardous substance (260.530), but liability capped at $3 million per occurrence (260.552)	No, but RACs right indemnification is preserved against other liable parties. (260.552: 1-(1))	No, 260.552:1-(1) recognizes right of a RAC to seek indemnification	No.
5/89	Montana	Environmental Quality Protection Fund (75-10-704)	No. Action taken to contain or remove a release is not an admission of liability for the discharge. (75-10-60, et seq.)	No.	Yes, for fraud or negligent violation of the law (28-2-702)	No.
5/89	Nebraska	None.	No, but negligence standard for those who cause discharges	No.	Yes, for own negligence in certain construction contents. (25-21,187)	Yes. The State constitution provides for immunity from suits. (Art. III.§ 18)

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Oklahoma	None	Yes, for releases to waters of state (Title 82, 926.1); for disposal of controlled industrial waste (Title 63, 1-2001)	No, but indemnification specifically authorized for lawful activities (Title 15, 421, 422, but see also Title 15, 212, 212.1)	No.	No.
5/89	Oregon	Hazardous Substance Remedial Action Fund (466.590)	Yes, for the release of hazardous material under RAC control (466.640)	No.	Yes, for negligence in design and sole negligence in inspection in certain construction contexts (30.140)	Yes.
5/89	Pennsylvania	None	Clean Streams Act imposes strict liability on polluters (691.316)	No.	Yes, for architect, engineer or surveyors' work or directions to others (Title 68 § 491)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	New Mexico	Hazardous Waste Emergency Fund (74-4-8)	No.	No.	Yes, for negligence, acts or omissions in certain construction contracts unless certain actions excluded (56-7-1)	Yes, New Mexico has a sovereign immunity statute
5/89	New York	Hazardous Waste Remedial Fund (NY Env. Cons. Law 27-0916)	No, no negligence standard is applied (NY Env. Cons. Law 27-1321(3))	No.	Yes, for negligence in certain construction AE and surveying contracts (Gen.Ob. Laws 5-322.1, 5-323, 5-324)	Contracts cannot be let for amounts exceeding the appropriation (State Fin. Law 136)
5/89	North Carolina	Hazardous Waste Fund and Hazardous Waste Site Remedial Fund (130 A-298 et seq.)	Yes, if RAC has control of hazardous waste discharge (143-215.93)	No, but RAC may reimburse state for role in inactive hazardous waste site. (130A-310-7)	Yes, for negligence in certain construction contracts (22B-1)	Yes.
5/89	North Dakota	None.	No.	No.	Yes, for fraud or negligent violations of the law (9-08-02)	Yes, Article 1 § 21
5/89	Ohio	Hazardous Waste Cleanup Fund (3734.28)	Yes, if RAC transports or disposes of wastes (3734.13,16)	No. RAC may have to indemnify state (3734.22)	Yes, for negligence in certain construction contracts. (2305;31)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	South Dakota	Regulated Substance Response Fund (34A-12-3)	No.	No, but RAC may have to reimburse state (34A-12-6)	Yes, for sole negligence in certain construction contexts (56-3-18), for architects' or engineers' work or direction to others (56-3-16, 17)	Yes, specific legislative approval required.
5/89	Tennessee	Hazardous Waste Remedial Action Fund	No, but transporters of hazardous substances at inactive sites are strictly liable (68-46-202)	No.	Yes, for sole negligence in certain construction contexts (62-6-123)	Yes.
5/89	Texas	Solid Waste Disposal Act (4477-7)	No. RAC not liable pursuant to Water Code, 26.303 (Water Code, 26.308)(f)); but strict liability if RAC handles, transports, processes or disposes of solid waste in context other than water pollution. (4477-7 Section 8(a)(2))	Yes, but only if the federal government agrees to indemnify the state (Water Code, 26.308(a))	Yes, for defects in architect's or engineers' work or AE negligence in certain construction contexts. (Art. 249d)	Anti-deficiency statute specifies procedures for pledging state credit (4351)

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Utah	Solid and Hazardous Waste Act (26-14-1, et seq)	Yes, if RAC contributed to the release. (26-14-19(4))	No.	Yes, for sole negligence in certain construction contents (13-8-1)	Yes.
5/89	Vermont	Solid Waste Management Assistance Fund (Tit. 10,6618)	Yes, if RAC arranged for disposal of treatment (Tit. 10,6605)	No.	No.	No.
5/89	Virginia	Virginia Waste Management Act (10.1-6402)	No.	No.	Yes. Voids agreements by contractors to indemnify other for sole negligence (11-4.1)	Waiver of sovereign immunity (8.01.192)
5/89	Washington	Hazardous Waste Regulation (70.105B.010)	No.	Yes. (70.105 B.100(3))	Yes, for negligence in certain construction contents (4.24.115)	No.
5/89	West Virginia	Hazardous Waste Emergency Response Fund (20-5A-1)	No.	No.	Yes, for sole negligence in certain construction contents. (55-8-14)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Wisconsin	Wisconsin Solid Waste, Hazardous Waste and Refuse (144.49, et seq)	No.	No.	Yes, voids agreements that limit tort liability, but does not void agreements which make one party the insurer for damages (895.49)	No.
5/89	Wyoming	None.	No.	No.	No.	No.

PART B

Adequacy of Legal Protection in DRMS Hazardous Waste Disposal Contracts

REPORT TO CONGRESS ON LIABILITY, BONDING, AND INDEMNIFICATION ISSUES FOR DEPARTMENT OF DEFENSE RESTORATION PROGRAM AND HAZARDOUS WASTE CONTRACTS

Office of the Deputy Assistant Secretary of Defense
(Environment)

Response Action Contractors' Liability Issues

Regarding the Defense Environmental Restoration Program

Conclusions and Recommendations

Conclusions:

The Department of Defense (DoD) faces a major challenge to cleanup its contaminated sites quickly, effectively and without excessive cost to taxpayers. The DoD cleanup and remedial program relies on the architectural and engineering services and the design and construction capabilities of private sector remedial action contractors (RACs). The RAC community expresses reservations about its members' future willingness to undertake this work for the DoD because of perceived uncertain, but believed potentially large, risk to their firms inherent in DoD's remedial action work. In order to better understand the substance and basis of these concerns the Department of Defense has endeavored to work with representatives of the RAC community, other private sector contracting entities, as well as representatives knowledgeable about the practices and concerns regarding the insurance and surety sectors of the nation. The study concludes that contractors have the following deeply held perception of the current liability situation:

- RACs, because of joint strict and several liability under federal and state law, may be found liable when they are not at fault.

- The resulting probability of insolvency through imposition of liability without fault is uncertain and therefore unacceptable.

    - RACs are unable to secure adequate insurance due to the insurance industry's reluctance to become involved where the risk is so uncertain and potentially large.

    - RACs are also hampered in obtaining performance bonds required by the Miller Act for DoD construction contracts. Surety companies are reluctant to write bonds. The uncertain and potentially large risk for the situation has decreased availability and increased costs which are ultimately reflected in DoD's costs.

- RAC's believe they are assuming risks that properly go to DoD as the generator of hazardous waste and owner of the site.

These perceptions have serious implications for the continued progress of the DoD's cleanup program, as DoD may not be able to sustain rapid progress in its cleanup program without a heavy reliance on knowledgeable qualified contractors.

The Department has also concluded the following as to the current status of response action contracting and the legal liabilities of the Department:

- DoD is currently able to get adequate competition for our remediation contracts.

- Some well-regarded companies are not bidding on DoD contracts citing the risk issues as their reason not to compete.

- DoD is not able to determine, based on this study, what impact the contractor's perceived liability exposure is having on their bid pricing of DoD contracts.

- There is no evidence that quality of work on DoD contracts is being affected.

- The current liability picture particularly discourages contractor participation in innovative remedies as they place potential additional risk on the contractor. A contractor's prime defense to their perceived liability exposure is to use standard, conservative measures wherever possible, thus favoring an excessively conservative approach to remediation.

- RACs express a willingness to be liable for their failure to perform adequately on their remediation contracts.

- DoD as waste generator, facility owner, and overall manager of its remediation effort is and should be ultimately responsible for future problems associated with its remediation efforts, however, it should have a legal remedy against a non-performing contractor.

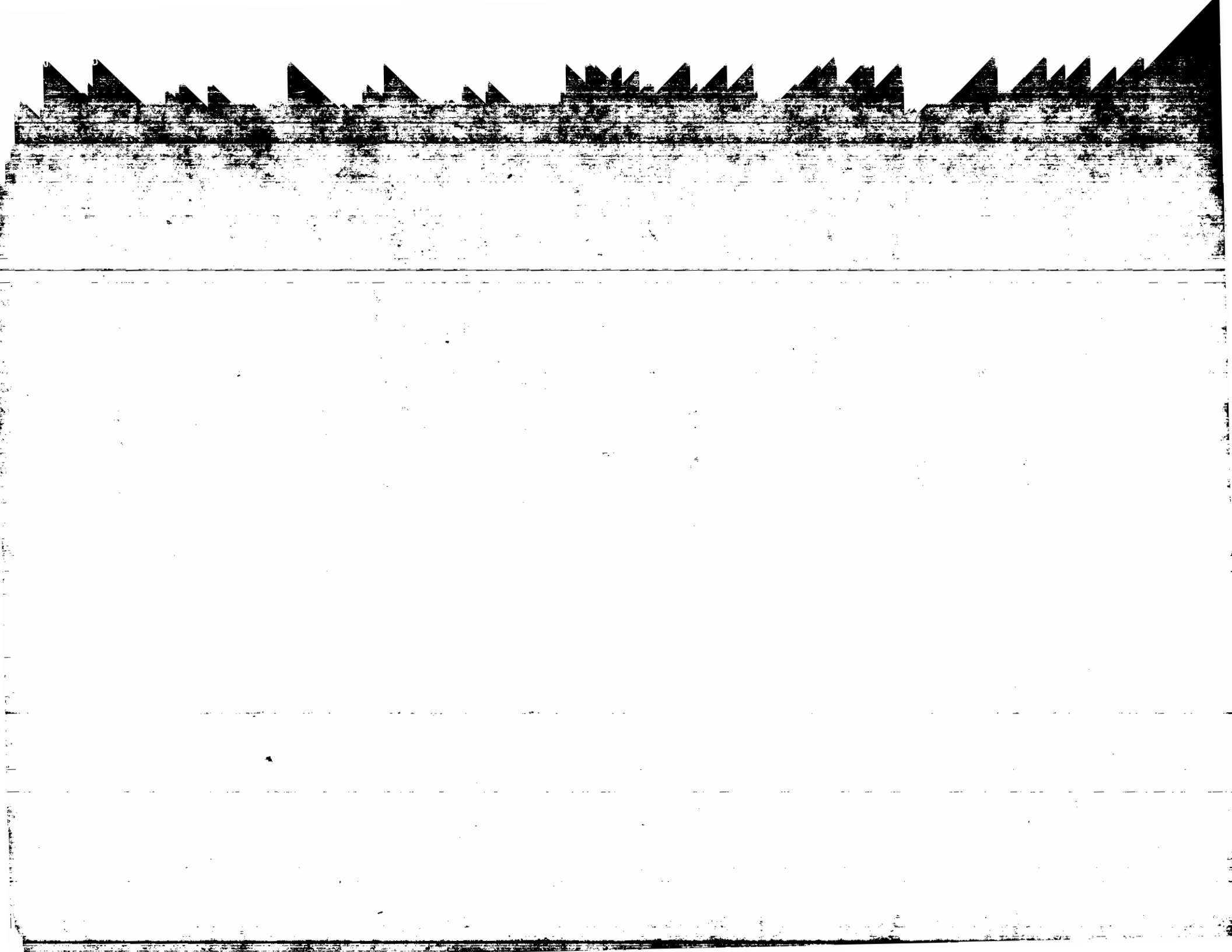
    - As a waste generator and owner of the contaminated site DoD is in a different liability relationship with its contractors than EPA with its contractors. As such liability shifting rules developed by EPA for dealing with its contractors may not be appropriate for DoD.

- Private firms hiring RACs for private cleanup work engage in risk sharing strategies with RAC contractors which may be adaptable to DoD contracts.

    - Different types of remediation projects have different inherent risks and therefore may call for different risk sharing strategies.

    - Appropriate risk sharing strategies should result in reduced cleanup cost to the Department and the taxpayer, without increasing the ultimate risk to the treasury.

    - Adoption of risk sharing strategies may require regulatory and legislative reform.



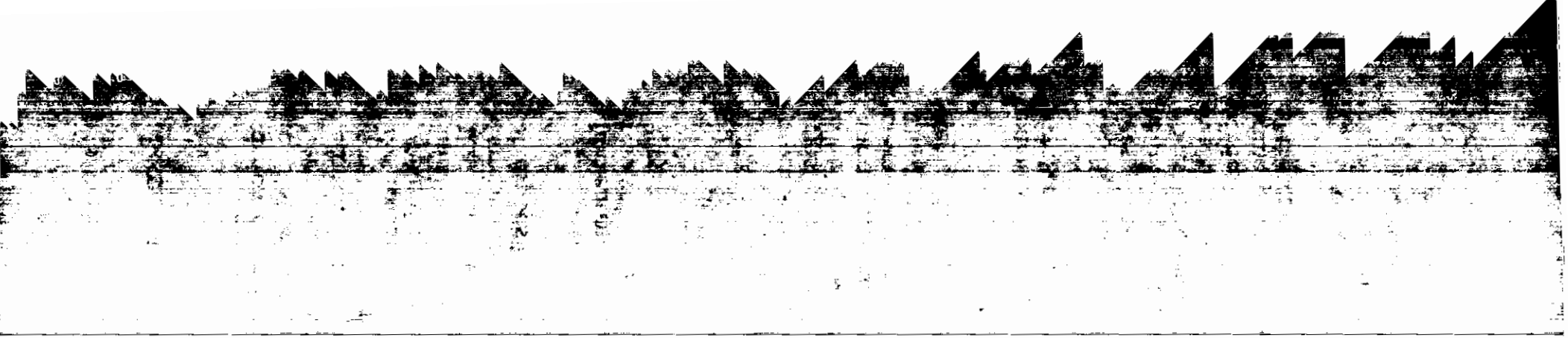
Recommendations:

Based on the foregoing conclusions, the Department is concerned remedial action contractors' perceptions may lead in the future to reduction in competition, escalation in costs, lowering of quality, and increased risk to the public. We are also very conscious that any recommendation we adopt for action or inaction, will have economic consequences. Any choice inevitably confers competitive advantage on some contractors and disadvantage on others. We must make sure we understand the nature and implications of the incentives and disincentives our choices imply. We must encourage responsible and professional behavior by our contractors. We must avoid creating incentives for behavior that diverts government resources from the primary goal of cleanup. Ultimately, whatever strategies we adopt should improve the Department's ability to perform effective cleanup in a timely manner at a responsible cost to the taxpayer.

Based on information developed in doing this report, the Department is implementing changes in its contracting strategies and policies within its control to resolve some of these issues. These include better acquisition planning including varying types of contract strategies, reducing amounts of bonds required on construction contracts or use of rolling or phased bonds, allowing irrevocable letters of credit in lieu of bonds, and retaining certain work elements under DoD control (e.g. signing hazardous waste manifests). The environmental and engineering arms of the military departments will continue to examine their current contracting practices with a view to recommending changes in guidance, policy, regulations, and legislation to enhance the effectiveness of our environmental and remedial action contracting. We have tasked them to ensure the scope of their study addresses appropriate and equitable risk sharing between the DoD and its contractors in the cleanup program, and to make specific recommendations for action to be taken. The DoD is now also engaged in a comprehensive review of the Federal Acquisition Regulations so as to ensure adequate treatment of environmental requirements.

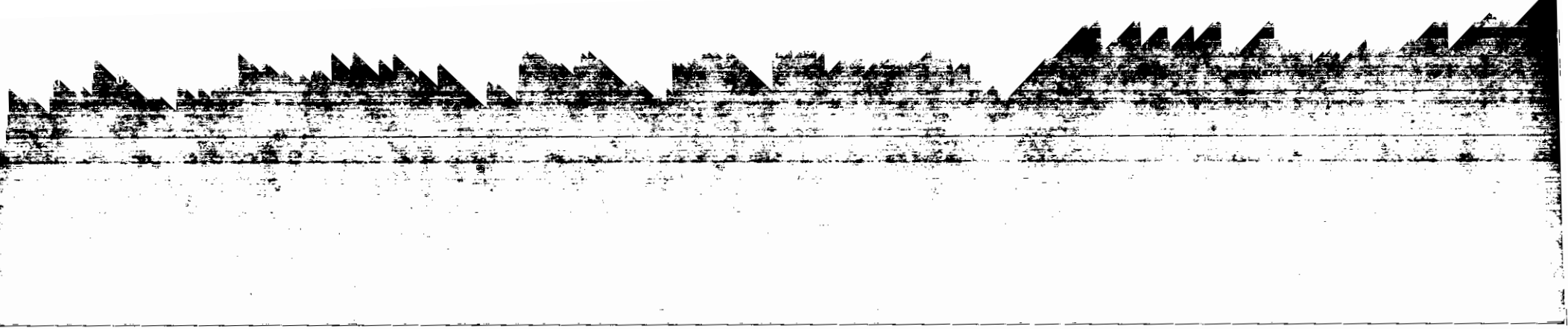
Two recommendations merit further consideration. The first would resolve the extent of liability of a surety to a remedial action contract where their only involvement is in providing a bond. This issue was addressed in the last Congress by amending section 119(g) of the Comprehensive Response Compensation and Liability Act to specifically broaden coverage for sureties at National Priorities List sites. Extending this principle to all DoD sites, whether or not on the NPL, would help bring sureties back into writing bonds for DoD cleanup contracts at a reasonable prices. This should broaden competition for contracts, improve timeliness, and reduce overall costs to the Department. This should not work a disservice to innocent third parties, as ultimately it is the Department that is responsible for the remediation. The prime purpose of the surety is to ensure the Department receives the fiscal benefit of the contract.

A more wide-sweeping risk sharing concept evolved from discussions during the preparation of this report. This concept would involve limiting a Response Action Contractor's liability to outside persons. The Department and any other true



potentially responsible parties would be designated as those solely responsible for damages to innocent third parties for damages arising out of a remediation action at a DoD site--logical application of current law as to generators and operators of hazardous waste facilities. The DoD's contracts with its RACs would then provide for recovery by DoD from the RAC if the damages resulted from the RAC's negligence. This concept is similar to the latent damages clause currently used in construction contracts.

The time for preparation of this report was short considering the complexity of the issues. Among the areas that still need substantial further analysis are the total cost implications of various risk sharing strategies as compared with the long term liabilities of the government. We will continue working with the contractor community and other interested parties to explore these and other recommendations and solutions to improve the Department's clean-up program.



APPENDIX 1

SAME Forum Proceedings

SOCIETY OF MILITARY ENGINEERS

ENVIRONMENTAL CONTRACTS FORUM

30-31 JANUARY 1991
BOLLING AIR FORCE BASE

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

EXECUTIVE SUMMARY

On 30 - 31 January 1991, the executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting.

During the forum, the following key issues were raised:

a. There is a risk to the remedial action contractor (RAC) performing environmental work. Part of this risk are the unknowns associated with the work. Another part is the potential for third party liability suits resulting from the performance of such work.

b. RACs are unable to obtain professional performance liability insurance for hazardous waste site cleanup projects. The insurance industry is reluctant to provide such insurance due to the high risk of liability associated with the performance of such work. Available insurance only covers the period of work performance; not the period during which RACs are most susceptible to third party liability suits.

c. RACs are unable to obtain surety bonds required for Federal government hazardous waste cleanup projects because the surety bond industry sees a high risk from liability in issuing such bonds. Available bonds are generally for projects of less than $5M value. Some companies are self-bonding in order to meet governmental requirements.

d. RACs feel that the Department of Defense (DOD) is responsible for the presence of the hazardous material on the site and therefore, should be responsible for their portion of the risk associated with site cleanup. RACs believe that DOD should indemnify RACs performing work against third party liability to cover the government's portion of the risk.

In response to the concerns raised by RACs, DOD representatives indicated that they would consider the following potential solutions to resolve the issues raised:

a. Change the laws so that RACs are excluded as a potentially responsible party for liability suits resulting from cleanup actions.

b. Revise the Federal Acquisition Regulations (FAR) to extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program.

c. Limit the statute of limitations for contractors on environmental cleanup projects and limit the contractor's liability for a project.

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine equitable distribution of the risk between the contractor and the government as a part of the contract.

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

A. INTRODUCTION

The executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base on 30 and 31 January 1991 to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting. In attendance at this forum were representatives of the Office of the Deputy Assistant Secretary of Defense (Environment), Army, Navy, Air Force, and Coast Guard and executives representing remedial action contractors (RACs) that perform environmental cleanup services for the Department of Defense and private industry. A list of attendees for this forum is provided as Attachment A to this report.

This forum was co-chaired by Captain James A. Rispoli, CEC, USN, Vice President, Environmental Affairs, Society of American Military Engineers and Mr. Russ Milnes, Principal Deputy to the Deputy Assistant Secretary of Defense, (Environment).

Prior to this forum, invitees were asked to submit discussion papers on any aspect of the topic issues. Suggested discussion topics included: what are the liability concerns; what are the experiences with regard to liability and bonding; how is the risk of performing environmental work assessed; and how do the problems of liability and bonding affect competition. Seven papers were submitted in advance or during the forum. These papers were provided as attachments to the draft proceedings of the forum.

B. OPENING REMARKS

Captain Rispoli opened the forum by outlining the objective of the Environmental Contracts Forum, which is to facilitate an ongoing frank and open discussion of programmatic and contractual issues between industry and the military services. He indicated that this was the third session of this executive forum, and that SAME had been asked by the Office of the Deputy Assistant Secretary of Defense (Environment) to further address the issues of liability, indemnification, and bonding to assist them in obtaining views so that DOD might prepare a report to Congress. To increase the dialogue, CAPT Rispoli indicated that additional contractors had been invited to participate. CAPT Rispoli stated that proceedings of the forum would be issued. These proceedings would not provide any quotes or attribution. He asserted that the forum was not a place for debate, but was a means to discuss the issues so that all in attendance could listen and learn. He asked if there would be any objections in having submitted papers published as a part of the forum proceedings. No objections were raised.

Mr. Milnes addressed the forum stating that the only means of solving environmental cleanup liability problems was through an open forum. He indicated that the Department of Defense (DOD) has pledged to comply with its environmental obligations. The installation restoration effort is important, and as the DOD moves from the study phase, it recognizes that action must be taken to ensure site cleanup progresses smoothly. He emphasized that the DOD wants to finish the cleanup business. Mr. Milnes stated that his office wants to come to grips with the hazardous waste site cleanup contract issue. Performance bonding is an issue; legislative fixes may be possible, but he did not see this as a solution. He explained that if the DOD and the cleanup industry do not

for a cleanup in certain states, and therefore may choose not to bid. They indicated that in performing some work, they were staking the survivability of their corporation. When asked, the RACs explained that, in working with the private sector, the RAC shares the risk with the client. This protects the contractor. The point was raised that the owner of a waste site owns the waste, and the RAC is helping to clean it up. Therefore, the site owner must share a good portion of the risk.

The issue of strict liability was raised by the RAC representatives. If anyone has a connection with a hazardous waste site, they are liable. Proper behavior has not excused liability.

When working for the Environmental Protection Agency (EPA) on orphan sites, there is a greater risk to the RAC. The EPA indemnifies the RAC under Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This indemnification only covers negligence and not strict liability. The RAC must look at the state laws when deciding to accept a risk.

Another issue raised was that in some instances, a DOD activity required a RAC to sign hazardous waste manifests. This action places liability on the RAC for transporting of wastes. If the RAC had known it would be required to do this, it would not have bid on the job without indemnification. A DOD representative indicated that, generally, the DOD signs the manifest as the generator. The RAC representatives indicated that even if the contractor does not sign the manifest, but arranges for transport, the contractor could be liable, a potentially responsible party (PRP). Even if the contractor doesn't arrange the transport, but is on site, it may be sued. The contractors emphasized that defense costs are a real-time cash flow problem and a real risk even if the contractor is not involved or is innocent.

The problems for the RAC were summarized as follows:

a. There is an inherent risk associated with doing environmental work. RACs are dealing with anomalies which are inherently difficult to model.

b. There is an environmental risk of third party liability.

c. There is no incentive for innovation. Before innovation will be employed by contractors, there must be an agreement between the client and the contractor, and the beneficiary of the innovative practice is required to assume liability. Innovation is prohibitive in a regulatory atmosphere. There is generally no innovation in the U.S.

d. The architect-engineers (A-Es) are being expected to accept the liabilities of others. Liability insurance is not available in the market. If it is available, it is only for the period of the job.

e. Requirements vary from state to state. There is a bright spot for the RACs in that there is more flexibility shown when dealing with states than when dealing with the Federal government. Some states may change the specifications on their cleanup projects to permit innovative technology. Many see some states assuming the liability of PRPs. State regulators are a part of the Record of Decision (ROD), and this permits flexibility in dealing with the states.

"prior acts". RACs are paying premiums but are not receiving future coverage. The topic leader indicated that if states had negligence statements similar to Section 119 of CERCLA, then insurance companies might become more interested in providing such insurance. There are presently no magic solutions.

The topic leader was asked the insurance industry's plan of action. The response was that the insurance industry is "slugging out" solutions on a case-by-case basis. The industry has not been able to agree on alternatives to the current situation. A formal definition of "pollution exclusion" is a possibility. A general discussion on possible approaches (solutions) followed. A law similar to Price-Anderson which would be applicable to the toxic waste cleanup industry was mentioned as a potential solution. This solution would create three layers of protection in the event of liability: the insurance layer, the owner/operator layer, and the government layer.

3. Near and Long Term Environmental Restoration Contracting Strategies.

Each of the service representatives made a short presentation on environmental restoration contracting strategies. Described were current efforts, current problems, and actions being taken to clean up identified hazardous waste sites.

4. The Availability, Costs, and Limitations of Corporate Surety Bonds to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors.

The topic leader from the insurance industry indicated that there were considerable problems with the issuance of corporate surety bonds. Contractors must post a surety bond for Federal work under the Miller Act. At this time, there are few bonds available for work on hazardous waste sites.

The topic leader described the problems of issuing bonds for such tasks. Surety bonds are underwritten only to cover the performance of a contractor and the payment of suppliers for construction work. They are written based on the quality of the contractor (ability to do good work, quality of people on site, equipment, how well the contractor has done on similar efforts, and the availability of contractor finances to fulfill the contract requirements). Underwriters normally develop a long-standing relationship with the contractor. Liability from third party suits is not normally considered (this is normally covered by commercial general liability insurance). Recently, however, surety bond issuers have come under attack in the court room because they are the only "deep pocket" remaining in a law suit (RACs are normally people rich, but asset limited).

There has been a lack of indemnification for surety bond issuers for hazardous waste site work. Anyone involved in hazardous waste site work (including the surety bond underwriters who are only covering contractor performance and supply payments) have been found to be liable. If the RAC defaults on such work, the surety principal would be required to hire a completing contractor and, consequently, may be construed to have contracted for the removal of hazardous waste and subjected itself to liability.

Another issue with hazardous waste site bonding is the bond termination date. Normally, a bond is terminated when all work has been satisfactorily accomplished on a project. Due the possibility of long time periods associated with hazardous waste site cleanup action (including the prospect of having to reinitiate work), the bonding company may be required to pay claims long after work has been completed on a project.

5. Further Discussion on Industry's Liability Concerns with Regard to DOD Environmental Restoration Work and Potential Solutions to Address These Concerns.

A DOD representative led this topic to generate further discussion on the key issues and to explore potential solutions to these issues. The topic leader indicated that DOD was looking for solutions that would result in good (technical and timely) cleanups of its hazardous waste sites, at a good price, and maintain a good contractor base which earns a fair profit and is a viable community. The RAC representatives indicated that this would be possible if there was equitable risk sharing between the RACs and the DOD.

It was suggested that value-engineering clauses in contracts be utilized. Some contractors indicated that this effort doesn't work very well, due to lack of timeliness in the government's response. This lack of timeliness causes contractors to stop trying. A DOD representative indicated that in situations in which a technology is approved in the ROD, there is reluctance to consider value-engineering proposals because it may mean reopening the ROD. A Navy representative indicated that his service welcomes value-engineering. The services indicated that when they become aware of roadblocks, they would take action to eliminate them.

A question was raised whether the RACs normally revalidated the remedial investigation/feasibility study (RI/FS) when contracted to perform remedial design/remedial action (RD/RA). The RACs agreed that they would revalidate the data obtained by another contractor. The degree of revalidation would depend upon the contractor who performed the RI/FS. Such revalidation could cost up to 20 percent of the RD/RA effort.

The Navy's Comprehensive Long Term Environmental Action, Navy (CLEAN) contract was discussed. The RACs were asked why they bid on these contracts since they did not know the cleanup effort involved. The RACs said that cost-plus (rather than fixed fee) contracting of CLEAN was a plus. They remarked that they would be better able to define the work and get a good price to perform a full scope of each task. As long as the cleanup effort was on the base, the possibility of third party liability was low. The closer to the site boundaries, the greater the risk associated with a project. Under CLEAN, each task is negotiated, and the contractor can evaluate the risk for each task. Only one percent of the projects in a CLEAN contract are anticipated as being a problem.

In a discussion of contracting strategies versus risk, the RAC representatives indicated that third party liability is independent of the contract type. They did not look at fixed price contracts in the environmental area because there are too many unknowns and too much time and effort is spent in contract modifications. They wanted to be able to address, in the contract, the care to be taken in determining the risk of the project.

The RAC representatives were asked, what percentage of contracts are high risk? The response was, that a large percentage of environmental effort requires third party liability and therefore, is a high risk. One company representative indicated that his company will not perform any work without some form of indemnification. Defense costs for liability suits are the big problem. There is no method of predetermining how juries will apportion costs.

The RAC representatives reiterated that they have the ability to negotiate risks for commercial projects. That ability does not currently exist in dealing with the DOD. They also indicated that

The discussion continued with the RAC representatives indicating that a negligence standard exists in CERCLA, and they want a similar law modification for state laws and the Resource Conservation and Recovery Act (RCRA). They do not desire strict liability to apply to them. The overriding issue is that the RACs are concerned that they must assume responsibility for what they did not initially cause. The responsibility should be adjudged to the people who put the waste in the land.

The DOD topic leader asked what the DOD could do to help the contractors. There were four areas of potential change: the law, which would be most difficult to change; the regulations (DOD indicated that they would work with the EPA to determine how the regulations might be changed); policy; and the FAR/contract (DOD indicated that they could directly impact these last two areas and achieve the quickest results).

Indemnification of contractors is now addressed in Public Law (P.L.) 85-804 and FAR 52-228.7. Under P.L. 85-504, the contractor must identify the nature of the risk and then the Contracting Officer must raise the issue to the service Secretary for authorization. To support indemnification of contractors for environment risks would make each service's effort unique. The FAR clause is based on radioactive material risks and excludes construction. A change to the FAR appears to be appropriate, but it would have to be based on a change in the law. DOD representatives considered that such a change might be accomplished as a part of the Defense Reauthorization Act.

The following potential solutions were identified for evaluation by DOD in response to the issues raised by the RAC representatives regarding their risks:

a. Change the laws so that the RACs are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine an equitable distribution of the risk between the contractor and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

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Re: Minutes of the Society of American Military Engineers January Conference

Dear Mr. Dobes:

Thank you for sending the draft minutes from the January 30-31, 1991 meeting of the Society of American Military Engineers. I was pleased to attend and discuss the issue of surety bonds for hazardous waste cleanup projects. As we discussed on the phone recently, I have only a few comments on the draft minutes, and you took care of the specific items while we spoke.

However, I also have a general comment which I wanted you to have in writing for the record. As you may remember, I was unable to stay for the entire program, and thus, missed the creation of the recommendations and potential solutions contained in the minutes. All of the recommendations and potential solutions developed by the attendees of the conference are excellent ideas. However, I was concerned that surety was not specifically included in some of the comments.

For example, recommendation "e" states that "The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable." This is an instance where the RAC's surety should specifically be included in the recommendation. Just such a provision is part of the Superfund amendment passed last year, and has been essential to the increase we have seen in the availability of surety bonds for those contracts covered by that amendment. The ideas contained in the recommendations should apply equally to the RAC and its surety.

The potential solutions also refer only to the contractor, while applying the solutions to the surety as well will be necessary to increase the sureties' ability to underwrite

bonds for these types of projects. Thus, it is my recommendation that the potential solutions be amended to read as follows (underlined portion is the proposed amendment):

a. Change the laws so that the RACs and their sureties are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor and surety work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor or surety liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors and their sureties on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's and surety's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's and surety's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and surety who takes over for a contractor and determine an equitable distribution of the risk between the contractor or surety and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor or surety must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

These minor changes in the recommendations and potential solutions would express the necessity of protecting the surety of a response action contractor to the same extent as the contractor. Without this equity, it is most likely that bonds will continue to be difficult to obtain for all hazardous waste cleanup projects not covered by the Superfund amendment implemented last year.

Thank you for allowing us to submit these follow-up comments. Please let me know if there is anything else which I can do to assist you in putting together the final version of the minutes.

Very truly yours,

Lynn M. Schubert
Senior Counsel

LMS/lms/jdltr.sam

cc: Captain James A. Rispoli
Ms. Susan Sarason
Craig A. Berrington, Esquire
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APPENDIX 2

Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

US Army Corps of Engineers
Water Resources Support Center
Institute for Water Resources

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

JULY 1990

IWR REPORT 90-R-1

Unclassified
SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE

Form Approved
OMB No 0704-0188
Exp Date Jun 30, 1986

1a REPORT SECURITY CLASSIFICATION Unclassified	1b RESTRICTIVE MARKINGS
2a SECURITY CLASSIFICATION AUTHORITY	3 DISTRIBUTION / AVAILABILITY OF REPORT Approved for public release; unlimited
2b DECLASSIFICATION / DOWNGRADING SCHEDULE	
4 PERFORMING ORGANIZATION REPORT NUMBER(S) IWR Report 90-R-1	5 MONITORING ORGANIZATION REPORT NUMBER(S)
6a NAME OF PERFORMING ORGANIZATION USACE, Institute for Water Resources 6b OFFICE SYMBOL (If applicable) CEWRC-IWR	7a NAME OF MONITORING ORGANIZATION
6c ADDRESS (City, State, and ZIP Code) Casey Building Telegraph & Leaf Roads Ft. Belvoir, VA 22060-5586	7b ADDRESS (City, State, and ZIP Code)
8a NAME OF FUNDING / SPONSORING ORGANIZATION USACE, Directorate of Military Programs 8b OFFICE SYMBOL (If applicable)	9 PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c ADDRESS (City, State, and ZIP Code) Pulaski Building 20 Massachusetts Avenue, NW Washington, DC 20314-1000	10 SOURCE OF FUNDING NUMBERS PROGRAM ELEMENT NO. / PROJECT NO / TASK NO / WORK UNIT ACCESSION NO

11 TITLE (Include Security Classification)
Hazardous and Toxic Waste (HTW) Contracting Problems - A Study of the Contracting Problems Related to Surety Bonding in the HTW Clean-up Program

12 PERSONAL AUTHOR(S)
rp, Francis, M.

13a TYPE OF REPORT	13b TIME COVERED	14 DATE OF REPORT (Year, Month, Day)	15 PAGE COUNT
final	FROM _____ TO _____	1990/April	

16 SUPPLEMENTARY NOTATION

17 COSATI CODES			18 SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB-GROUP	Bonding, Miller Act, Service Contracts Act, Davis-Bacon Act, CERCLA, FAR , HTW, Surety, Performance Bond

19 ABSTRACT (Continue on reverse if necessary and identify by block number)

This study attempts to determine the impact of performance bond availability on the successful accomplishment of Hazardous & Toxic Waste (HTW) projects.

20 DISTRIBUTION / AVAILABILITY OF ABSTRACT UNCLASSIFIED/UNLIMITED ☒ SAME AS RPT ☐ DTIC USERS	21 ABSTRACT SECURITY CLASSIFICATION
22a NAME OF RESPONSIBLE INDIVIDUAL Francis M. Sharp	22b TELEPHONE (Include Area Code) (202) 355-2369 22c OFFICE SYMBOL CEWRC-IWR-N

DD FORM 1473, 84 MAR 83 APR edition may be used until exhausted
All other editions are obsolete

SECURITY CLASSIFICATION OF THIS PAGE

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

Prepared by

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Commissioned by
Environmental Protection Agency
and
U.S. Army Corps of Engineers
Environmental Restoration Division

July 1990

IWR Report 90-R-1

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I. SUMMARY

The EPA and the U.S. Army Corps of Engineers ("Corps") have experienced difficulties in contracting Hazardous and Toxic Waste (HTW) cleanup projects. The HTW cleanup industry has expressed concern that it could not obtain surety bonds required as a prerequisite for competing for remedial action construction projects. It was reported that Treasury Department listed corporate sureties, which provide the guarantee bonds for Government projects, had imposed stringent limitations on the provision of performance bonds which assure the government that the cleanup project will be completed. Essentially, the bonds guarantee that the surety will either complete performance or pay the Government its costs associated with completing the project to the limit of the penal amount of the bond. Various contracting industry firms stated that they have not been able to secure bonding for some projects. Those that have obtained bonds had a difficult time doing so, and some firms that had obtained bonds for previous projects were unable to obtain bonds for a subsequent project. The surety industry indicated its reluctance to guarantee performance on HTW projects primarily because of its concern for possible long-term liability exposure and changing state-of-the-art design requirements associated with such actions.

The EPA and the Corps commissioned the Institute for Water Resources to gather information on the subject; to analyze the data to determine the extent of the existing bonding problems; and to offer recommendations which could be implemented in an effort to alleviate problems noted. A survey was conducted of Corps district offices, the HTW cleanup industry, surety firms, and trade associations, to determine the extent and nature of the problem. A few survey activities extended to EPA and state offices involved in HTW work.

The study examined 24 ongoing remedial action and completed Corps HTW construction contracts. Statistics were gathered from actual Corps records on the contractors and sureties that participated in these contracts. In addition, a sample of the universe of HTW contractors and sureties was interviewed along with industry association representatives. The responses to these interviews appear later in this paper. They were analyzed to arrive at conclusions concerning industry views and perceptions of the surety problem.

will be issued on the appropriate factors to be taken into consideration in accomplishing this analysis.

- Analysis of the option of dividing the project into work elements with an appropriate level of bonding in each.

- Clarify the government's policy on indemnification of contractors and sureties.

- To the extent of its authority, each government agency will define its specific responsibility for the risk aspect of the cleanup project where appropriate (e.g. accept responsibility for performance specifications).

- The government will specifically accept the responsibility for project design where the performance specifications have been met.

The thrust of this study was specifically centered on the bonding issue. While the stated problem of many of the respondents was bonding, the underlying issue is the uncertainty about risk in general as it applies to the HTW Cleanup program. There is uncertainty by sureties and contractors concerning risk and liability. Surety bonds for performance, liability insurance and indemnification questions are closely related and difficult to separate when dealing with HTW risk questions.

There are two categories of options available to address these solutions. First, short term steps can be taken internally by the Corps and EPA that involve revising internal agency procedures to alleviate the contracting problem. Changes to government-wide construction procurement regulations, e.g. standard bond forms, should be pursued with the FAR Council. Finally, longer term actions could be carried out which concentrate on potential legislative revisions to the liability and indemnification provisions in the superfund statute.

Resources (IWR), a Corps research agency located at Fort Belvoir, VA, was selected to do the study. The study was initiated in late November 1989. IWR conducted a series of personal and telephone interviews of HTW industry contractors, as well as HTW industry associations. In addition, personnel from insurance and surety industry firms, surety associations, states, EPA, and the Corps were interviewed about the issue. A listing of the interviewees appears in Appendix A.

The interviewees were questioned regarding difficulties experienced in the HTW bonding area. They were also asked for their views on the nature and magnitude of any bonding problems and requested to provide suggestions on actions that could be taken to rectify the situation. IWR also gathered references, such as seminar papers, letters of concern to various agencies, testimony before Congress, government forms and regulations, and other relevant documents. A body of background material concerning the problem was assembled. The study also collected information concerning contracting for HTW cleanup, in particular information regarding the difficulties in the acquisition of surety bonds by contractors.

Table 1

STATUTES AND REGULATIONS PERTAINING TO HTW CONTRACTING

ACT	DESCRIPTION
Miller Act Construction Contract Bonding Requirement	Requires Federal agencies awarding construction contracts to utilize payment bonds to assure that the prime contractor pays his subcontractors and performance bonds to guarantee completion of work in accordance with the contract specifications.
McNamara-O'Hara Service Contract Act (SCA)	Defines the types of activity classified as service contracts for the purposes of Federal government procurement.
Davis-Bacon Act (DBA)	Applies to all Federally funded construction projects. Designates the Secretary of Labor as the sole authority on the classification of wage rates for construction projects.
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by Superfund Amendments & Reauthorization Act (SARA)	CERCLA enacted to eliminate past contamination caused by hazardous substances pollutants or contaminants released into the environment. Authorizes EPA to recover cleanup costs. SARA enacted to strengthen CERCLA and tighten cleanup target dates. Requires use Davis-Bacon wage rates for construction projects funded under section 9604(G) of CERCLA.
Federal Acquisition Regulation (FAR)	Pursuant to the requirements of Public Law 93-400 as amended by Public Law 96-83: provides uniform policies and procedures for contracting by Federal executive agencies.

The procedure for obtaining performance and payment bonds from individual or corporate sureties for HTW cleanup contracts is incomplete without examining the background of the bonding requirement. The 1935 Miller Act specified that all construction contracts by the Federal Government would be covered by performance and payment bonds. The purpose of the performance bond is to insure that the project is completed in the event that the original contractor defaults.

The requirement for performance bonds varies with each project and is affected by the type of project being undertaken. A bond is required by the Miller Act on all fixed-price construction contracts over $25,000, but must be

the project. The Corps of Engineers is very sensitive to avoiding disputes with DOL arising from failure to use construction wage rates. EPA is equally concerned that the proper rate be used by the Corps.

1. Miller Act Construction Contract Bonding Requirements. In order to fully address the performance bonding requirement and its relationship to the contracting industry, we must first examine the Miller Act. The Miller Act requires performance and payment bonds for any contract over $25,000 for the "construction, alteration or repair of any public building or public work". P&P bonds are required on all FFP construction contracts and/or delivery orders over $25,000. The percentage needed for performance bonds is flexible. However, these bonds are not necessary for cost reimbursement contracts and/or delivery orders. The level of bonding required is determined by the Contracting Officer based on the level of risk associated with the project and the resulting need to protect the Government's interest. The performance bond guarantees the Government that the building or work will be completed in accordance with the terms and conditions of the contract or the Government will be compensated. The payment bond guarantees that subcontractors and suppliers of the prime contractor will be paid for their work. Performance and payment bonds are usually issued by the same surety for a particular project. These bonds protect against contractor non-performance. They are not intended as insurance for contractor actions which may prompt third party liability suits, or as a substitute for pollution or any other type of insurance. A third bond, generally required by agency or acquisition regulations where the contract solicitation is a formally advertised sealed bid, is the bid bond. The bid bond protects the Government by providing a penal amount that will be forfeited by the surety of the lowest responsible bidder if the bidder fails to accept the award or to provide the required performance and payment bonds after award has been made. Bid bonds generally are provided by the same surety that provides the performance and payment bonds for a particular contract. The surety's decision to issue the bonds appears to be controlled by the contractors bonding capacity and its analysis of the risk associated with each particular contract. Hence, it would seem that difficulties reported in contractors' ability to acquire bid bonds are in fact directly connected to the same factors causing those contractors inability to acquire performance bonds.

Inasmuch as the scope of possible service contracts is extensive, section 7 of the Act lists specific contracts outside the Act. Included among these exemptions are contracts for "construction, alteration and/or repair, including painting, or decorating of public buildings or public works." While DOL's regulations (29 CFR 4.130) contain a number of illustrative service contracts, none of those listed relate specifically to environmental restoration (HTW) projects.

The principal purpose emphasis is key inasmuch as a contract may be principally for services, but may at the same time involve more than incidental construction.

Existing DOL regulations do not define incidental construction. Guidance on this issue, however, may be derived from advisory memoranda issued by the DOL's wage and hour administration relating to construction projects comprised of different categories or schedules (building, heavy, highway and residential). As a general rule, DOL advises contracting officers to incorporate a separate schedule when such work is more than incidental to the overall or predominant schedule. "Incidental" is here defined as less than 20% of the overall project cost. DOL notes that 20% is a rough guide, inasmuch as items of work of a different category may be sufficiently substantial to warrant separate schedules even though these items of work do not specifically amount to 20% of the total project cost. This same rationale may apply to contracts involving services and construction.

Under such circumstances, both the SCA and the Davis-Bacon Act (see below) may apply. In this regard FAR 22.402(b)(1) prescribes that the DBA will apply when:

a. The construction is to be performed on a public building or work.

b. The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the DBA. The term substantial defines the type and quantity of the construction work and not merely the total value of the construction work as compared with the total contract value.

these activities standing alone may be properly characterized as construction, alteration or repair of a public work.

Section 9604(G) of CERCLA also specifically stipulates the wage rates to be paid on Response Action Construction projects are to be as determined by the Secretary of Labor in accordance with the Davis-Bacon Act as follows:

> "Sect. 9604(g)(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.
>
> (2)The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40 of the United States Code."

b. The essential point of the foregoing discussion of the Service Contract and Davis-Bacon Acts is that although the public policy objective (labor standard protection) of the statutes are similar, there are significant differences between the two which affect the cost of doing business. Clearly, the DOL's authority to require contracting agencies to retroactively modify contracts to add one set of wage rate provisions and/or delete another, will have consequences for project costs. In view of DOL's authority to issue determinations as to what comprises "construction" for purposes of the DBA, there may also be consequences for the coverage and extent of the bonds required under the Miller Act.

4. Superfund Statute. Inasmuch as considerable concern was expressed by the surety industry regarding its potential for liability arising from bonding of HTW projects, a brief discussion of the superfund statute is included in this section. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510)(CERCLA), commonly referred to as the Superfund law, authorized $1.6 billion to clean up abandoned dump sites. The

performance default on the same basis as such indemnification would be offered to any remedial action contractor provided the surety assumes substantially the same role as the original contractor. Some corporate sureties point to this liability potential as the basis for their refusal or reluctance to actively provide bonding for HTW work. These sureties urge that it be made clear that the surety performance bond is a guarantee of performance only and in no way is intended to serve as insurance for potential third party liability suits. Likewise, they urge that the application of the Section 119 indemnification to the corporate surety involved in a HTW project be clarified.

5. Federal Acquisition Regulation. HTW contracts, like other Federal government procurement procedures, are controlled by the Federal Acquisition Regulation (FAR). The Federal Acquisition Regulation provides uniform policies and procedures for all Federal executive agencies. These policies and procedures define construction and other government procurement activities. In addition, they specifically define contracting instruments such as performance and payment bonds (see Appendix B). The development of the FAR is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400) as amended by Pub. L. 96-83 and OFPP Policy Letter 85-1, Federal Acquisition Regulation System, dated August 18, 1985. The FAR is prepared, issued, and maintained, and the FAR system is prescribed jointly by the Secretary of Defense, the Administrator of General Services Administration (GSA) and the Administrator of the National Aeronautics and Space Administration (NASA). These agency heads rely on the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council) to perform this function. Agency heads are authorized to independently issue agency acquisition regulations provided such regulations implement or supplement the FAR.

By definition, the term "acquisition" refers to acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal government through purchase or lease -- whether the services or supplies are already in existence or must be created or developed, demonstrated, and evaluated. Acquisition begins at the point when agency

Bid Information	Bid Open Date	Project Size	Project Date
Award Amount/ Gov. Estimate	1A	1B	1C
High Bid/ Low Bid	2A	2B	2C
Number of Bids	3A	3B	3C

2. Analysis and Findings.

a. Ratio of Award Price to Government Estimate. Chart 1A illustrates the trend in the ratio of award price to the government estimate over the study period from 1987 to 1989. The ratio of award amount to government estimate rose from .8 to 1.2. In addition, the ratio of award amount to government estimate tended to increase with the size of the project, as shown in chart 1B. The type of remedy that was utilized also affected the award/estimate ratio. Award ratios of 1.3 were observed for the waste containment projects, on the average, as opposed to .85 on the other extreme for alternative water supply projects as displayed in chart 1C. The remainder of the projects were around the 1.0 area. The conclusion drawn from this information is that there is a tendency for large projects to run at a higher ratio of award/estimate and through time. This tends to lend credence to the fact that there is a tight market for HTW contracts.

b. High to Low Bid Ratio. An analysis of the contract data indicated that out of the 24 projects four contracts involved situations where the initial bid winner was not awarded the bid due to inability to secure bonding. These four contracts totaled about $31 million. $3.9 million additional costs were incurred because of the necessity to utilize the next lowest bidder. This was an average of a 14% increase in costs for the four contracts. The ratio of high bids to low bids has been found to drop from around 2 to 1 in 1987 to 1.3 to 1 in 1989 as illustrated in chart 2A. The range of bids also tends to decrease with the size of the project. Chart 2B shows this tendency. The high-low bid ratio also varies by the type of project. The collection and disposal of waste products has a large variation in the ratio of the bids

Deletion of the handling of hazardous material in the first phase of the project and shifting it to the second phase and deletion of a test burn of contaminated soil, thus removing the sureties' objections to bonding the first phase.

The writing of separate bond agreements for the two project phases and the precise definition of what liability is covered by the performance bond and the time limits of liability.

Reducing the dollar cap on the retainage for the last phase of the project from $6 million to $2 million and reducing the time the retainage is held from 60 to 18 months.

Giving the surety the right to choose the option of whether to complete the project or forfeit the bond if the contractor defaults on the performance bond.

Providing the requirements for the surety to obtain indemnification in case of contractor default and the surety assuming project completion.

d. Distribution of HTW Contracts. There is considerable variation in the distribution of contracts among HTW contractors. In the Kansas City District, about 400 firms are on the bidders' mailing list for all construction, including HTW contracts. In 1987 through January 1990, 24 contractors competed in the HTW program, and 14 received contracts. According to Corps District personnel, the same few companies continually appear in the final bidders' lists for HTW contracts.

Charts 5 and 6 list the contractors that have worked on Corps HTW construction projects and their market share of the total competed Corps HTW outlay or activity. Five contractors, individually or in partnerships, have received 78% of the HTW contract dollars (Chart 5). Five of the 14 firms obtained about 58% of all the projects (Chart 6). The firms receiving awards are, for the most part, large firms with experience in waste handling in general. They are not the only firms with the qualifications and credentials to do the work, nor are they the only firms that have expressed interest in the hazardous and toxic waste projects. There are many contractors interested in participating in these projects. There appears to be legitimate concern that contracting impediments, such as bonding, might lessen further the Government's ability to expand contractor participation. Contracting impediments must be carefully considered as to their relative significance.

TABLE 2B

CORPS HTW CONTRACTS

COST OF PROJECT COMPARED TO GOVERNMENT ESTIMATE

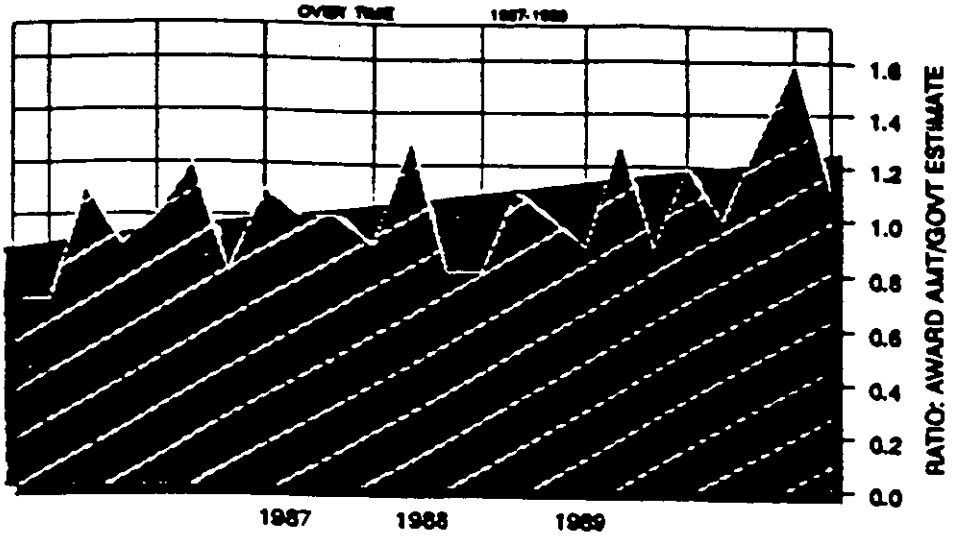
NUMBER OF BIDS PER PROJECT

BID DATE	ST	PROJECT NAME	PROGRAM	GOVT EST	AWARD AMT	AWARD AMT /GOVT EST	NO. BIDS
6/04/87	PA	Lackawanna Refuse	SF	23.0	15.9	0.7	7
3/23/88	MA	Nyanza Chemical Waste Dump	SF	13.0	8.6	0.7	13
5/17/88	MA	Charles George Landfill	SF	15.0	15.6	1.0	6
6/07/88	NJ	Lang Property	SF	4.1	3.6	0.9	6
6/07/88	NJ	Metaltec Aerosystems	SF	3.5	3.4	1.0	5
8/02/88	OH	New Lyme Landfill	SF	12.0	13.7	1.1	5
10/06/88	PA	Bruin Lagoon	SF	5.0	4.0	0.8	5
10/12/88	PA	Heleva Landfill	SF	4.7	5.4	1.1	8
10/18/88	IN	Lake Sandy Jo	SF	2.3	2.4	1.0	3
11/16/88	NJ	Bog Creek Farm	SF	14.0	14.0	1.0	4
12/06/88	CA	Del Norte Pesticide Storage	SF	1.3	1.2	0.9	11
2/02/89	NJ	Bridgeport Rental/Oil Svcs.	SF	42.0	52.5	1.3	5
3/28/89	NJ	Caldwell Truck Co.	SF	0.2	0.2	0.8	9
6/22/89	NH	Lipari Landfill on-site	SF	21.0	15.8	0.8	4
7/11/89	MD	Kane & Lombard St. Drums	SF	4.0	4.5	1.1	1
7/24/89	NY	Wide Beach Development	SF	15.6	15.6	1.0	2
8/01/89	KS	Cherokee County Storage Tanks	SF	0.7	0.6	0.9	2
8/01/89	DE	Delaware Sand/Gravel Landfill	SF	1.2	1.5	1.3	3
8/02/89	RI	Western Sand & Gravel	SF	1.0	0.9	0.9	9
8/23/89	MA	Baird & McGuire	SF	9.6	11.3	1.2	5
8/31/89	NJ	Montclair W orange Sites	SF	0.2	0.2	1.0	3
9/06/89	MD	S.Md.Wood Treating	SF	2.0	2.6	1.3	7
9/19/89	NJ	Helen Kramer Landfill	SF	36.0	55.7	1.5	4
9/19/89	PA	Moyers Landfill	SF	25.0	28.0	1.1	4
			TOTAL:	256.4	277.2	1.12	AVG.

$1,000,000s

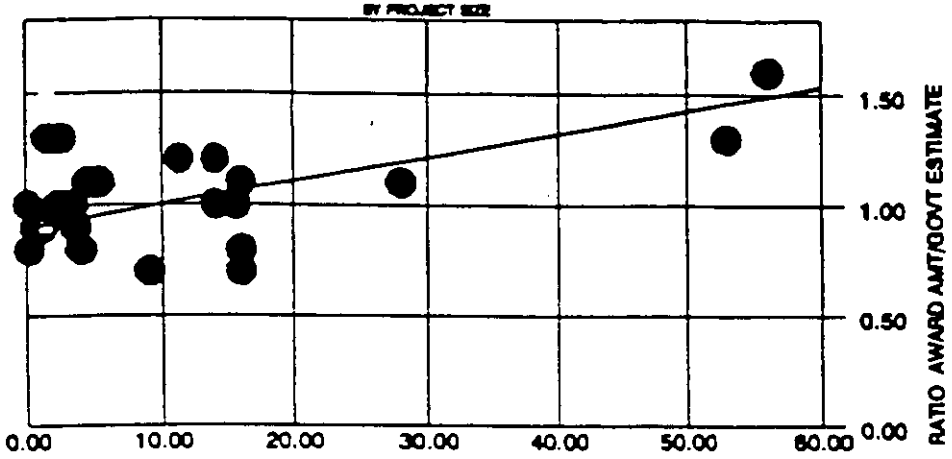
SF- SUPERFUND

CH 1A RATIO: AWARD AMOUNT/GOVT EST



AWD/EST AWD/EST REGRES

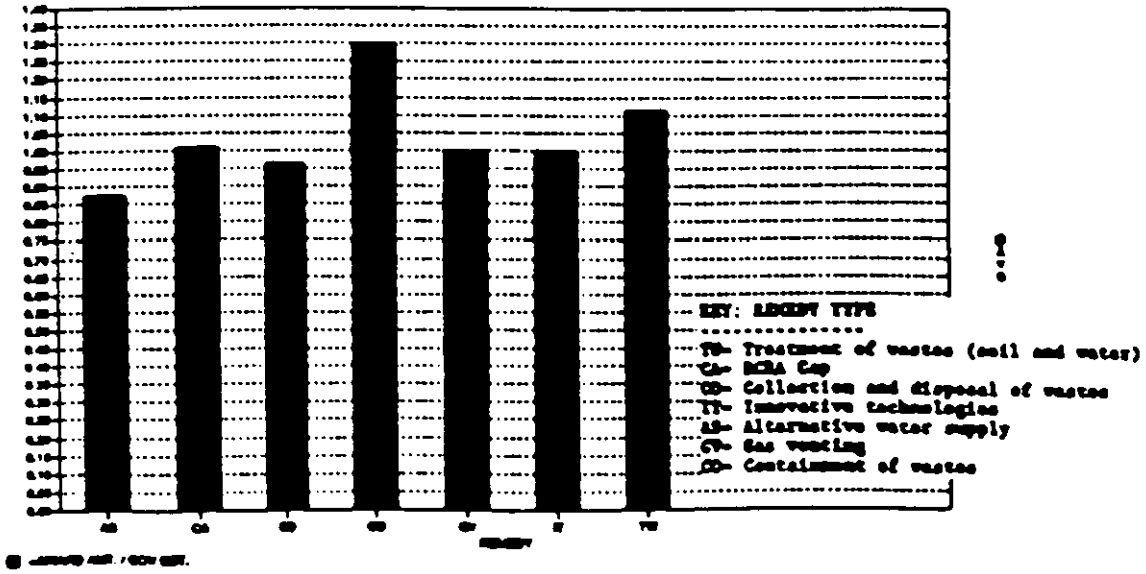
CH 1B RATIO: AWARD AMOUNT/GOVT ESTIMATE



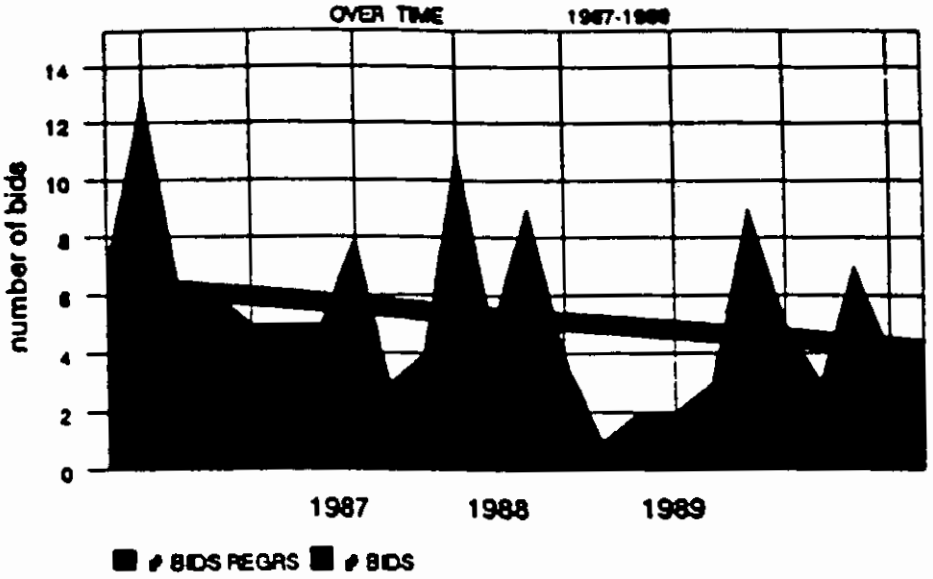
AWARD AMOUNT $1,000,000S

AWARD AMOUNT # BIDS NO. BIDS REGR

CHART 1C RATIO: AWARD AMOUNT/GOVERNMENT ESTIMATE
BY REMEDY TYPE



CH 3A · BIDS PER PROJECT



CH 3B NUMBER OF BIDS (BY AWARD AMOUNT)

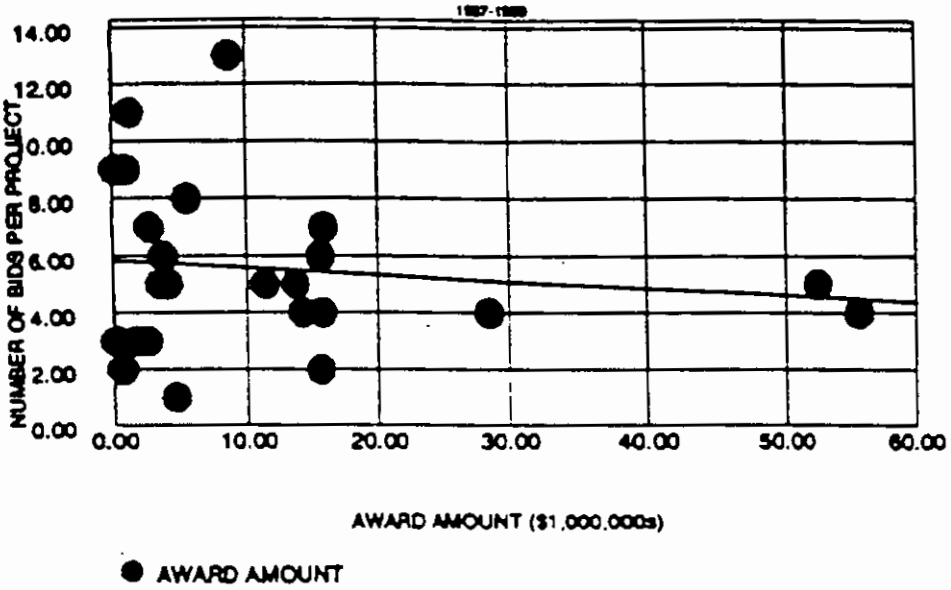


CHART 3C

AVERAGE NO. BIDS RECEIVED (BY REMEDY)

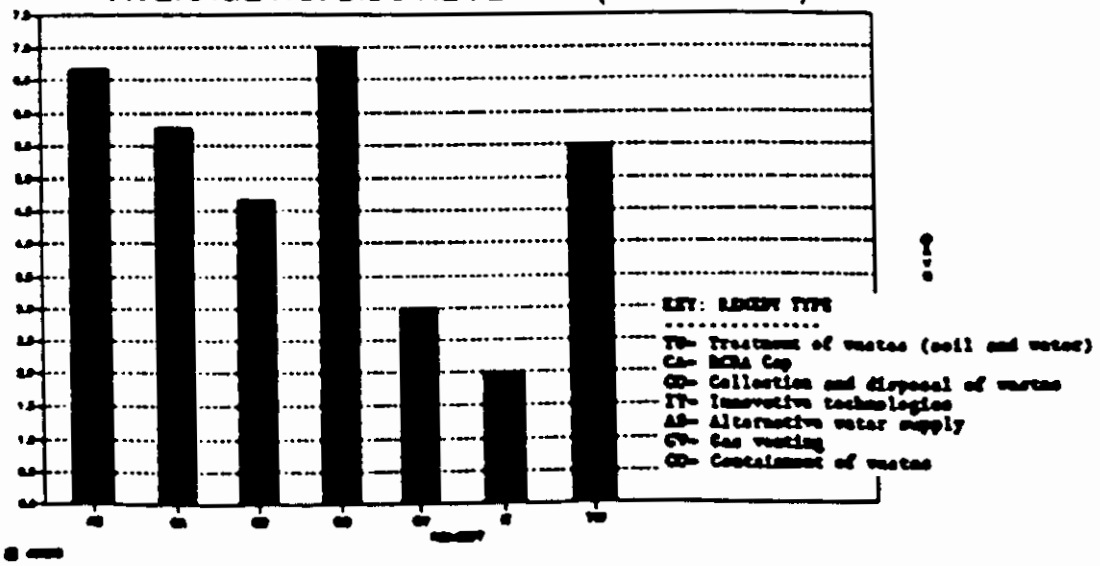
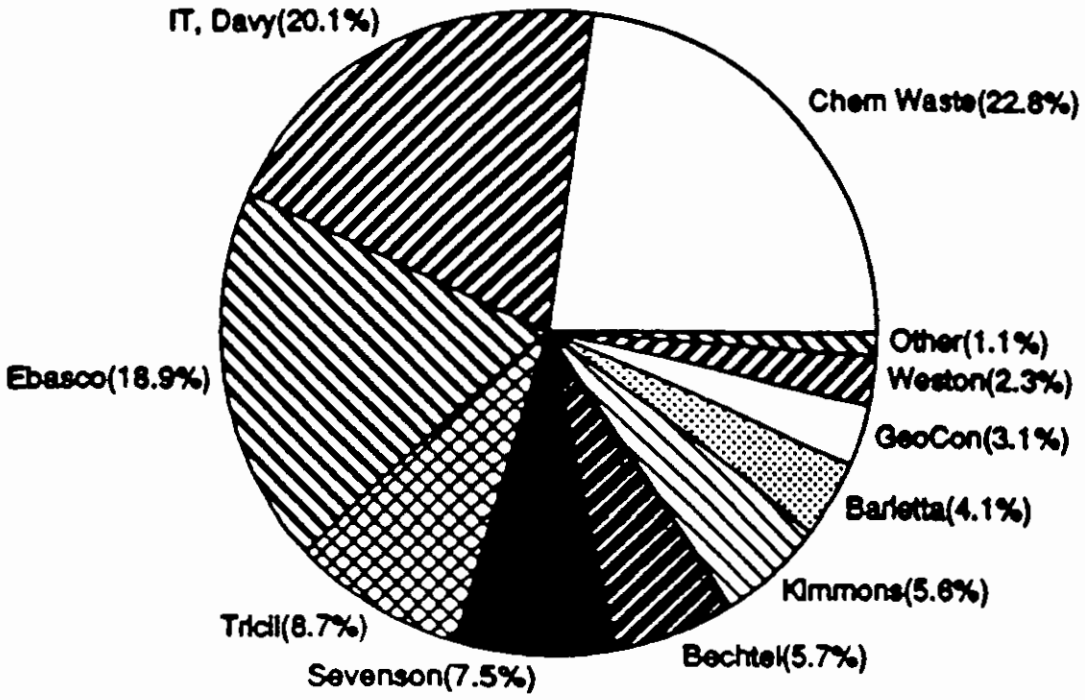
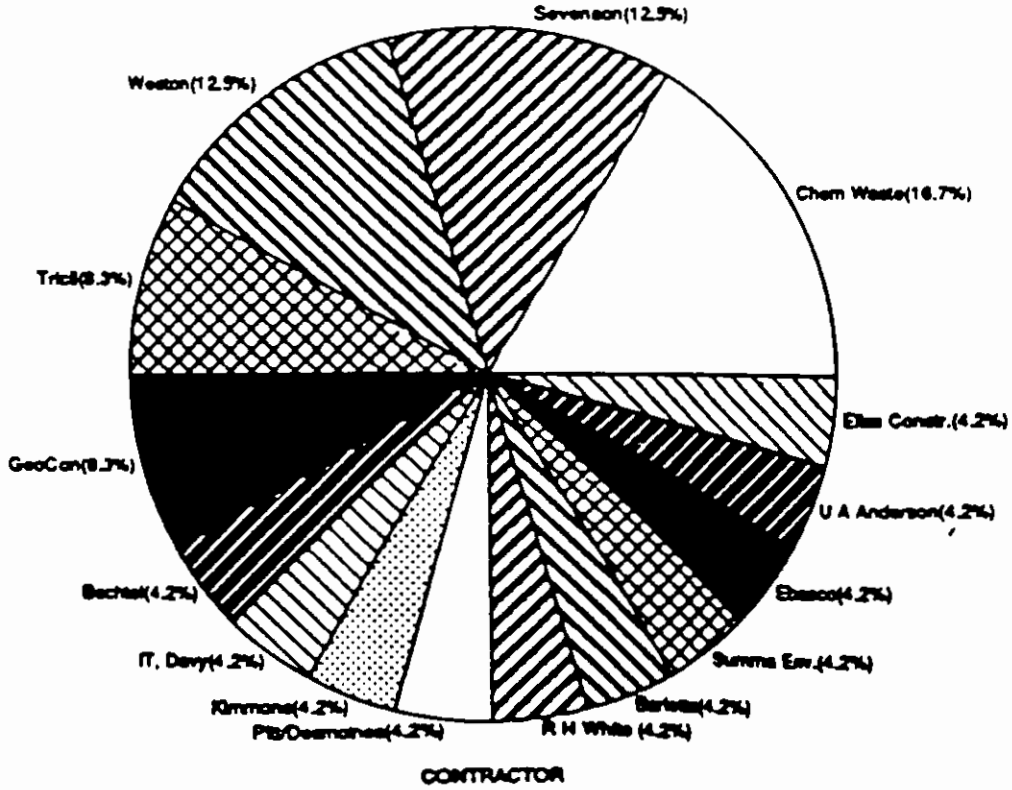


CHART 5 CORPS HTW PROGRAM
CONTRACTORS' SHARES ($280 MILLION TOTAL)



AWARD AMT.

CHART 6
CONTRACTORS' SHARES (24 PROJECTS TOTAL)



PROJECT

CHART 7 CORPS HTW PROGRAM 1987-9
SURETIES' SHARES ($280 MILLION TOTAL)

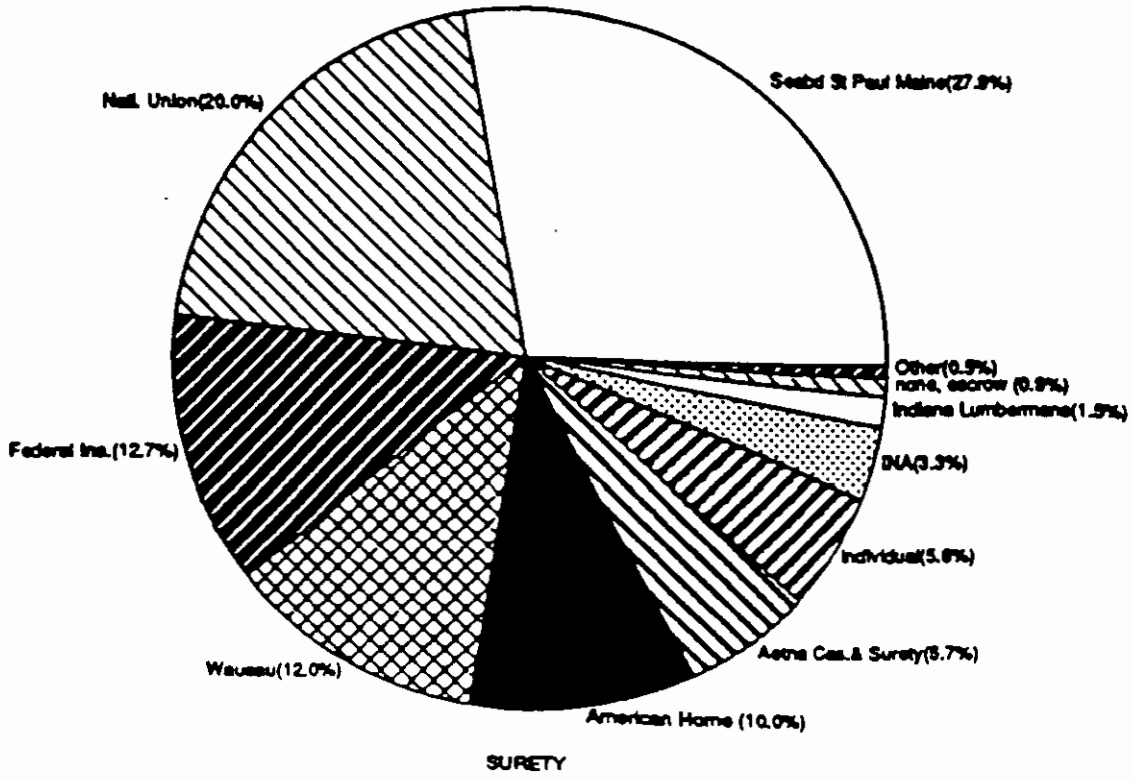
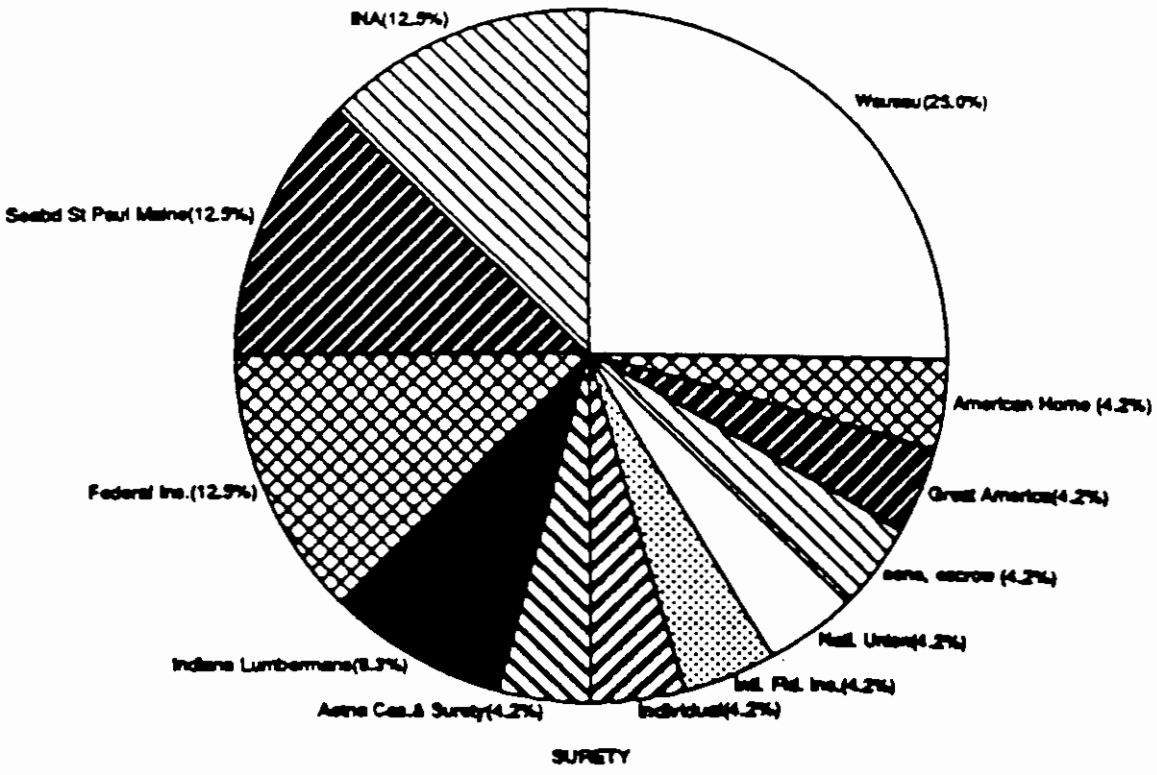


CHART 8
SURETIES' SHARES (24 PROJECTS TOTAL)



This had particular concern to contractors that had been awarded large, indefinite delivery contracts. They feared that sureties might use the total contract maximum, rather than actual work orders issued, to compute their bond capacity limitation.

Tables 2A-C illustrate the experience of the Omaha and Kansas City Corps districts. There were a small number of bids received on several HTW projects. This low number of bids is not necessarily due to the lack of interest in the projects. According to several HTW organizations interviewed, including the Hazardous Waste Action Coalition, Environmental Business Association, Associated General Contractors, National Solid Waste Management Association and the Remedial Contractors Institute, the key factor contributing to lower competition for some HTW projects is the inability of many contractors to secure bonding. It should be noted that in many cases firms cannot obtain bonding despite a proven history of competence in doing such work, strong financial assets and profitability and sound leadership and experience in the firm.

In some cases it was reported by both contractors and government contracting agencies that projects have been delayed due to the shortage of contractors who can obtain bonding and related surety problems. Contracting representatives for both the Corps and the states advised that they have had administrative delays as a result of contractors not being able to obtain appropriate bonding. This additional work has resulted in the slippage of project schedules.

The resulting shortage of qualified firms that are able to consistently arrange surety bonding may be reflected in higher costs to the government. Bonding's limitation on competition, with only four or five final bidders in many cases, may have resulted in higher contract bids than would otherwise be expected. Tables 2A and 2B illustrate the experience of two Corps districts in bid prices and number of bidders.

Smaller contractors, in particular, may be screened out of the HTW cleanup program market due to their inability to secure surety bonding. Several contractors stated that they do not have the extensive financial equity

surety community. Bonding companies perceive that the state of technology of the HTW cleanup process is constantly changing and very ambiguous. It is their opinion that little is known about the adequacy of the technology either concerning immediate or long-term experience. Technology may evolve that renders the present method inadequate. Sureties are concerned that this may leave the designer-builder potentially liable if the present HTW legal climate continues.

c. Surety firms have stated that the present unfavorable legal environment, with widespread litigation and large awards, has made insurance companies very cautious about insuring HTW projects. Although vocal in their assertions that they not be treated as a substitute for insurance, they fear that by bonding such work they may in the future be sought out based on a legal theory which would treat them as if they were insurance. The cause for liability, such as the appearance of a disease 20 or more years after exposure to toxic substances, leads to a very uncertain situation for sureties.

d. According to the surety firms interviewed, toxic tort litigation features are an important reason for their present reluctance to participate in the HTW cleanup field. In the toxic tort arena a very long time period (10 or 20 years) between exposure and development of injury is typical. Unlike other prototypical injury situations, toxic liability involves long time periods' between the alleged exposure and the discovery of damages. Since this litigation takes place in state courts, the indemnification under SARA is not helpful, nor legally binding on the states.

e. Insurance. The Hazardous Waste Action Coalition, an organization comprised of technical consulting firms in the HTW field, along with Marsh and McLennan, a large insurance broker, held a meeting in Washington, D.C. on September 13, 1989, in which a series of speakers outlined the insurance and indemnification problems confronting the contracting industry. The collected papers of this meeting are entitled "Pollution Insurance/Indemnification Issues for Engineers in Hazardous Waste Cleanup". The papers point out that the present insurance coverage is not adequate in many areas. They also express the insurance industry's concern that potential litigation uncertainties play a major part in their decisions to forego providing

by the courts as the insurer of last resort or a "deep pocket."[8] This unknown risk has led some corporate sureties to forego involvement in the HTW market. Surety bond producers that have made such a decision indicate that they would be more likely to participate in the market if the applicability of SARA indemnification to the surety was clarified. Moreover, that the performance surety bond be clearly represented as being intended by the Government solely as a guarantee of performance by the contractor and not in anyway as protection for the contractor's tortuous injuries to third parties.

f. Greater risk to Government. In response to claims by some contractor interests that bonding could be substantially reduced for certain categories of HTW work, surety sources stated that risks of non-performance increase if construction contracts are awarded either without surety bonds or with lower rated surety performance bonds. Surety officers contacted in the survey pointed out the trade-offs involved risks to the government if surety bonds were not used on projects that normally would be surety bonded. They emphasized that surety firms perform a valuable service for the government in screening out potential problem contractors from the pool of contractors competing on government construction projects.

g. Indemnification. The sureties and contractors have listed many perceived problems with the present SARA[9] indemnity law. There is dissatisfaction over the amount of indemnification coverage, as well as the extent of the coverage and even what events are indemnified. Sureties find that the definition of what is the maximum dollar coverage of the indemnity is not specific. CERCLA sets the upper limit of the indemnification amount as the funding that is remaining in the Superfund account. However Section 119 says "If sufficient funds are unavailable in the...Superfund... to make payments pursuant to such indemnification or if the fund is repeated. There are authorized to be appropriated such amounts as may be necessary to make such payments. Sureties and contractors are of the opinion that such limitation on indemnification may prove inadequate in the future if there are limited funds available in the Superfund account at the time indemnification requests ripen. The EPA is presently addressing the limit on indemnification problem in proposed draft guidelines for implementing Section 119 of SARA.

conclusive, indicate a pattern of competition in the field that shows a limited availability of eligible contractors. The expanding HTW cleanup requirement will exacerbate this situation

Relationship of project type. Examination of the relationship of the ratio of award amount to government estimate shows that the ratio is acceptable, except for containment projects where the ratio was 1.3 to 1. The largest spread for the variation of high and low bids was in the projects involving collection and disposal of wastes, 2.2 to 1, while the next greatest variation was for gas venting projects which ran 2 to 1. The heaviest competition was evidenced in the average number of bids (7) received for waste containment projects with the next highest number (6.5) bids for alternate water supply projects. It is noted that the average number of bids received for RFP's was only 3, compared with nearly double that amount for Invitations for bids.

Contractors' project market shares. The shares of the HTW cleanup market (24 Corps projects) are heavily concentrated in a relatively small number of contractors. Chart 5 shows that three firms or joint partnerships have about 60% of the dollar market of HTW projects and 5 of the 15 firms have successfully bid for about 58% of the total number of projects. The rest of the projects are being spread among the remainder of contractors, some of which are quite large. While the total is still small, the concentration of activity in a few firms tends to persist and is not assuring to those aspiring to participate in the program.

Sureties' market shares. Surety bond providers are also unequally represented in the list of sureties shares of the project pie. Five sureties or surety combinations account for 83% of the project bond dollars and five sureties or combinations bonded 70% of the Corps 24 projects analyzed in the study. This illustrates the case that few sureties are interested in providing bonding for HTW projects.

The foregoing experience presentad in the contracting information from the Corps Kansas City and Omaha Districts reinforces the story presented by the

level of risk does not disappear; it is merely transferred from one entity of society to another. It is not reasonable to expect private industry to voluntarily participate in a high risk enterprise unless a high premium is paid. Many government programs are structured to reduce this uncertainty in new high tech and experimental enterprises to a level that is manageable by the private sector.

Indemnification, insurance, bonding and contractual agreements are all mechanisms to transfer risk. The present situation in the HTW cleanup area brings this aspect of risk, and who must assume risks for the nation's cleanup, into focus. There is a need in the HTW program for the definition of the risk involved and the assignment of each risk to the proper entity. Guidelines are necessary to spell out and clarify the appropriate responsibilities that will be borne by government agencies and those that are within the purview of private enterprise.

Indemnification is a tool that transfers the risks from private industry to the government. One problem with indemnification in HTW cleanups is the uncertainty of coverage. It is not known at the time of bid openings whether coverage will be available to the contractor or the surety, and, if it is, the maximum amount of coverage is unknown.

Another tool commonly used to manage uncertainty is insurance. Insurance presently available to contractors is inadequate. The maximum amount available is much too low, the time period of coverage is too limited, and third parties are not covered. Thus, the transfer of risk to the insurance industry is quite limited.

The bonding process is another way to transfer uncertainties from the government. It is a traditional way to transfer risk in the construction area where construction occurs over a long time period and commitments must be made for the entire project before the project can proceed. The traditional risk covered by construction performance bonds was that the project be completed as designed, that the contractor assumed responsibility during the construction period, the warranty and the latent defect period. Problems have arisen in

industry fears. The underlying industry concern is risk to the contractor and/or the surety. Factors affecting risk include: indemnification, insurance and bonding. These risk factors influence one another, e.g., if indemnification is available to the surety, then bonding may be more readily available. No single action will solve all the bonding problems. Additional conclusions are listed below:

- The government must select the most appropriate acquisition strategy early in the solicitation process. Risk to sureties, contractors and the government should be considered in addition to other site requirements.
- The government acquisition strategy should address the need to make an early decision whether to use a service or construction contract. In some cases, different contract types may be used for different project phases within the same contract. Miller Act, Davis-Bacon Act and Service Contract Act decisions should be made on their merits and without regard to bonding or cost implications.
- Contracts should be structured, the type of contracts selected and bonding requirements established, to appropriately protect the government's interests. These interests include: insuring that contractors capable of performing the contract remain eligible and that the selected contractor performs as promised.
- HTW cleanup agencies should explicitly decide how much performance bonding is required and how that bonding should be structured. Normal practice is to require 100% performance bonding for construction contracts and zero bonding for service contracts, although the contracting officer can select other percentages. We need to assure that the amount selected is only that needed to protect government interests.
- Sureties only want to assure that the remedial action contractor constructs what was required by the plans and specifications. They wish to avoid design/construct contracts or contracts containing major performance specifications.
- There is a strong perception by the industry that difficulties with bonds is limiting competition. RA contractors report that they have not bid projects due to unavailability of bonding. Sureties indicate that the risk is too large.

V. OPTIONS EXAMINED

A. INTRODUCTION

Discussions conducted during the study with industry, contractor, and government personnel raised several possible alternatives that might be taken to increase the availability of bonds to HTW construction contractors. These alternatives fall into two general categories as follows:

- Non-Legislative Changes. Internal Corps and EPA non-legislative changes in procedures related to contracting strategy and implementation of the authorities which each agency already possesses.

- Legislative Changes. includes revisions to regulations which guide each agency but which neither possesses the authority to revise independently; revisions to existing statutes so as to, (1) eliminate requirements that serve to lessen the corporate surety industry's interest in bonding of HTW projects and, (2) to clarify that performance bonds are to be used only to assure that the contractor will complete all contractual requirements and are not a vehicle by which third party claims may be satisfied.

Of the options available to the government to alleviate the bonding problem, many are centered on the concept of management of risk by the government. Financial and physical risk exist in the cleanup process and the government needs to incorporate risk analysis into its planning process to examine the trade offs in costs and benefits of the transfers of these risks between government and the private sector. In the case of bonding HTW cleanup projects, the government must examine the assumption of higher risks in non-performance of contracts for HTW cleanup against the gains of more competition by the cleanup industry and the resultant lower prices for projects.

It should be pointed out that the bonding community generally does perform a service for the Government contracting agency in making its evaluation to bond a particular contractor. In making this decision, it carefully analyses the contractor's financial and technical competence to do the work as well as

TABLE 3

TYPES OF OPTIONS

Options	Advantages	Disadvantages	Implemented By
NON-LEGISLATIVE CHANGES			
1. Improved Acquisition Planning and Bond Structuring:			
A. Require increased acquisition planning. Incorporate analysis of service contracts vs. construction contracts and incorporate cost type contracts into acquisition plan.	May reduce obstacles, induces more participation by contractors	Use of service contracts with no bonds may increase risk to government. May request use of bonds from USACE. N.O. Procurement.	Each agency
B. Provide Guidance on Bonding Requirements. Reduction of penal amount of bond. BTW Policy Guidance, 2 year test program.	Reduces bond portion project costs, induces more and greater variety of contractors to bid (e.g. smaller firms).	Limits non-performance protection to government, more marginal contractors.	Each agency
C. Clarify performance period.	Same as above.	All bonds must be in place before notice to proceed is issued. Initially difficult to set up guidance. Can be accomplished more simply by reduction of penal amount of bond.	Each agency
2. Clarify surety liability under SARA: A. Define third party risk. Bond form and contract modifications including 3rd party exclusion clauses, exclusion of bond as liability insurance substitute. Requires a change in the regulations.	Removal of sureties' stated objections to contractual clauses. Inducement to participate in BTW program.	Will take one and one-half years to implement interagency coordination needed.	Each agency
B. Surety Indemnification. Provide indemnification for sureties if they assume project control.	Induce more surety and contractor participation in BTW program.	May increase Federal liability for indemnification.	EPA
C. Define bond completion period.	Induces more surety and participation in program.	None.	Each agency
3. Indemnification guidelines: Modify proposed indemnification regulations, establish high maximum limits and clarify qualifying requirements.	Limits Federal liability for idemnification.	May discourage participation by sureties, if limits are set too low.	EPA
4. Communication with Industry: Outreach program for contractors and sureties. Technology education program.	May encourage contractors sureties to participate in program.	Effectiveness unknown.	Each agency
5. Limit Risk Potential: A. Clarify contract policy on RFP performance specifications and design-build.	Separating out design portion may encourage sureties to participate in program.	Imprecise clause could limit contractor performance obligations more than necessary.	Each agency
B. Use of irrevocable letters of credit vs. bonds.	Enables some contractors to participate in program.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
LEGISLATIVE CHANGES:			
A. Increase separate dollar limit reserves from SARA fund and increase types of coverage for indemnification and types of coverage for indemnification.	Induce more sureties and contractors to participate.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
B. Specify a dollar cap on liability.	Induce more contractor and surety participation.	Federal government assumes more risk.	EPA
C. Preempt state's strict liability sureties. Provide universal indemnity.	Induce sureties and contractors to participate in program.	Reduction of public protection against BTW hazards.	EPA
D. Modify CERCLA or Miller Act. Specify performance bonds area only to assure completion of contract requirements.	Induce sureties and contractors to participate in program.	Reduction of public protection against BTW liability hazards.	Each agency

Government. This should be done early in the acquisition process to assure that the competition benefits that might be gained by such effort can be fully maximized. The decision of whether to use a service contract or a construction contract must be made on their respective merits and not on the impacts of securing performance bonding. A separate set of procedures is required to establish the bonding requirement.

In making this bonding determination it is also important to recognize that the surety community's concern regarding the risk associated with HTW work will probably lead to the surety not stepping forward to complete the project in the event of a contractor default. Consequently, it is likely that the Government will benefit only from the surety's providing the penal sum of the performance bond. The Government probably will still need to reprocure the work. Contractors pointed out that sureties were requiring substantial financial commitments from contractors as a prerequisite to providing bonding. This fact would tend to make the surety even more inclined to buy itself out rather than assume the greater risk burden associated with its takeover of the defaulted contract. The reality then appears to be that the performance bond is primarily protecting the Government's financial stake in the contract rather than its interest in not having to deal with reprocurement upon default.

In looking at the character of work to be performed under an HTW contract, it may well be that the nature of the work and the payment arrangements employed by the Government may provide a measure of protection in themselves that could warrant a lower bonding percentage. In the excavation situation, and even more so where we are dealing with incineration service work, many of the payments to the contractor are subject to its performing satisfactorily. A default after partial performance requires that the Government procure another contractor to continue performance. This default situation, however, is substantially different from that faced where we are dealing with a building construction project. In the former case, the work to be completed is relatively easy to determine. This is in sharp contrast to the problem facing the Government where multiple subcontractors and complex design requirements must be determined and taken into consideration in a vertical

b. Require Increased Acquisition Planning. The contracting process, including the bonding issues, should be integrated into a project acquisition plan. An analysis of the risk trade offs to the Government may be incorporated into the acquisition planning process for HTW projects. Presently the Federal Government requires performance bonds to assure against the uncertainty of project non-performance on construction projects as mandated by the Miller Act. The cost of this protection should approximate the cost of the potential non-performance risk in the long run. The trade offs of this risk may be examined in the acquisition planning process for each project. The process will analyze the benefits and costs of the Government assuming slightly higher risks in project performance and the resultant benefits and costs of improving the competitive climate for HTW contracting and the consequent reduction in contract prices. This may involve the analysis of each phase of the cleanup and the appropriate level of bonding that would afford adequate protection for the Government's interests and still encourage participation by the bonding industry. Careful examination of the contract alternatives, service contracts or construction contracts, should be carried out by an interdisciplinary team, "recommending" to the contracting officer, although final disposition will be made by the Department of Labor. Meetings are being planned for early summer 1990 between EPA, Corps and Department of Labor representatives to clarify the classification of construction and service contracts under the Davis-Bacon and Service contract Acts.

Cost type contracts should be given careful consideration where there are significant technological unknowns associated with undertaking an HTW project. It is not in the program's interest for the contractor to be required to bear an inordinate share of the risk. Requiring fixed priced contracts under such conditions places both the contractor and surety in an unacceptable risk condition and would increase the cost to the government significantly.

Multiple contracts are another action which could be considered by the Government during its acquisition planning to limit the risk potential for the bonding community. The approach would be to structure the contract requirements so as to limit or isolate the activity requiring a surety bond

plan would place an administrative burden on the project. If additional firms participate, there is a chance of reduced project costs.

2. Clarify Surety Liability.

a. Background. Interviews conducted in the course of the study with contractors and sureties focused on the real concern in the surety community regarding the potential liability arising from their willingness to act as guarantors for HTW projects. This is consistent with the sureties' stand that they are bonding execution of plans and specs, not project performance. This is a perceived danger, not one based on any particular court ruling involving a surety guarantee situation. The perceived liability arises from potential third party injury claims and an ill-defined bond coverage completion period.

The surety's concern for liability results from the trend in cases arising from the monumental asbestos litigations where the courts have sought some deep pocket to compensate the injured party. In some cases, the courts have looked to insurance companies for such relief despite the insurance industry's disclaimer of any liability under their policies. The sureties view themselves as similar to these situations, with potential deep pockets from which injured parties may seek relief. They recognize that they are not insurers of such injury, but have little faith that the courts will take note of the distinction between insurer and guarantor if there is no other financially viable party against which a valid judgement can be executed.

The surety community, similar to the insurance industry, uses a secondary market to spread the risk associated with any particular bond arrangement. This secondary market has made it clear that it is not interested in sharing the risk associated with HTW projects. As a consequence, surety firms are more and more being called upon to undertake greater risk levels for such work. The insurance industry responded to the loss of its secondary insurers by withdrawing completely from the pollution liability coverage market. The surety industry, although still maintaining a reduced presence, does have certain members of its community which have followed the insurance industry lead and chosen to withdraw from providing bond coverage for such work.

c. Surety Indemnification. Another concern that needs to be clarified is the extent of indemnification, if any, that the surety would be entitled to as a result of providing bonding on the contract. Indemnification for remedial action contractors performing HTW work is permitted by 42 U.S.C. 9619, provided that certain requirements are met. Sureties question the applicability of this indemnification to them. Since it has a major impact on the evaluation of the risk for bonding such work, clarification is needed to allow the industry to adequately quantify its potential long-term risk.

d. Define bond completion period. The government will define the point at which bond completion requirements have been fulfilled. This definition is within the authority of the procuring agencies.

Recently, in reply to a surety's concern over its right to indemnification in the event of a default of the bonded contractor, EPA advised that the surety would be eligible for indemnification if it elected to stand in the shoes of the defaulted contractor and complete performance of the remedial action. A final decision has not been made as to how this will apply to a surety that elects to take on responsibility for performance, but does so through its procuring another contractor. It is clear that this issue must be clarified with respect to the EPA superfund projects.

3. Indemnification Guidelines.

a. Background. There is no defined limit of coverage in EPA's interim guidance on indemnification that can be addressed with certainty by surety or contractor interests in assessing their potential risk. Likewise, the requirements that will need to be met to become eligible for the indemnification are not completely clear with respect to the contractor. They are even more ambiguous regarding the surety. These unknowns appear to exacerbate an already bad situation and provide no incentive for industry to move forward and commit themselves and their assets to support the program.

It is unclear from the data compiled in the study the affect that clarification of this issue will have on the surety and contractor community. DOD, which has not provided indemnification, for its work, has been able to

hazardous and complex, many projects use proven engineering principles which have a long history of use and acceptance. The extreme caution on the part of the surety industry, limited number of projects constructed and reluctance of sureties to become involved in HTW projects, all mesh together to cause the surety to assume each HTW project is the same despite the considerable variation in the types of projects. A number of projects are water supply construction alternatives that have no direct involvement with hazardous wastes.

b. Outreach Program. To overcome this lack of understanding, the EPA and the Corps could sponsor outreach efforts aimed at bringing both sureties and contractors together for purposes of discussing with industry technical aspects of different types of HTW projects. The agencies should also focus on the different site conditions and various contractual provisions that can distinguish one site from another and the technical aspects of using state of the art technology. While not eliminating all impediments to surety involvement, this could go a long way toward lowering the surety industry's reticence to participate on some of the less complex projects.

5. Limit Risk Potential.

a. Background. Sureties expressed particular concern that the Government not package its procurements, as design-build contracts including the use of performance specifications. In these cases, the surety is concerned that its risks are significantly enlarged from the situation it faces where design has been completed and the contractor need only construct the designed project in order to satisfy performance.

b. Clarify Contract Policy. The government should consider accepting design responsibility where performance specification requirements have been met. Performance specifications are used to some extend in all construction contracts. Incineration and ground water treatment contracts have a very large performance specification component and will remain that way. The government will continue to allow contractors to propose the complex equipment needed to meet specific site treatment requirements. Once the contractor has demonstrated that the equipment meets the performance specification, the

1. Increase the coverage for indemnification. Expand the types of coverage for liability indemnification and make these available to the surety as well as the contractor.

2. Establish a dollar cap on HTW liability.

3. Preempt state laws covering strict liability, and provide universal indemnity.

4. Amend CERCLA and/or Miller Act to specify that the purpose of performance bonds is to assure the government that the contractor will complete all contractual requirements and obligations. Performance bonds shall not be a vehicle for third party liability claims.

EPA and Corps representatives should meet with Department of Labor to clarify the contract requirements of the HTW program and the relationship of these to the: Miller Act, Davis-Bacon Act and related regulations.

A program of continuing review of contract actions will insure continued competition in the contracting process.

Emphasis should be placed on appropriate acquisition planning which takes into consideration all factors that relate to the competitiveness of the contract situation.

2. Clarify Surety Liability Under SARA.

EPA should move immediately to clearly define the extent to which it will provide indemnification coverage to sureties on HTW projects. Extending indemnification by the Federal government to sureties should be explored when they fulfill these surety obligations by stepping in and completing the project for the defaulting contractor. Presently this area is not well defined. EPA should also institute, in conjunction with the Corps, an effort to revise the present FAR performance bond form to deal with the concerns raised by sureties on potential for third party actions looking to the bond for injury judgement recovery. A task force composed of appropriate personnel from both agencies should be established to work on having this revision instituted for HTW projects. At the same time, each agency should require its internal procurement elements to assure that wording is included in invitations and solicitations disclaiming any interest by the Government in having the performance bond being available to cover third party injury claims.

3. Indemnification Guidelines.

A new indemnification clause will be implemented by the Corps which will assure the indemnification of HTW contractors in the event that they are not able to secure adequate insurance for firm fixed price contracts. The indemnification will extend to third party liability by the surety.

4. Communication with Industry.

substantially reduce many of the concerns of the surety industry and contractor community in being involved with Superfund remedial action work.

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5. Hazardous Waste and the Surety. American Bar Assn. William Ryan and Robert Wright. November 1989.

6. Briefing on Pollution Insurance/Indemnification Issues for Engineers in Hazardous Waste Cleanup. Hazardous Waste Action Coalition, Marsh and McLennan. Washington, DC. September 1989.

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APPENDICES

Appendix A:

List of Contacts

APPENDIX A

HTW BONDING STUDY

List of Contacts

Name	Organization	Address	
John Steller	Ill. Dept land Pollution ctrl	Springfield	IL
Lynn Schubert	American Ins. Assn	Washington	DC
Brian Deery	Assn. Genl. Contr/Amer	Washington	DC
Stuart Binstock	Assn. Genl. Contr/Amer.	Washington	DC
Dave Johnson	Assn. Genl. Contr/Amer.	Washington	DC
Jack Mahon	CECC-C OCE	Washington	DC
Greg Noonan	CECC-C OCE	Washington	DC
Chuck Schroer	CEMP-C OCE	Washington	DC
Waltar Norko	CEMP-CP OCE	Washington	DC
Sara Bunch	CEMP-RS OCE	Washington	DC
Jim Gibson	CEMP-RS OCE	Washington	DC
Paul Lancer	CEMP-RS OCE	Washington	DC
Noel Urban	CEMP-RS OCE	Washington	DC
Gene Jones	CEMRD-CT	Omaha	NE
Bruce Anderson	CEMRD-OC	Omaha	NE
Norm Spero	CEMRD-OC	Omaha	NE
August Spallo	CEMRK-OC	Kansas City	MO
Joan Chapman	CEMRK-CT	Kansas City	MO
Steven Switzer	CEMRK-CT-K	Kansas City	MO
Frank Bader	CEMRK-ED-T	Kansas City	MO
Lee Fuerst	CEMRK-ED-T	Kansas City	MO
Donald Robinson	CEMRO-CT	Omaha	NE
Cathy Vanetta	CEMRO-CT	Omaha	NE
Kirk Williams	CEMRO-CT	Omaha	NE
Stanley Karlock	CEMRO-ED-E	Omaha	NE
Gary Henninger	CEMRO-OC	Kansas City	Mo
Ann Wright	CEMRO-OC	Omaha	NE
Rick Heinz	CEORD-RS	Cincinatti	OH
Mary Melhorn	CEPR-ZA	Washington	DC
George Wischman	CEPR-ZA	Washington	DC
Richard Corrigan	CH2M Hill	Washinton	DC
S. McCallie	CH2M Hill	Denver	CO
Jim Lane	Corroon & Black	Madison	WI
Peter Bond	Davy Corp	San Francisco	CA
Mike Yates	Ebasco Constr. Inc.	Lyndhurst	NJ
William Bodie	Environmental Bus. Assn.	Washington	DC
Paul Nadeau	EPA HQ	Washington	DC
Tom Whalen	EPA HQ	Washington	DC
Carl Edlund	EPA Reg Off 6 (Dallas)	Dallas	TX
Tom Bosley	Fidelity & Deposit Co.	Baltimore	MD
John Herguth	Foster Wheeler Corp.	Clinton	NJ
Terre Belt	Hazardous Waste Action Co	Washington	DC
Joe Turner	Huntington Dist.	Huntington	WV
John Daniel	IT Corp	Washington	DC

Appendix B:

Sample Forms

CERTIFICATE OF SUFFICIENCY

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true.

NAME (Type or print)	SIGNATURE

OFFICIAL TITLE

ADDRESS (Number, Street, City, State, ZIP Code)

INSTRUCTIONS

1. This form shall be used whenever sureties on bonds to be executed in connection with Government contracts are individual sureties, as provided in governing regulations (see 41 CFR 1-10.203, 1-16.801, 101-45.3). There shall be no deviation from this form except as so authorized (see 41 CFR 1-1.009, 101-1.110).

2. A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member. Stockholders of a corporate principal may be acccepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports.

3. An individual surety shall be a citizen of the United States, except that if the contract and bond are executed in any foreign country, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, or any other territory or possession of the United States, such surety need only be a permanent resident of the place of execution of the contract and bond.

4. The individual surety shall show net worth in a sum not less than the penalty of the bond by supplying the information required on the face hereof, under oath before a United States commissioner, a clerk of a United States Court, or notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal, it shall be affixed, otherwise the proper certificate as to his official character shall be furnished.

5. The certificate of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

U.S. GOVERNMENT PRINTING OFFICE : 1984 O - 437-307 STANDARD FORM 28 BACK (4-84)

CORPORATE SURETY(IES) *(Continued)*

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		

INSTRUCTIONS

1 This form is authorized for use when a bid guaranty is required. Any deviation from this form will require the written approval of the Administrator of General Services

2 Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved

3. The bond may express penal sum as a percentage of the bid price In these cases, the bond may state a maximum dollar limitation (e.g., 20% of the bid price but the amount not to exceed _____ dollars)

4 (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed herein Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)" In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond The Government may require these sureties to furnish additional substantiating information concerning their financial capability

5 Corporations executing the bond shall affix their corporate seals Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in the State of New Hampshire, or any other jurisdiction requiring adhesive seals

6 Type the name and title of each person signing this bond in the space provided

7 In its application to negotiated contracts, the terms "offer" and "bidder" shall include "proposal" and "offeror"

CORPORATE SURETY(IES) (Continued)

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	

BOND PREMIUM ▶	RATE PER THOUSAND	TOTAL
	$	$

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorization person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)". In the space designated "SURETY(IES)" on the face of the form insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

APPENDIX 3

Summary Table of State Law Relevant to RACs

CORPORATE SURETY(IES) *(Continued)*

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	*Corporate Seal*
	Name(s) & Title(s) *(Typed)*	1.	2.	

INSTRUCTIONS

1. This form for the protection of persons supplying labor and material is used when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a–270e). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where co-sureties are involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)" and in the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction regarding adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

GPO : 1984 O - 433-364

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Alabama	Pollution Control Grant Fund (§ 22-22e-16)	No 22-229(m) includes wrongful acts, omissions and negligence	No	No	Yes
5/89	Alaska	No	Yes, but RA must have control over hazardous substances. (46.03.822)	No	Yes, but does not apply to RACs (34.20.100)	Anti-deficiency statute is limited to mortgage has no application RACs (34.20.100)
5/89	Arizona	Water Quality Assurance Revolving Fund (49-282)	No	No	Yes, for sole negligence in certain AE	Yes. Section 34-154 precludes public sector indemnities unless funds are appropriated
5/89	Arkansas	Remedial Action Trust Fund (8-7-508)	No. 8-7-420 holds RACs to a negligence standard	No. 8-7-312 requires RACs to indemnify states.	No.	No. DPCE contracts with consultants and contractors have received full state indemnification.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Delaware	Hazardous Waste Management Act, § 6316, allows Department of Conservation to receive funds in carrying out Act.	Yes, if RAC treated or disposed of wastes (7DE Code 6301-6309)	No.	Yes, for negligence of all parties in all phases of design and construction projects (6DE Code 2704).	Yes, sovereign immunity statutes exempt the state from liability (10 DE Code-4001, et seq)
5/89	District of Columbia	None.	No.	No.	No.	No.
5/89	Florida	Hazardous Waste Management Trust Fund (403.725)	Yes, if RAC arranged for disposal or treatment (Fla.Stat.Ann. 403.727)	Yes, for state and local contractors (376.319)	Yes. For acts or omissions in certain construction contexts unless indemnification capped or consideration given.	No.
5/89	Georgia	Hazardous Waste Trust Fund (12-8-68)	Yes, if RAC contributes to the release (12-8-81)	No.	Yes, for sole negligence in certain construction contexts (13-8-2)	No.
5/89	Hawaii	None, but Director has authority, with approval of the Governor, to receive money from the Federal and State government	No, however, Director was authorized in 1988 to bring state into compliance with federal law	No.	Yes, for sole negligence in certain construction contexts. (431.459)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Iowa	Hazardous Waste Remedial Fund	Yes, if RAC has control over hazardous substance (§558.392), but no (negligence standard) if transport hazardous waste	No.	No.	Yes, no state indemnification if paid to do the work
5/89	Kansas	Environmental Response Fund (65-3454a)	No, liability only for gross negligence or reckless wanton or intentional misconduct (65-3472)	No.	No.	No.
5/89	Kentucky	Hazardous Waste Assessment and Management Fund (224.876)	Yes, if RAC has possession or control over discharge or caused the discharge (224.877)	No.	Maybe. Kentucky Constitution §§ 50-177 arguably bars indemnification	Yes.
5/89	Louisiana	Hazardous Waste Protection Fund (30-2190) and Hazardous Waste Site Cleanup Fund (30-2205)	No. Statutory negligence standard (9-2800.9(a))	Yes, holds harmless state contractors from property damage and personal injuries caused by negligence (30-1169-1)	Yes, applicable to owners of facility or any person liable for discharge or disposal (30-2278)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Minnesota	Environmental Response, Compensation and Compliance Fund (§ 115 B.20)	No, as long as RAC is working under State or Federal Acts (115 B.05)	No.	Yes, cannot transfer liability to another person (115 B.10)	No.
5/89	Mississippi	Hazardous Waste Facility Sight Fund (§ 115 B.20)	Yes, if it helps create necessity for cleanup	No.	Yes, for own negligence in certain construction contexts (31-5-41)	No.
5/89	Missouri	Hazardous Waste Fund (260.391)	Yes, if RAC has control over hazardous substance (260.530), but liability capped at $3 million per occurrence (260.552)	No, but RACs right indemnification is preserved against other liable parties. (260.552: 1-(1))	No, 260.552:1-(1) recognizes right of a RAC to seek indemnification	No.
5/89	Montana	Environmental Quality Protection Fund (75-10-704)	No. Action taken to contain or remove a release is not an admission of liability for the discharge. (75-10-60, et seq.)	No.	Yes, for fraud or negligent violation of the law (28-2-702)	No.
5/89	Nebraska	None.	No, but negligence standard for those who cause discharges	No.	Yes, for own negligence in certain construction contexts. (25-21,187)	Yes. The State constitution provides for immunity from suits. (Art. III.S 18)

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	New Mexico	Hazardous Waste Emergency Fund (74-4-8)	No.	No.	Yes, for negligence, acts or omissions in certain construction contexts unless certain actions excluded (56-7-1)	Yes, New Mexico has a sovereign immunity statute
5/89	New York	Hazardous Waste Remedial Fund (NY Env. Cons. Law 27-0916)	No, no negligence standard is applied (NY Env. Cons. Law 27-1321(3))	No.	Yes, for negligence in certain construction AE and surveying contexts (Gen.Ob. Laws 5-322.1, 5-323, 5-324)	Contracts cannot be let for amounts exceeding the appropriation (State Fin. Law 136)
5/89	North Carolina	Hazardous Waste Fund and Hazardous Waste Site Remedial Fund (130 A-290 et seq.)	Yes, if RAC has control of hazardous waste discharge (143-215.93)	No, but RAC may reimburse state for role in inactive hazardous waste site. (130A-310-7)	Yes, for negligence in certain construction contexts (22B-1)	Yes.
5/89	North Dakota	None.	No.	No.	Yes, for fraud or negligent violations of the law (9-08-02)	Yes, Article 1 § 21
5/89	Ohio	Hazardous Waste Cleanup Fund (3734.28)	Yes, if RAC transports or disposes of wastes (3734.13,16)	No. RAC may have to indemnify state (3734.22)	Yes, for negligence in certain construction contexts. (2305.31)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Pennsylvania (continued)	Solid Waste Management Act imposes strict liability on violators. (6018.601 e303) No, RACs must meet conditions set forth in Hazardous Sites Clean-up Act, § 702(a)				
5/89	Rhode Island	Environmental Response Fund (23-19-1-23)	No. Absolute liability only for unauthorized transportation, storage or disposal (23-19-1-22	No.	Yes, for negligence in certain construction contents (6-34-1)	Yes, state liable in tort actions subject ot period of limitations and statutory limitations (9-31-1)
5/89	South Carolina	Hazardous Waste Contingency Fund (44-56-160)	Yes, for unpermitted water discharges (48-1-90) and for transporting or disposing of hazardous waste without reporting to Agency. (44-56-130, 140)	No.	Yes, for sole negligence in certain construction contents (32-2-10)	Yes.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
3/89	Utah	Solid and Hazardous Waste Act (26-14-1, et seq)	Yes, if RAC contributed to the release. (26-14-19(4))	No.	Yes, for sole negligence in certain construction contexts (13-8-1)	Yes.
3/89	Vermont	Solid Waste Management Assistance Fund (Tit. 10,6618)	Yes, if RAC arranged for disposal of treatment (Tit. 10,6605)	No.	No.	No.
3/89	Virginia	Virginia Waste Management Act (10.1-6402)	No.	No.	Yes. Voids agreements by contractors to indemnify other for sole negligence (11-4.1)	Waiver of sovereign immunity (8.01.192)
3/89	Washington	Hazardous Waste Regulation (70.105B.010)	No.	Yes. (70.105 B.100(3))	Yes, for negligence in certain construction contexts (4.24.115)	No.
3/89	West Virginia	Hazardous Waste Emergency Response Fund (20-5G-1)	No.	No.	Yes, for sole negligence in certain construction contexts. (55-8-14)	No.

PART B

Adequacy of Legal Protection in DRMS Hazardous Waste Disposal Contracts

REPORT TO CONGRESS ON LIABILITY, BONDING, AND INDEMNIFICATION ISSUES FOR DEPARTMENT OF DEFENSE RESTORATION PROGRAM AND HAZARDOUS WASTE CONTRACTS

Office of the Deputy Assistant Secretary of Defense
(Environment)

Response Action Contractors' Liability Issues

Regarding the Defense Environmental Restoration Program

Conclusions and Recommendations

Conclusions:

The Department of Defense (DoD) faces a major challenge to cleanup its contaminated sites quickly, effectively and without excessive cost to taxpayers. The DoD cleanup and remedial program relies on the architectural and engineering services and the design and construction capabilities of private sector remedial action contractors (RACs). The RAC community expresses reservations about its members' future willingness to undertake this work for the DoD because of perceived uncertain, but believed potentially large, risk to their firms inherent in DoD's remedial action work. In order to better understand the substance and basis of these concerns the Department of Defense has endeavored to work with representatives of the RAC community, other private sector contracting entities, as well as representatives knowledgeable about the practices and concerns regarding the insurance and surety sectors of the nation. The study concludes that contractors have the following deeply held perception of the current liability situation:

- RACs, because of joint strict and several liability under federal and state law, may be found liable when they are not at fault.

- The resulting probability of insolvency through imposition of liability without fault is uncertain and therefore unacceptable.

    - RACs are unable to secure adequate insurance due to the insurance industry's reluctance to become involved where the risk is so uncertain and potentially large.

    - RACs are also hampered in obtaining performance bonds required by the Miller Act for DoD construction contracts. Surety companies are reluctant to write bonds. The uncertain and potentially large risk for the situation has decreased availability and increased costs which are ultimately reflected in DoD's costs.

- RAC's believe they are assuming risks that properly go to DoD as the generator of hazardous waste and owner of the site.

These perceptions have serious implications for the continued progress of the DoD's cleanup program, as DoD may not be able to sustain rapid progress in its cleanup program without a heavy reliance on knowledgeable qualified contractors.

The Department has also concluded the following as to the current status of response action contracting and the legal liabilities of the Department:

- DoD is currently able to get adequate competition for our remediation contracts.

- Some well-regarded companies are not bidding on DoD contracts citing the risk issues as their reason not to compete.

- DoD is not able to determine, based on this study, what impact the contractor's perceived liability exposure is having on their bid pricing of DoD contracts.

- There is no evidence that quality of work on DoD contracts is being affected.

- The current liability picture particularly discourages contractor participation in innovative remedies as they place potential additional risk on the contractor. A contractor's prime defense to their perceived liability exposure is to use standard, conservative measures wherever possible, thus favoring an excessively conservative approach to remediation.

- RACs express a willingness to be liable for their failure to perform adequately on their remediation contracts.

- DoD as waste generator, facility owner, and overall manager of its remediation effort is and should be ultimately responsible for future problems associated with its remediation efforts, however, it should have a legal remedy against a non-performing contractor.

    - As a waste generator and owner of the contaminated site DoD is in a different liability relationship with its contractors than EPA with its contractors. As such liability shifting rules developed by EPA for dealing with its contractors may not be appropriate for DoD.

- Private firms hiring RACs for private cleanup work engage in risk sharing strategies with RAC contractors which may be adaptable to DoD contracts.

    - Different types of remediation projects have different inherent risks and therefore may call for different risk sharing strategies.

    - Appropriate risk sharing strategies should result in reduced cleanup cost to the Department and the taxpayer, without increasing the ultimate risk to the treasury.

    - Adoption of risk sharing strategies may require regulatory and legislative reform.

Recommendations:

Based on the foregoing conclusions, the Department is concerned remedial action contractors' perceptions may lead in the future to reduction in competition, escalation in costs, lowering of quality, and increased risk to the public. We are also very conscious that any recommendation we adopt for action or inaction, will have economic consequences. Any choice inevitably confers competitive advantage on some contractors and disadvantage on others. We must make sure we understand the nature and implications of the incentives and disincentives our choices imply. We must encourage responsible and professional behavior by our contractors. We must avoid creating incentives for behavior that diverts government resources from the primary goal of cleanup. Ultimately, whatever strategies we adopt should improve the Department's ability to perform effective cleanup in a timely manner at a responsible cost to the taxpayer.

Based on information developed in doing this report, the Department is implementing changes in its contracting strategies and policies within its control to resolve some of these issues. These include better acquisition planning including varying types of contract strategies, reducing amounts of bonds required on construction contracts or use of rolling or phased bonds, allowing irrevocable letters of credit in lieu of bonds, and retaining certain work elements under DoD control (e.g. signing hazardous waste manifests). The environmental and engineering arms of the military departments will continue to examine their current contracting practices with a view to recommending changes in guidance, policy, regulations, and legislation to enhance the effectiveness of our environmental and remedial action contracting. We have tasked them to ensure the scope of their study addresses appropriate and equitable risk sharing between the DoD and its contractors in the cleanup program, and to make specific recommendations for action to be taken. The DoD is now also engaged in a comprehensive review of the Federal Acquisition Regulations so as to ensure adequate treatment of environmental requirements.

Two recommendations merit further consideration. The first would resolve the extent of liability of a surety to a remedial action contract where their only involvement is in providing a bond. This issue was addressed in the last Congress by amending section 119(g) of the Comprehensive Response Compensation and Liability Act to specifically broaden coverage for sureties at National Priorities List sites. Extending this principle to all DoD sites, whether or not on the NPL, would help bring sureties back into writing bonds for DoD cleanup contracts at a reasonable prices. This should broaden competition for contracts, improve timeliness, and reduce overall costs to the Department. This should not work a disservice to innocent third parties, as ultimately it is the Department that is responsible for the remediation. The prime purpose of the surety is to ensure the Department receives the fiscal benefit of the contract.

A more wide-sweeping risk sharing concept evolved from discussions during the preparation of this report. This concept would involve limiting a Response Action Contractor's liability to outside persons. The Department and any other true

potentially responsible parties would be designated as those solely responsible for damages to innocent third parties for damages arising out of a remediation action at a DoD site—logical application of current law as to generators and operators of hazardous waste facilities. The DoD's contracts with its RACs would then provide for recovery by DoD from the RAC if the damages resulted from the RAC's negligence. This concept is similar to the latent damages clause currently used in construction contracts.

The time for preparation of this report was short considering the complexity of the issues. Among the areas that still need substantial further analysis are the total cost implications of various risk sharing strategies as compared with the long term liabilities of the government. We will continue working with the contractor community and other interested parties to explore these and other recommendations and solutions to improve the Department's clean-up program.

APPENDIX 1

SAME Forum Proceedings

SOCIETY OF MILITARY ENGINEERS

ENVIRONMENTAL CONTRACTS FORUM

30-31 JANUARY 1991
BOLLING AIR FORCE BASE

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

EXECUTIVE SUMMARY

On 30 - 31 January 1991, the executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting.

During the forum, the following key issues were raised:

a. There is a risk to the remedial action contractor (RAC) performing environmental work. Part of this risk are the unknowns associated with the work. Another part is the potential for third party liability suits resulting from the performance of such work.

b. RACs are unable to obtain professional performance liability insurance for hazardous waste site cleanup projects. The insurance industry is reluctant to provide such insurance due to the high risk of liability associated with the performance of such work. Available insurance only covers the period of work performance; not the period during which RACs are most susceptible to third party liability suits.

c. RACs are unable to obtain surety bonds required for Federal government hazardous waste cleanup projects because the surety bond industry sees a high risk from liability in issuing such bonds. Available bonds are generally for projects of less than $5M value. Some companies are self-bonding in order to meet governmental requirements.

d. RACs feel that the Department of Defense (DOD) is responsible for the presence of the hazardous material on the site and therefore, should be responsible for their portion of the risk associated with site cleanup. RACs believe that DOD should indemnify RACs performing work against third party liability to cover the government's portion of the risk.

In response to the concerns raised by RACs, DOD representatives indicated that they would consider the following potential solutions to resolve the issues raised:

a. Change the laws so that RACs are excluded as a potentially responsible party for liability suits resulting from cleanup actions.

b. Revise the Federal Acquisition Regulations (FAR) to extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program.

c. Limit the statute of limitations for contractors on environmental cleanup projects and limit the contractor's liability for a project.

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine equitable distribution of the risk between the contractor and the government as a part of the contract.

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

A. INTRODUCTION

The executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base on 30 and 31 January 1991 to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting. In attendance at this forum were representatives of the Office of the Deputy Assistant Secretary of Defense (Environment), Army, Navy, Air Force, and Coast Guard and executives representing remedial action contractors (RACs) that perform environmental cleanup services for the Department of Defense and private industry. A list of attendees for this forum is provided as Attachment A to this report.

This forum was co-chaired by Captain James A. Rispoli, CEC, USN, Vice President, Environmental Affairs, Society of American Military Engineers and Mr. Russ Milnes, Principal Deputy to the Deputy Assistant Secretary of Defense, (Environment).

Prior to this forum, invitees were asked to submit discussion papers on any aspect of the topic issues. Suggested discussion topics included: what are the liability concerns; what are the experiences with regard to liability and bonding; how is the risk of performing environmental work assessed; and how do the problems of liability and bonding affect competition. Seven papers were submitted in advance or during the forum. These papers were provided as attachments to the draft proceedings of the forum.

B. OPENING REMARKS

Captain Rispoli opened the forum by outlining the objective of the Environmental Contracts Forum, which is to facilitate an ongoing frank and open discussion of programmatic and contractual issues between industry and the military services. He indicated that this was the third session of this executive forum, and that SAME had been asked by the Office of the Deputy Assistant Secretary of Defense (Environment) to further address the issues of liability, indemnification, and bonding to assist them in obtaining views so that DOD might prepare a report to Congress. To increase the dialogue, CAPT Rispoli indicated that additional contractors had been invited to participate. CAPT Rispoli stated that proceedings of the forum would be issued. These proceedings would not provide any quotes or attribution. He asserted that the forum was not a place for debate, but was a means to discuss the issues so that all in attendance could listen and learn. He asked if there would be any objections in having submitted papers published as a part of the forum proceedings. No objections were raised.

Mr. Milnes addressed the forum stating that the only means of solving environmental cleanup liability problems was through an open forum. He indicated that the Department of Defense (DOD) has pledged to comply with its environmental obligations. The installation restoration effort is important, and as the DOD moves from the study phase, it recognizes that action must be taken to ensure site cleanup progresses smoothly. He emphasized that the DOD wants to finish the cleanup business. Mr. Milnes stated that his office wants to come to grips with the hazardous waste site cleanup contract issue. Performance bonding is an issue; legislative fixes may be possible, but he did not see this as a solution. He explained that if the DOD and the cleanup industry do not

for a cleanup in certain states, and therefore may choose not to bid. They indicated that in performing some work, they were staking the survivability of their corporation. When asked, the RACs explained that, in working with the private sector, the RAC shares the risk with the client. This protects the contractor. The point was raised that the owner of a waste site owns the waste, and the RAC is helping to clean it up. Therefore, the site owner must share a good portion of the risk.

The issue of strict liability was raised by the RAC representatives. If anyone has a connection with a hazardous waste site, they are liable. Proper behavior has not excused liability.

When working for the Environmental Protection Agency (EPA) on orphan sites, there is a greater risk to the RAC. The EPA indemnifies the RAC under Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This indemnification only covers negligence and not strict liability. The RAC must look at the state laws when deciding to accept a risk.

Another issue raised was that in some instances, a DOD activity required a RAC to sign hazardous waste manifests. This action places liability on the RAC for transporting of wastes. If the RAC had known it would be required to do this, it would not have bid on the job without indemnification. A DOD representative indicated that, generally, the DOD signs the manifest as the generator. The RAC representatives indicated that even if the contractor does not sign the manifest, but arranges for transport, the contractor could be liable, a potentially responsible party (PRP). Even if the contractor doesn't arrange the transport, but is on site, it may be sued. The contractors emphasized that defense costs are a real-time cash flow problem and a real risk even if the contractor is not involved or is innocent.

The problems for the RAC were summarized as follows:

a. There is an inherent risk associated with doing environmental work. RACs are dealing with anomalies which are inherently difficult to model.

b. There is an environmental risk of third party liability.

c. There is no incentive for innovation. Before innovation will be employed by contractors, there must be an agreement between the client and the contractor, and the beneficiary of the innovative practice is required to assume liability. Innovation is prohibitive in a regulatory atmosphere. There is generally no innovation in the U.S.

d. The architect-engineers (A-Es) are being expected to accept the liabilities of others. Liability insurance is not available in the market. If it is available, it is only for the period of the job.

e. Requirements vary from state to state. There is a bright spot for the RACs in that there is more flexibility shown when dealing with states than when dealing with the Federal government. Some states may change the specifications on their cleanup projects to permit innovative technology. Many see some states assuming the liability of PRPs. State regulators are a part of the Record of Decision (ROD), and this permits flexibility in dealing with the states.

"prior acts". RACs are paying premiums but are not receiving future coverage. The topic leader indicated that if states had negligence statements similar to Section 119 of CERCLA, then insurance companies might become more interested in providing such insurance. There are presently no magic solutions.

The topic leader was asked the insurance industry's plan of action. The response was that the insurance industry is "slugging out" solutions on a case-by-case basis. The industry has not been able to agree on alternatives to the current situation. A formal definition of "pollution exclusion" is a possibility. A general discussion on possible approaches (solutions) followed. A law similar to Price-Anderson which would be applicable to the toxic waste cleanup industry was mentioned as a potential solution. This solution would create three layers of protection in the event of liability: the insurance layer, the owner/operator layer, and the government layer.

3. Near and Long Term Environmental Restoration Contracting Strategies.

Each of the service representatives made a short presentation on environmental restoration contracting strategies. Described were current efforts, current problems, and actions being taken to clean up identified hazardous waste sites.

4. The Availability, Costs, and Limitations of Corporate Surety Bonds to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors.

The topic leader from the insurance industry indicated that there were considerable problems with the issuance of corporate surety bonds. Contractors must post a surety bond for Federal work under the Miller Act. At this time, there are few bonds available for work on hazardous waste sites.

The topic leader described the problems of issuing bonds for such tasks. Surety bonds are underwritten only to cover the performance of a contractor and the payment of suppliers for construction work. They are written based on the quality of the contractor (ability to do good work, quality of people on site, equipment, how well the contractor has done on similar efforts, and the availability of contractor finances to fulfill the contract requirements). Underwriters normally develop a long-standing relationship with the contractor. Liability from third party suits is not normally considered (this is normally covered by commercial general liability insurance). Recently, however, surety bond issuers have come under attack in the court room because they are the only "deep pocket" remaining in a law suit (RACs are normally people rich, but asset limited).

There has been a lack of indemnification for surety bond issuers for hazardous waste site work. Anyone involved in hazardous waste site work (including the surety bond underwriters who are only covering contractor performance and supply payments) have been found to be liable. If the RAC defaults on such work, the surety principal would be required to hire a completing contractor and, consequently, may be construed to have contracted for the removal of hazardous waste and subjected itself to liability.

Another issue with hazardous waste site bonding is the bond termination date. Normally, a bond is terminated when all work has been satisfactorily accomplished on a project. Due the possibility of long time periods associated with hazardous waste site cleanup action (including the prospect of having to reinitiate work), the bonding company may be required to pay claims long after work has been completed on a project.

5. Further Discussion on Industry's Liability Concerns with Regard to DOD Environmental Restoration Work and Potential Solutions to Address These Concerns.

A DOD representative led this topic to generate further discussion on the key issues and to explore potential solutions to these issues. The topic leader indicated that DOD was looking for solutions that would result in good (technical and timely) cleanups of its hazardous waste sites, at a good price, and maintain a good contractor base which earns a fair profit and is a viable community. The RAC representatives indicated that this would be possible if there was equitable risk sharing between the RACs and the DOD.

It was suggested that value-engineering clauses in contracts be utilized. Some contractors indicated that this effort doesn't work very well, due to lack of timeliness in the government's response. This lack of timeliness causes contractors to stop trying. A DOD representative indicated that in situations in which a technology is approved in the ROD, there is reluctance to consider value-engineering proposals because it may mean reopening the ROD. A Navy representative indicated that his service welcomes value-engineering. The services indicated that when they become aware of roadblocks, they would take action to eliminate them.

A question was raised whether the RACs normally revalidated the remedial investigation/feasibility study (RI/FS) when contracted to perform remedial design/remedial action (RD/RA). The RACs agreed that they would revalidate the data obtained by another contractor. The degree of revalidation would depend upon the contractor who performed the RI/FS. Such revalidation could cost up to 20 percent of the RD/RA effort.

The Navy's Comprehensive Long Term Environmental Action, Navy (CLEAN) contract was discussed. The RACs were asked why they bid on these contracts since they did not know the cleanup effort involved. The RACs said that cost-plus (rather than fixed fee) contracting of CLEAN was a plus. They remarked that they would be better able to define the work and get a good price to perform a full scope of each task. As long as the cleanup effort was on the base, the possibility of third party liability was low. The closer to the site boundaries, the greater the risk associated with a project. Under CLEAN, each task is negotiated, and the contractor can evaluate the risk for each task. Only one percent of the projects in a CLEAN contract are anticipated as being a problem.

In a discussion of contracting strategies versus risk, the RAC representatives indicated that third party liability is independent of the contract type. They did not look at fixed price contracts in the environmental area because there are too many unknowns and too much time and effort is spent in contract modifications. They wanted to be able to address, in the contract, the care to be taken in determining the risk of the project.

The RAC representatives were asked, what percentage of contracts are high risk? The response was, that a large percentage of environmental effort requires third party liability and therefore, is a high risk. One company representative indicated that his company will not perform any work without some form of indemnification. Defense costs for liability suits are the big problem. There is no method of predetermining how juries will apportion costs.

The RAC representatives reiterated that they have the ability to negotiate risks for commercial projects. That ability does not currently exist in dealing with the DOD. They also indicated that

The discussion continued with the RAC representatives indicating that a negligence standard exists in CERCLA, and they want a similar law modification for state laws and the Resource Conservation and Recovery Act (RCRA). They do not desire strict liability to apply to them. The overriding issue is that the RACs are concerned that they must assume responsibility for what they did not initially cause. The responsibility should be adjudged to the people who put the waste in the land.

The DOD topic leader asked what the DOD could do to help the contractors. There were four areas of potential change: the law, which would be most difficult to change; the regulations (DOD indicated that they would work with the EPA to determine how the regulations might be changed); policy; and the FAR/contract (DOD indicated that they could directly impact these last two areas and achieve the quickest results).

Indemnification of contractors is now addressed in Public Law (P.L.) 85-804 and FAR 52-228.7. Under P.L. 85-504, the contractor must identify the nature of the risk and then the Contracting Officer must raise the issue to the service Secretary for authorization. To support indemnification of contractors for environment risks would make each service's effort unique. The FAR clause is based on radioactive material risks and excludes construction. A change to the FAR appears to be appropriate, but it would have to be based on a change in the law. DOD representatives considered that such a change might be accomplished as a part of the Defense Reauthorization Act.

The following potential solutions were identified for evaluation by DOD in response to the issues raised by the RAC representatives regarding their risks:

a. Change the laws so that the RACs are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine an equitable distribution of the risk between the contractor and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

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March 28, 1991

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Re: Minutes of the Society of American Military Engineers January Conference

Dear Mr. Dobes:

Thank you for sending the draft minutes from the January 30-31, 1991 meeting of the Society of American Military Engineers. I was pleased to attend and discuss the issue of surety bonds for hazardous waste cleanup projects. As we discussed on the phone recently, I have only a few comments on the draft minutes, and you took care of the specific items while we spoke.

However, I also have a general comment which I wanted you to have in writing for the record. As you may remember, I was unable to stay for the entire program, and thus, missed the creation of the recommendations and potential solutions contained in the minutes. All of the recommendations and potential solutions developed by the attendees of the conference are excellent ideas. However, I was concerned that surety was not specifically included in some of the comments.

For example, recommendation "e" states that "The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable." This is an instance where the RAC's surety should specifically be included in the recommendation. Just such a provision is part of the Superfund amendment passed last year, and has been essential to the increase we have seen in the availability of surety bonds for those contracts covered by that amendment. The ideas contained in the recommendations should apply equally to the RAC and its surety.

The potential solutions also refer only to the contractor, while applying the solutions to the surety as well will be necessary to increase the sureties' ability to underwrite

bonds for these types of projects. Thus, it is my recommendation that the potential solutions be amended to read as follows (underlined portion is the proposed amendment):

a. Change the laws so that the RACs and their sureties are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor and surety work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor or surety liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors and their sureties on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's and surety's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's and surety's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and surety who takes over for a contractor and determine an equitable distribution of the risk between the contractor or surety and the government as a part of the contract.

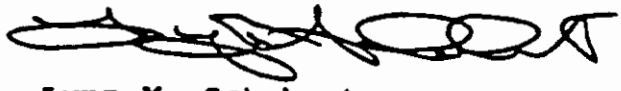
f. The DOD should specify standards of practice for a project to which the contractor or surety must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

These minor changes in the recommendations and potential solutions would express the necessity of protecting the surety of a response action contractor to the same extent as the contractor. Without this equity, it is most likely that bonds will continue to be difficult to obtain for all hazardous waste cleanup projects not covered by the Superfund amendment implemented last year.

Thank you for allowing us to submit these follow-up comments. Please let me know if there is anything else which I can do to assist you in putting together the final version of the minutes.

Very truly yours,



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APPENDIX 2

Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

US Army Corps of Engineers
Water Resources Support Center
Institute for Water Resources

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

JULY 1990

IWR REPORT 90-R-1

Unclassified
SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE

Form Approved
OMB No 0704-0188
Exp Date Jun 30, 1986

1a REPORT SECURITY CLASSIFICATION Unclassified	1b RESTRICTIVE MARKINGS
2a SECURITY CLASSIFICATION AUTHORITY	3 DISTRIBUTION/AVAILABILITY OF REPORT Approved for public release; unlimited
2b DECLASSIFICATION/DOWNGRADING SCHEDULE	
4 PERFORMING ORGANIZATION REPORT NUMBER(S) IWR Report 90-R-1	5 MONITORING ORGANIZATION REPORT NUMBER(S)
6a NAME OF PERFORMING ORGANIZATION USACE, Institute for Water Resources 6b OFFICE SYMBOL (If applicable) CEWRC-IWR	7a NAME OF MONITORING ORGANIZATION
6c ADDRESS (City, State, and ZIP Code) Casey Building Telegraph & Leaf Roads Ft. Belvoir, VA 22060-5586	7b ADDRESS (City, State, and ZIP Code)
8a NAME OF FUNDING/SPONSORING ORGANIZATION USACE, Directorate of Military Programs 8b OFFICE SYMBOL (If applicable)	9 PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c ADDRESS (City, State, and ZIP Code) Pulaski Building 20 Massachusetts Avenue, NW Washington, DC 20314-1000	10 SOURCE OF FUNDING NUMBERS PROGRAM ELEMENT NO. / PROJECT NO / TASK NO / WORK UNIT ACCESSION NO

11 TITLE (Include Security Classification)
Hazardous and Toxic Waste (HTW) Contracting Problems - A Study of the Contracting Problems Related to Surety Bonding in the HTW Clean-up Program

12 PERSONAL AUTHOR(S)
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13a TYPE OF REPORT	13b TIME COVERED	14 DATE OF REPORT (Year, Month, Day)	15 PAGE COUNT
final	FROM _____ TO _____	1990/April	

16 SUPPLEMENTARY NOTATION

17 COSATI CODES			18 SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB-GROUP	Bonding, Miller Act, Service Contracts Act, Davis-Bacon Act, CERCLA, FAR , HTW, Surety, Performance Bond

19 ABSTRACT (Continue on reverse if necessary and identify by block number)

This study attempts to determine the impact of performance bond availability on the successful accomplishment of Hazardous & Toxic Waste (HTW) projects.

20 DISTRIBUTION/AVAILABILITY OF ABSTRACT UNCLASSIFIED/UNLIMITED ☒ SAME AS RPT ☐ DTIC USERS	21 ABSTRACT SECURITY CLASSIFICATION
22a NAME OF RESPONSIBLE INDIVIDUAL Francis M. Sharp	22b TELEPHONE (Include Area Code) (202) 355-2369 22c OFFICE SYMBOL CEWRC-IWR-N

DD FORM 1473, 84 MAR 83 APR edition may be used until exhausted
All other editions are obsolete

SECURITY CLASSIFICATION OF THIS PAGE

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

Prepared by

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Commissioned by
Environmental Protection Agency
and
U.S. Army Corps of Engineers
Environmental Restoration Division

July 1990

IWR Report 90-R-1

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I. SUMMARY

The EPA and the U.S. Army Corps of Engineers ("Corps") have experienced difficulties in contracting Hazardous and Toxic Waste (HTW) cleanup projects. The HTW cleanup industry has expressed concern that it could not obtain surety bonds required as a prerequisite for competing for remedial action construction projects. It was reported that Treasury Department listed corporate sureties, which provide the guarantee bonds for Government projects, had imposed stringent limitations on the provision of performance bonds which assure the government that the cleanup project will be completed. Essentially, the bonds guarantee that the surety will either complete performance or pay the Government its costs associated with completing the project to the limit of the penal amount of the bond. Various contracting industry firms stated that they have not been able to secure bonding for some projects. Those that have obtained bonds had a difficult time doing so, and some firms that had obtained bonds for previous projects were unable to obtain bonds for a subsequent project. The surety industry indicated its reluctance to guarantee performance on HTW projects primarily because of its concern for possible long-term liability exposure and changing state-of-the-art design requirements associated with such actions.

The EPA and the Corps commissioned the Institute for Water Resources to gather information on the subject; to analyze the data to determine the extent of the existing bonding problems; and to offer recommendations which could be implemented in an effort to alleviate problems noted. A survey was conducted of Corps district offices, the HTW cleanup industry, surety firms, and trade associations, to determine the extent and nature of the problem. A few survey activities extended to EPA and state offices involved in HTW work.

The study examined 24 ongoing remedial action and completed Corps HTW construction contracts. Statistics were gathered from actual Corps records on the contractors and sureties that participated in these contracts. In addition, a sample of the universe of HTW contractors and sureties was interviewed along with industry association representatives. The responses to these interviews appear later in this paper. They were analyzed to arrive at conclusions concerning industry views and perceptions of the surety problem.

will be issued on the appropriate factors to be taken into consideration in accomplishing this analysis.

- Analysis of the option of dividing the project into work elements with an appropriate level of bonding in each.

- Clarify the government's policy on indemnification of contractors and sureties.

- To the extent of its authority, each government agency will define its specific responsibility for the risk aspect of the cleanup project where appropriate (e.g. accept responsibility for performance specifications).

- The government will specifically accept the responsibility for project design where the performance specifications have been met.

The thrust of this study was specifically centered on the bonding issue. While the stated problem of many of the respondents was bonding, the underlying issue is the uncertainty about risk in general as it applies to the HTW Cleanup program. There is uncertainty by sureties and contractors concerning risk and liability. Surety bonds for performance, liability insurance and indemnification questions are closely related and difficult to separate when dealing with HTW risk questions.

There are two categories of options available to address these solutions. First, short term steps can be taken internally by the Corps and EPA that involve revising internal agency procedures to alleviate the contracting problem. Changes to government-wide construction procurement regulations, e.g. standard bond forms, should be pursued with the FAR Council. Finally, longer term actions could be carried out which concentrate on potential legislative revisions to the liability and indemnification provisions in the superfund statute.

Resources (IWR), a Corps research agency located at Fort Belvoir, VA, was selected to do the study. The study was initiated in late November 1989. IWR conducted a series of personal and telephone interviews of HTW industry contractors, as well as HTW industry associations. In addition, personnel from insurance and surety industry firms, surety associations, states, EPA, and the Corps were interviewed about the issue. A listing of the interviewees appears in Appendix A.

The interviewees were questioned regarding difficulties experienced in the HTW bonding area. They were also asked for their views on the nature and magnitude of any bonding problems and requested to provide suggestions on actions that could be taken to rectify the situation. IWR also gathered references, such as seminar papers, letters of concern to various agencies, testimony before Congress, government forms and regulations, and other relevant documents. A body of background material concerning the problem was assembled. The study also collected information concerning contracting for HTW cleanup, in particular information regarding the difficulties in the acquisition of surety bonds by contractors.

Table 1

STATUTES AND REGULATIONS PERTAINING TO HTW CONTRACTING

ACT	DESCRIPTION
Miller Act Construction Contract Bonding Requirement	Requires Federal agencies awarding construction contracts to utilize payment bonds to assure that the prime contractor pays his subcontractors and performance bonds to guarantee completion of work in accordance with the contract specifications.
McNamara-O'Hara Service Contract Act (SCA)	Defines the types of activity classified as service contracts for the purposes of Federal government procurement.
Davis-Bacon Act (DBA)	Applies to all Federally funded construction projects. Designates the Secretary of Labor as the sole authority on the classification of wage rates for construction projects.
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by Superfund Amendments & Reauthorization Act (SARA)	CERCLA enacted to eliminate past contamination caused by hazardous substances pollutants or contaminants released into the environment. Authorizes EPA to recover cleanup costs. SARA enacted to strengthen CERCLA and tighten cleanup target dates. Requires use Davis-Bacon wage rates for construction projects funded under section 9604(G) of CERCLA.
Federal Acquisition Regulation (FAR)	Pursuant to the requirements of Public Law 93-400 as amended by Public Law 96-83: provides uniform policies and procedures for contracting by Federal executive agencies.

The procedure for obtaining performance and payment bonds from individual or corporate sureties for HTW cleanup contracts is incomplete without examining the background of the bonding requirement. The 1935 Miller Act specified that all construction contracts by the Federal Government would be covered by performance and payment bonds. The purpose of the performance bond is to insure that the project is completed in the event that the original contractor defaults.

The requirement for performance bonds varies with each project and is affected by the type of project being undertaken. A bond is required by the Miller Act on all fixed-price construction contracts over $25,000, but must be

the project. The Corps of Engineers is very sensitive to avoiding disputes with DOL arising from failure to use construction wage rates. EPA is equally concerned that the proper rate be used by the Corps.

1. Miller Act Construction Contract Bonding Requirements. In order to fully address the performance bonding requirement and its relationship to the contracting industry, we must first examine the Miller Act. The Miller Act requires performance and payment bonds for any contract over $25,000 for the "construction, alteration or repair of any public building or public work". P&P bonds are required on all FFP construction contracts and/or delivery orders over $25,000. The percentage needed for performance bonds is flexible. However, these bonds are not necessary for cost reimbursement contracts and/or delivery orders. The level of bonding required is determined by the Contracting Officer based on the level of risk associated with the project and the resulting need to protect the Government's interest. The performance bond guarantees the Government that the building or work will be completed in accordance with the terms and conditions of the contract or the Government will be compensated. The payment bond guarantees that subcontractors and suppliers of the prime contractor will be paid for their work. Performance and payment bonds are usually issued by the same surety for a particular project. These bonds protect against contractor non-performance. They are not intended as insurance for contractor actions which may prompt third party liability suits, or as a substitute for pollution or any other type of insurance. A third bond, generally required by agency or acquisition regulations where the contract solicitation is a formally advertised sealed bid, is the bid bond. The bid bond protects the Government by providing a penal amount that will be forfeited by the surety of the lowest responsible bidder if the bidder fails to accept the award or to provide the required performance and payment bonds after award has been made. Bid bonds generally are provided by the same surety that provides the performance and payment bonds for a particular contract. The surety's decision to issue the bonds appears to be controlled by the contractors bonding capacity and its analysis of the risk associated with each particular contract. Hence, it would seem that difficulties reported in contractors' ability to acquire bid bonds are in fact directly connected to the same factors causing those contractors inability to acquire performance bonds.

Inasmuch as the scope of possible service contracts is extensive, section 7 of the Act lists specific contracts outside the Act. Included among these exemptions are contracts for "construction, alteration and/or repair, including painting, or decorating of public buildings or public works." While DOL's regulations (29 CFR 4.130) contain a number of illustrative service contracts, none of those listed relate specifically to environmental restoration (HTW) projects.

The principal purpose emphasis is key inasmuch as a contract may be principally for services, but may at the same time involve more than incidental construction.

Existing DOL regulations do not define incidental construction. Guidance on this issue, however, may be derived from advisory memoranda issued by the DOL's wage and hour administration relating to construction projects comprised of different categories or schedules (building, heavy, highway and residential). As a general rule, DOL advises contracting officers to incorporate a separate schedule when such work is more than incidental to the overall or predominant schedule. "Incidental" is here defined as less than 20% of the overall project cost. DOL notes that 20% is a rough guide, inasmuch as items of work of a different category may be sufficiently substantial to warrant separate schedules even though these items of work do not specifically amount to 20% of the total project cost. This same rationale may apply to contracts involving services and construction.

Under such circumstances, both the SCA and the Davis-Bacon Act (see below) may apply. In this regard FAR 22.402(b)(1) prescribes that the DBA will apply when:

a. The construction is to be performed on a public building or work.

b. The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the DBA. The term substantial defines the type and quantity of the construction work and not merely the total value of the construction work as compared with the total contract value.

these activities standing alone may be properly characterized as construction, alteration or repair of a public work.

Section 9604(G) of CERCLA also specifically stipulates the wage rates to be paid on Response Action Construction projects are to be as determined by the Secretary of Labor in accordance with the Davis-Bacon Act as follows:

> "Sect. 9604(g)(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.
>
> (2)The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40 of the United States Code."

b. The essential point of the foregoing discussion of the Service Contract and Davis-Bacon Acts is that although the public policy objective (labor standard protection) of the statutes are similar, there are significant differences between the two which affect the cost of doing business. Clearly, the DOL's authority to require contracting agencies to retroactively modify contracts to add one set of wage rate provisions and/or delete another, will have consequences for project costs. In view of DOL's authority to issue determinations as to what comprises "construction" for purposes of the DBA, there may also be consequences for the coverage and extent of the bonds required under the Miller Act.

4. Superfund Statute. Inasmuch as considerable concern was expressed by the surety industry regarding its potential for liability arising from bonding of HTW projects, a brief discussion of the superfund statute is included in this section. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510)(CERCLA), commonly referred to as the Superfund law, authorized $1.6 billion to clean up abandoned dump sites. The

performance default on the same basis as such indemnification would be offered to any remedial action contractor provided the surety assumes substantially the same role as the original contractor. Some corporate sureties point to this liability potential as the basis for their refusal or reluctance to actively provide bonding for HTW work. These sureties urge that it be made clear that the surety performance bond is a guarantee of performance only and in no way is intended to serve as insurance for potential third party liability suits. Likewise, they urge that the application of the Section 119 indemnification to the corporate surety involved in a HTW project be clarified.

5. Federal Acquisition Regulation. HTW contracts, like other Federal government procurement procedures, are controlled by the Federal Acquisition Regulation (FAR). The Federal Acquisition Regulation provides uniform policies and procedures for all Federal executive agencies. These policies and procedures define construction and other government procurement activities. In addition, they specifically define contracting instruments such as performance and payment bonds (see Appendix B). The development of the FAR is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400) as amended by Pub. L. 96-83 and OFPP Policy Letter 85-1, Federal Acquisition Regulation System, dated August 18, 1985. The FAR is prepared, issued, and maintained, and the FAR system is prescribed jointly by the Secretary of Defense, the Administrator of General Services Administration (GSA) and the Administrator of the National Aeronautics and Space Administration (NASA). These agency heads rely on the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council) to perform this function. Agency heads are authorized to independently issue agency acquisition regulations provided such regulations implement or supplement the FAR.

By definition, the term "acquisition" refers to acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal government through purchase or lease -- whether the services or supplies are already in existence or must be created or developed, demonstrated, and evaluated. Acquisition begins at the point when agency

Bid Information	Bid Open Date	Project Size	Project Date
Award Amount/ Gov. Estimate	1A	1B	1C
High Bid/ Low Bid	2A	2B	2C
Number of Bids	3A	3B	3C

2. Analysis and Findings.

a. Ratio of Award Price to Government Estimate. Chart 1A illustrates the trend in the ratio of award price to the government estimate over the study period from 1987 to 1989. The ratio of award amount to government estimate rose from .8 to 1.2. In addition, the ratio of award amount to government estimate tended to increase with the size of the project, as shown in chart 1B. The type of remedy that was utilized also affected the award/estimate ratio. Award ratios of 1.3 were observed for the waste containment projects, on the average, as opposed to .85 on the other extreme for alternative water supply projects as displayed in chart 1C. The remainder of the projects were around the 1.0 area. The conclusion drawn from this information is that there is a tendency for large projects to run at a higher ratio of award/estimate and through time. This tends to lend credence to the fact that there is a tight market for HTW contracts.

b. High to Low Bid Ratio. An analysis of the contract data indicated that out of the 24 projects four contracts involved situations where the initial bid winner was not awarded the bid due to inability to secure bonding. These four contracts totaled about $31 million. $3.9 million additional costs were incurred because of the necessity to utilize the next lowest bidder. This was an average of a 14% increase in costs for the four contracts. The ratio of high bids to low bids has been found to drop from around 2 to 1 in 1987 to 1.3 to 1 in 1989 as illustrated in chart 2A. The range of bids also tends to decrease with the size of the project. Chart 2B shows this tendency. The high-low bid ratio also varies by the type of project. The collection and disposal of waste products has a large variation in the ratio of the bids

Deletion of the handling of hazardous material in the first phase of the project and shifting it to the second phase and deletion of a test burn of contaminated soil, thus removing the sureties' objections to bonding the first phase.

The writing of separate bond agreements for the two project phases and the precise definition of what liability is covered by the performance bond and the time limits of liability.

Reducing the dollar cap on the retainage for the last phase of the project from $6 million to $2 million and reducing the time the retainage is held from 60 to 18 months.

Giving the surety the right to choose the option of whether to complete the project or forfeit the bond if the contractor defaults on the performance bond.

Providing the requirements for the surety to obtain indemnification in case of contractor default and the surety assuming project completion.

d. Distribution of HTW Contracts. There is considerable variation in the distribution of contracts among HTW contractors. In the Kansas City District, about 400 firms are on the bidders' mailing list for all construction, including HTW contracts. In 1987 through January 1990, 24 contractors competed in the HTW program, and 14 received contracts. According to Corps District personnel, the same few companies continually appear in the final bidders' lists for HTW contracts.

Charts 5 and 6 list the contractors that have worked on Corps HTW construction projects and their market share of the total competed Corps HTW outlay or activity. Five contractors, individually or in partnerships, have received 78% of the HTW contract dollars (Chart 5). Five of the 14 firms obtained about 58% of all the projects (Chart 6). The firms receiving awards are, for the most part, large firms with experience in waste handling in general. They are not the only firms with the qualifications and credentials to do the work, nor are they the only firms that have expressed interest in the hazardous and toxic waste projects. There are many contractors interested in participating in these projects. There appears to be legitimate concern that contracting impediments, such as bonding, might lessen further the Government's ability to expand contractor participation. Contracting impediments must be carefully considered as to their relative significance.

TABLE 2B

CORPS HTW CONTRACTS

COST OF PROJECT COMPARED TO GOVERNMENT ESTIMATE

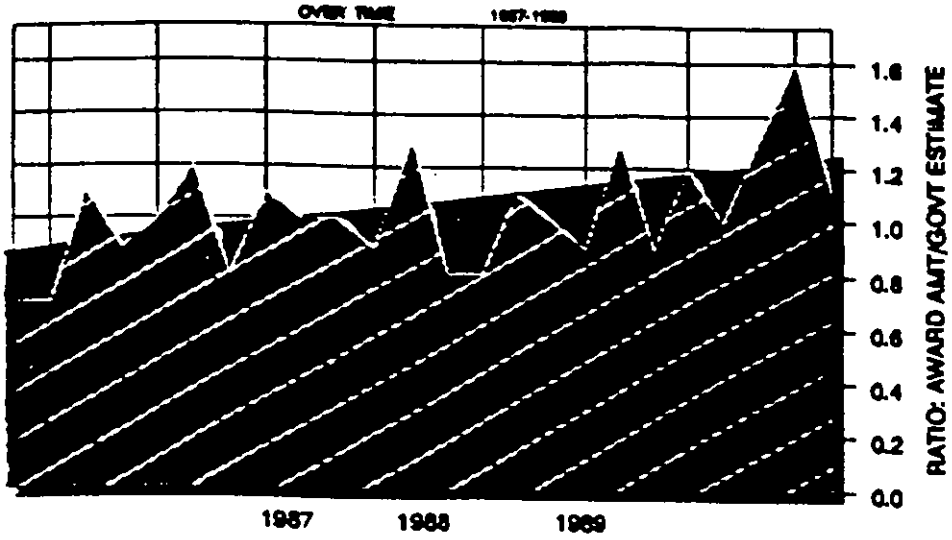
NUMBER OF BIDS PER PROJECT

BID DATE	ST	PROJECT NAME	PROGRAM	GOVT EST	AWARD AMT	AWARD AMT /GOVT EST	NO. BIDS
6/04/87	PA	Lackawanna Refuse	SF	23.0	15.9	0.7	7
3/23/88	MA	Nyanza Chemical Waste Dump	SF	13.0	8.6	0.7	13
5/17/88	MA	Charles George Landfill	SF	15.0	15.6	1.0	6
6/07/88	NJ	Lang Property	SF	4.1	3.6	0.9	6
6/07/88	NJ	Metaltec Aerosystems	SF	3.5	3.4	1.0	5
8/02/88	OH	New Lyme Landfill	SF	12.0	13.7	1.1	5
10/06/88	PA	Bruin Lagoon	SF	5.0	4.0	0.8	5
10/12/88	PA	Heleva Landfill	SF	4.7	5.4	1.1	8
10/18/88	IN	Lake Sandy Jo	SF	2.3	2.4	1.0	3
11/16/88	NJ	Bog Creek Farm	SF	14.0	14.0	1.0	4
12/06/88	CA	Del Norte Pesticide Storage	SF	1.3	1.2	0.9	11
2/02/89	NJ	Bridgeport Rental/Oil Svcs.	SF	42.0	52.5	1.3	5
3/28/89	NJ	Caldwell Truck Co.	SF	0.2	0.2	0.8	9
6/22/89	NH	Lipari Landfill on-site	SF	21.0	15.8	0.8	4
7/11/89	MD	Kane & Lombard St. Drums	SF	4.0	4.5	1.1	1
7/24/89	NY	Wide Beach Development	SF	15.6	15.6	1.0	2
8/01/89	KS	Cherokee County Storage Tanks	SF	0.7	0.6	0.9	2
8/01/89	DE	Delaware Sand/Gravel Landfill	SF	1.2	1.5	1.3	3
8/02/89	RI	Western Sand & Gravel	SF	1.0	0.9	0.9	9
8/23/89	MA	Baird & McGuire	SF	9.6	11.3	1.2	5
8/31/89	NJ	Montclair W orange Sites	SF	0.2	0.2	1.0	3
9/06/89	MD	S.Md.Wood Treating	SF	2.0	2.6	1.3	7
9/19/89	NJ	Helen Kramer Landfill	SF	36.0	55.7	1.5	4
9/19/89	PA	Moyers Landfill	SF	25.0	28.0	1.1	4
			TOTAL:	256.4	277.2	1.12	AVG.

$1,000,000s

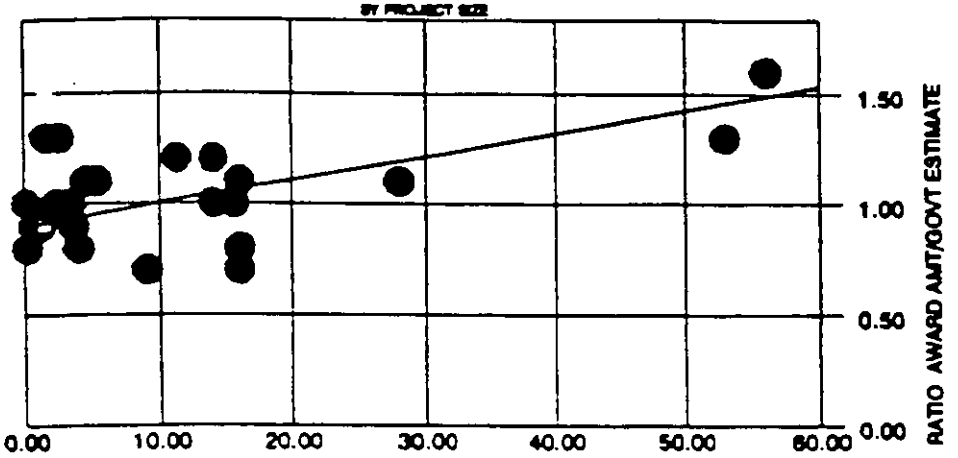
SF- SUPERFUND

CH 1A RATIO: AWARD AMOUNT/GOVT EST



AWD/EST AWD/EST REGRES

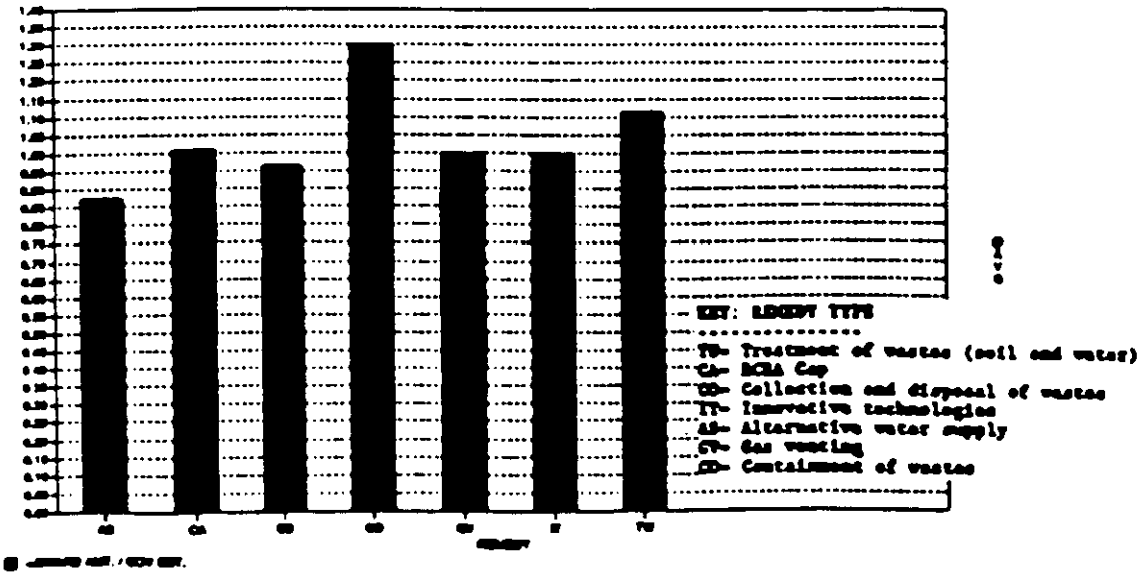
CH 1B RATIO: AWARD AMOUNT/GOVT ESTIMATE



AWARD AMOUNT $1,000,000S

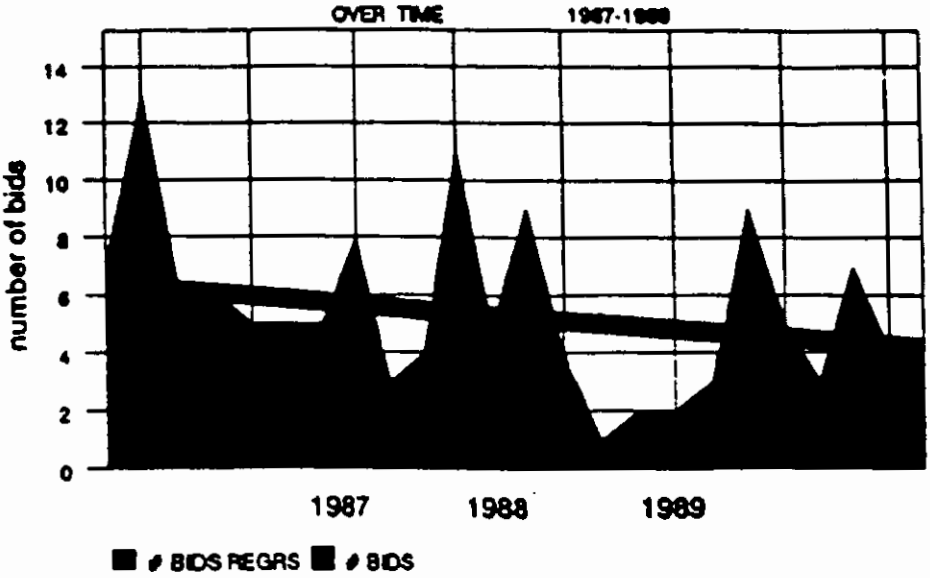
AWARD AMOUNT # BIDS NO. BIDS REGR

CHART 1C RATIO: AWARD AMOUNT/GOVERNMENT ESTIMATE
BY REMEDY TYPE



CH 3A · BIDS PER PROJECT

OVER TIME 1987-1989



CH 3B NUMBER OF BIDS (BY AWARD AMOUNT)

1987-1989

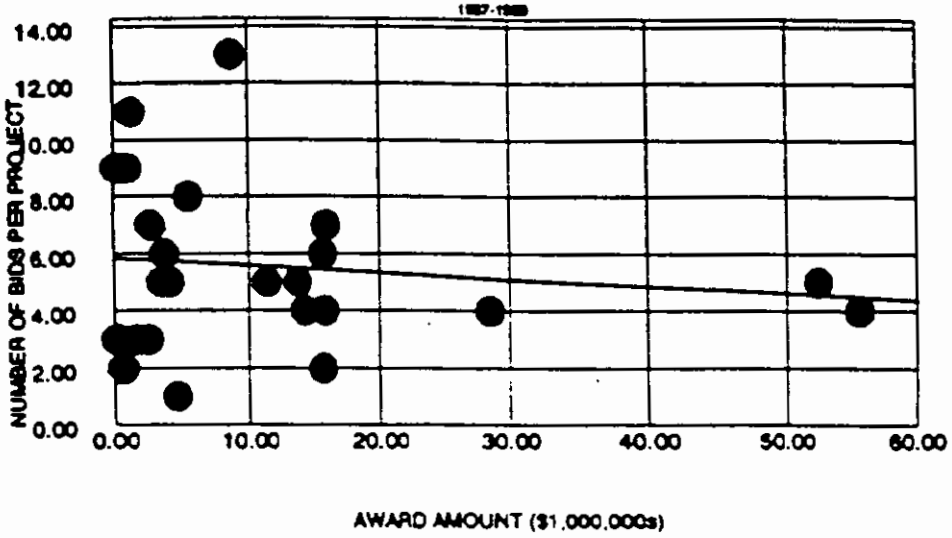


CHART 3C

AVERAGE NO. BIDS RECEIVED (BY REMEDY)

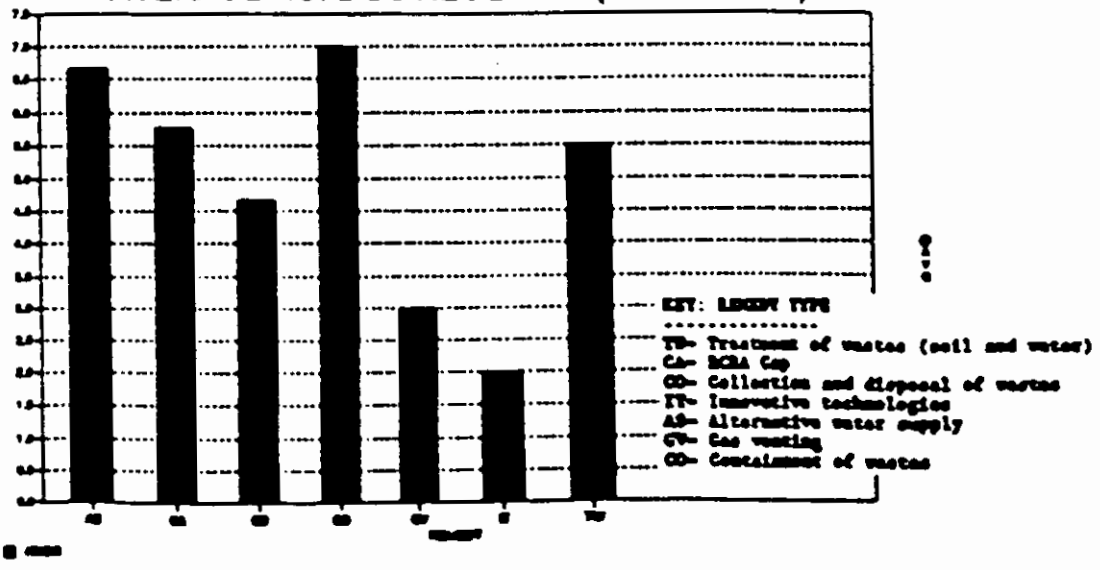


CHART 5 CORPS HTW PROGRAM
CONTRACTORS' SHARES ($280 MILLION TOTAL)

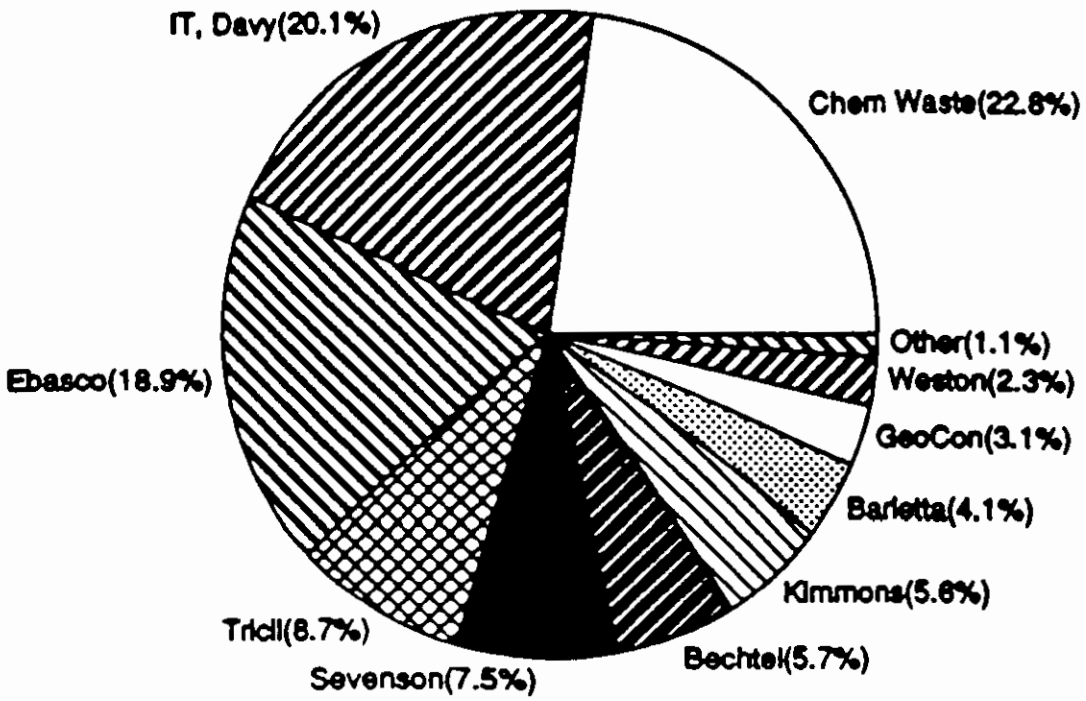


CHART 6
CONTRACTORS' SHARES (24 PROJECTS TOTAL)

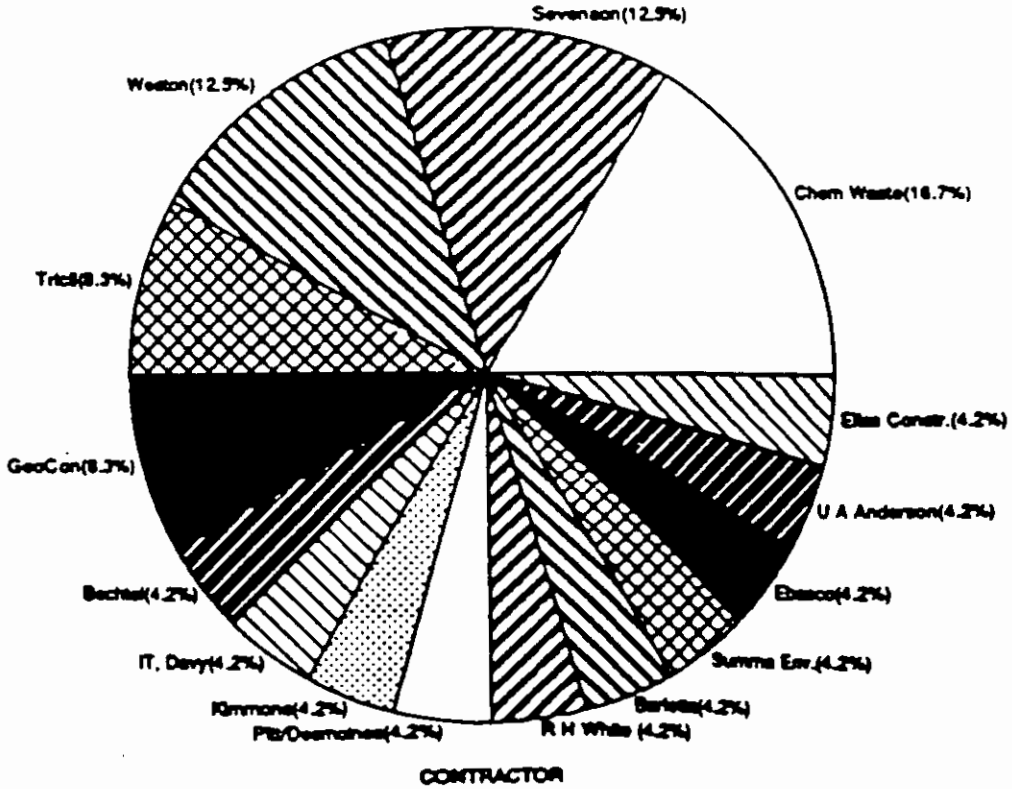


CHART 7 CORPS HTW PROGRAM 1987-9
SURETIES' SHARES ($280 MILLION TOTAL)

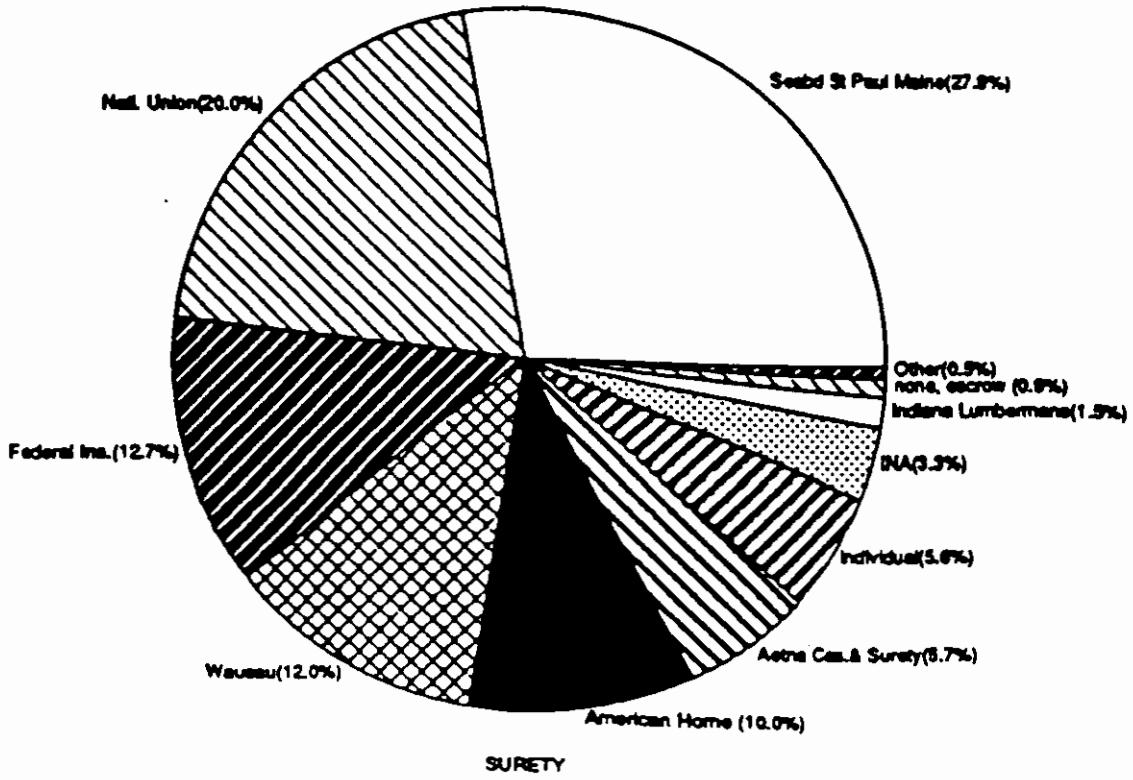
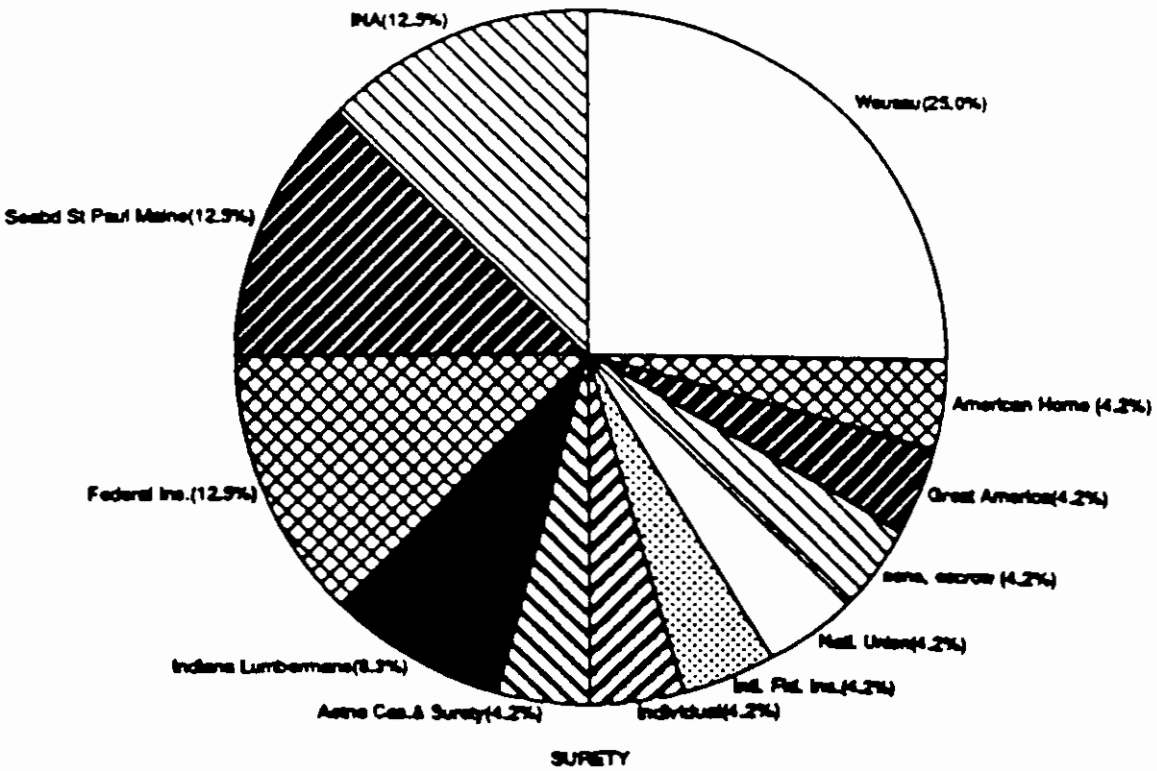


CHART 8
SURETIES' SHARES (24 PROJECTS TOTAL)



This had particular concern to contractors that had been awarded large, indefinite delivery contracts. They feared that sureties might use the total contract maximum, rather than actual work orders issued, to compute their bond capacity limitation.

Tables 2A-C illustrate the experience of the Omaha and Kansas City Corps districts. There were a small number of bids received on several HTW projects. This low number of bids is not necessarily due to the lack of interest in the projects. According to several HTW organizations interviewed, including the Hazardous Waste Action Coalition, Environmental Business Association, Associated General Contractors, National Solid Waste Management Association and the Remedial Contractors Institute, the key factor contributing to lower competition for some HTW projects is the inability of many contractors to secure bonding. It should be noted that in many cases firms cannot obtain bonding despite a proven history of competence in doing such work, strong financial assets and profitability and sound leadership and experience in the firm.

In some cases it was reported by both contractors and government contracting agencies that projects have been delayed due to the shortage of contractors who can obtain bonding and related surety problems. Contracting representatives for both the Corps and the states advised that they have had administrative delays as a result of contractors not being able to obtain appropriate bonding. This additional work has resulted in the slippage of project schedules.

The resulting shortage of qualified firms that are able to consistently arrange surety bonding may be reflected in higher costs to the government. Bonding's limitation on competition, with only four or five final bidders in many cases, may have resulted in higher contract bids than would otherwise be expected. Tables 2A and 2B illustrate the experience of two Corps districts in bid prices and number of bidders.

Smaller contractors, in particular, may be screened out of the HTW cleanup program market due to their inability to secure surety bonding. Several contractors stated that they do not have the extensive financial equity

surety community. Bonding companies perceive that the state of technology of the HTW cleanup process is constantly changing and very ambiguous. It is their opinion that little is known about the adequacy of the technology either concerning immediate or long-term experience. Technology may evolve that renders the present method inadequate. Sureties are concerned that this may leave the designer-builder potentially liable if the present HTW legal climate continues.

c. Surety firms have stated that the present unfavorable legal environment, with widespread litigation and large awards, has made insurance companies very cautious about insuring HTW projects. Although vocal in their assertions that they not be treated as a substitute for insurance, they fear that by bonding such work they may in the future be sought out based on a legal theory which would treat them as if they were insurance. The cause for liability, such as the appearance of a disease 20 or more years after exposure to toxic substances, leads to a very uncertain situation for sureties.

d. According to the surety firms interviewed, toxic tort litigation features are an important reason for their present reluctance to participate in the HTW cleanup field. In the toxic tort arena a very long time period (10 or 20 years) between exposure and development of injury is typical. Unlike other prototypical injury situations, toxic liability involves long time periods[7] between the alleged exposure and the discovery of damages. Since this litigation takes place in state courts, the indemnification under SARA is not helpful, nor legally binding on the states.

e. Insurance. The Hazardous Waste Action Coalition, an organization comprised of technical consulting firms in the HTW field, along with Marsh and McLennan, a large insurance broker, held a meeting in Washington, D.C. on September 13, 1989, in which a series of speakers outlined the insurance and indemnification problems confronting the contracting industry. The collected papers of this meeting are entitled "Pollution Insurance/Indemnification Issues for Engineers in Hazardous Waste Cleanup". The papers point out that the present insurance coverage is not adequate in many areas. They also express the insurance industry's concern that potential litigation uncertainties play a major part in their decisions to forego providing

by the courts as the insurer of last resort or a "deep pocket."[8] This unknown risk has led some corporate sureties to forego involvement in the HTW market. Surety bond producers that have made such a decision indicate that they would be more likely to participate in the market if the applicability of SARA indemnification to the surety was clarified. Moreover, that the performance surety bond be clearly represented as being intended by the Government solely as a guarantee of performance by the contractor and not in anyway as protection for the contractor's tortuous injuries to third parties.

f. Greater risk to Government. In response to claims by some contractor interests that bonding could be substantially reduced for certain categories of HTW work, surety sources stated that risks of non-performance increase if construction contracts are awarded either without surety bonds or with lower rated surety performance bonds. Surety officers contacted in the survey pointed out the trade-offs involved risks to the government if surety bonds were not used on projects that normally would be surety bonded. They emphasized that surety firms perform a valuable service for the government in screening out potential problem contractors from the pool of contractors competing on government construction projects.

g. Indemnification. The sureties and contractors have listed many perceived problems with the present SARA[9] indemnity law. There is dissatisfaction over the amount of indemnification coverage, as well as the extent of the coverage and even what events are indemnified. Sureties find that the definition of what is the maximum dollar coverage of the indemnity is not specific. CERCLA sets the upper limit of the indemnification amount as the funding that is remaining in the Superfund account. However Section 119 says "If sufficient funds are unavailable in the...Superfund... to make payments pursuant to such indemnification or if the fund is repeated. There are authorized to be appropriated such amounts as may be necessary to make such payments. Sureties and contractors are of the opinion that such limitation on indemnification may prove inadequate in the future if there are limited funds available in the Superfund account at the time indemnification requests ripen. The EPA is presently addressing the limit on indemnification problem in proposed draft guidelines for implementing Section 119 of SARA.

conclusive, indicate a pattern of competition in the field that shows a limited availability of eligible contractors. The expanding HTW cleanup requirement will exacerbate this situation

Relationship of project type. Examination of the relationship of the ratio of award amount to government estimate shows that the ratio is acceptable, except for containment projects where the ratio was 1.3 to 1. The largest spread for the variation of high and low bids was in the projects involving collection and disposal of wastes, 2.2 to 1, while the next greatest variation was for gas venting projects which ran 2 to 1. The heaviest competition was evidenced in the average number of bids (7) received for waste containment projects with the next highest number (6.5) bids for alternate water supply projects. It is noted that the average number of bids received for RFP's was only 3, compared with nearly double that amount for Invitations for bids.

Contractors' project market shares. The shares of the HTW cleanup market (24 Corps projects) are heavily concentrated in a relatively small number of contractors. Chart 5 shows that three firms or joint partnerships have about 60% of the dollar market of HTW projects and 5 of the 15 firms have successfully bid for about 58% of the total number of projects. The rest of the projects are being spread among the remainder of contractors, some of which are quite large. While the total is still small, the concentration of activity in a few firms tends to persist and is not assuring to those aspiring to participate in the program.

Sureties' market shares. Surety bond providers are also unequally represented in the list of sureties shares of the project pie. Five sureties or surety combinations account for 83% of the project bond dollars and five sureties or combinations bonded 70% of the Corps 24 projects analyzed in the study. This illustrates the case that few sureties are interested in providing bonding for HTW projects.

The foregoing experience presented in the contracting information from the Corps Kansas City and Omaha Districts reinforces the story presented by the

level of risk does not disappear; it is merely transferred from one entity of society to another. It is not reasonable to expect private industry to voluntarily participate in a high risk enterprise unless a high premium is paid. Many government programs are structured to reduce this uncertainty in new high tech and experimental enterprises to a level that is manageable by the private sector.

Indemnification, insurance, bonding and contractual agreements are all mechanisms to transfer risk. The present situation in the HTW cleanup area brings this aspect of risk, and who must assume risks for the nation's cleanup, into focus. There is a need in the HTW program for the definition of the risk involved and the assignment of each risk to the proper entity. Guidelines are necessary to spell out and clarify the appropriate responsibilities that will be borne by government agencies and those that are within the purview of private enterprise.

Indemnification is a tool that transfers the risks from private industry to the government. One problem with indemnification in HTW cleanups is the uncertainty of coverage. It is not known at the time of bid openings whether coverage will be available to the contractor or the surety, and, if it is, the maximum amount of coverage is unknown.

Another tool commonly used to manage uncertainty is insurance. Insurance presently available to contractors is inadequate. The maximum amount available is much too low, the time period of coverage is too limited, and third parties are not covered. Thus, the transfer of risk to the insurance industry is quite limited.

The bonding process is another way to transfer uncertainties from the government. It is a traditional way to transfer risk in the construction area where construction occurs over a long time period and commitments must be made for the entire project before the project can proceed. The traditional risk covered by construction performance bonds was that the project be completed as designed, that the contractor assumed responsibility during the construction period, the warranty and the latent defect period. Problems have arisen in

industry fears. The underlying industry concern is risk to the contractor and/or the surety. Factors affecting risk include: indemnification, insurance and bonding. These risk factors influence one another, e.g., if indemnification is available to the surety, then bonding may be more readily available. No single action will solve all the bonding problems. Additional conclusions are listed below:

- The government must select the most appropriate acquisition strategy early in the solicitation process. Risk to sureties, contractors and the government should be considered in addition to other site requirements.
- The government acquisition strategy should address the need to make an early decision whether to use a service or construction contract. In some cases, different contract types may be used for different project phases within the same contract. Miller Act, Davis-Bacon Act and Service Contract Act decisions should be made on their merits and without regard to bonding or cost implications.
- Contracts should be structured, the type of contracts selected and bonding requirements established, to appropriately protect the government's interests. These interests include: insuring that contractors capable of performing the contract remain eligible and that the selected contractor performs as promised.
- HTW cleanup agencies should explicitly decide how much performance bonding is required and how that bonding should be structured. Normal practice is to require 100% performance bonding for construction contracts and zero bonding for service contracts, although the contracting officer can select other percentages. We need to assure that the amount selected is only that needed to protect government interests.
- Sureties only want to assure that the remedial action contractor constructs what was required by the plans and specifications. They wish to avoid design/construct contracts or contracts containing major performance specifications.
- There is a strong perception by the industry that difficulties with bonds is limiting competition. RA contractors report that they have not bid projects due to unavailability of bonding. Sureties indicate that the risk is too large.

V. OPTIONS EXAMINED

A. INTRODUCTION

Discussions conducted during the study with industry, contractor, and government personnel raised several possible alternatives that might be taken to increase the availability of bonds to HTW construction contractors. These alternatives fall into two general categories as follows:

- o Non-Legislative Changes. Internal Corps and EPA non-legislative changes in procedures related to contracting strategy and implementation of the authorities which each agency already possesses.

- o Legislative Changes. includes revisions to regulations which guide each agency but which neither possesses the authority to revise independently; revisions to existing statutes so as to, (1) eliminate requirements that serve to lessen the corporate surety industry's interest in bonding of HTW projects and, (2) to clarify that performance bonds are to be used only to assure that the contractor will complete all contractual requirements and are not a vehicle by which third party claims may be satisfied.

Of the options available to the government to alleviate the bonding problem, many are centered on the concept of management of risk by the government. Financial and physical risk exist in the cleanup process and the government needs to incorporate risk analysis into its planning process to examine the trade offs in costs and benefits of the transfers of these risks between government and the private sector. In the case of bonding HTW cleanup projects, the government must examine the assumption of higher risks in non-performance of contracts for HTW cleanup against the gains of more competition by the cleanup industry and the resultant lower prices for projects.

It should be pointed out that the bonding community generally does perform a service for the Government contracting agency in making its evaluation to bond a particular contractor. In making this decision, it carefully analyses the contractor's financial and technical competence to do the work as well as

TABLE 3

TYPES OF OPTIONS

Options	Advantages	Disadvantages	Implemented By
NON-LEGISLATIVE CHANGES			
1. Improved Acquisition Planning and Bond Structuring:			
A. Require increased acquisition planning. Incorporate analysis of service contracts vs. construction contracts and incorporate cost type contracts into acquisition plan.	May reduce obstacles, induces more participation by contractors	Use of service contracts with no bonds may increase risk to government. May request use of bonds from USACE. S.O. Procurement.	Each agency
B. Provide Guidance on Bonding Requirements. Reduction of penal amount of bond. HTW Policy Guidance, 2 year test program.	Reduces bond portion project costs, induces more and greater variety of contractors to bid (e.g. smaller firms).	Limits non-performance protection to government, more marginal contractors.	Each agency
C. Clarify performance period.	Same as above.	All bonds must be in place before notice to proceed is issued. Initially difficult to set up guidance. Can be accomplished more simply by reduction of penal amount of bond.	Each agency
2. Clarify surety liability under RARA:			
A. Define third party risk. Bond form and contract modifications including 3rd party exclusion clauses, exclusion of bond as liability insurance substitute. Requires a change in the regulations.	Removal of sureties' stated objections to contractual clauses. Inducement to participate in HTW program.	Will take one and one-half years to implement interagency coordination needed.	Each agency
B. Surety Indemnification. Provide indemnification for sureties if they assume project control.	Induce more surety and contractor participation in HTW program.	May increase Federal liability for indemnification.	EPA
C. Define bond completion period.	Induces more surety and participation in program.	None.	Each agency
3. Indemnification guidelines: Modify proposed indemnification regulations, establish high maximum limits and clarify qualifying requirements.	Limits Federal liability for indemnification.	May discourage participation by sureties, if limits are set too low.	EPA
4. Communication with Industry: Outreach program for contractors and sureties. Technology education program.	May encourage contractors sureties to participate in program.	Effectiveness unknown.	Each agency
5. Limit Risk Potential:			
A. Clarify contract policy on RFP performance specifications and design-build.	Separating out design portion may encourage sureties to participate in program.	Imprecise clause could limit contractor performance obligations more than necessary.	Each agency
B. Use of irrevocable letters of credit vs. bonds.	Enables some contractors to participate in program.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
LEGISLATIVE CHANGES:			
A. Increase separate dollar limit reserves from RARA fund and increase types of coverage for indemnification and types of coverage for indemnification.	Induce more sureties and contractors to participate.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
B. Specify a dollar cap on liability.	Induce more contractor and surety participation.	Federal government assumes more risk.	EPA
C. Preempt state's strict liability sureties. Provide universal indemnity.	Induce sureties and contractors to participate in program.	Reduction of public protection against HTW hazards.	EPA
D. Modify CERCLA or Miller Act. Specify performance bonds area only to assure completion of contract requirements.	Induce sureties and contractors to participate in program.	Reduction of public protection against HTW liability hazards.	Each agency

Government. This should be done early in the acquisition process to assure that the competition benefits that might be gained by such effort can be fully maximized. The decision of whether to use a service contract or a construction contract must be made on their respective merits and not on the impacts of securing performance bonding. A separate set of procedures is required to establish the bonding requirement.

In making this bonding determination it is also important to recognize that the surety community's concern regarding the risk associated with HTW work will probably lead to the surety not stepping forward to complete the project in the event of a contractor default. Consequently, it is likely that the Government will benefit only from the surety's providing the penal sum of the performance bond. The Government probably will still need to reprocure the work. Contractors pointed out that sureties were requiring substantial financial commitments from contractors as a prerequisite to providing bonding. This fact would tend to make the surety even more inclined to buy itself out rather than assume the greater risk burden associated with its takeover of the defaulted contract. The reality then appears to be that the performance bond is primarily protecting the Government's financial stake in the contract rather than its interest in not having to deal with reprocurement upon default.

In looking at the character of work to be performed under an HTW contract, it may well be that the nature of the work and the payment arrangements employed by the Government may provide a measure of protection in themselves that could warrant a lower bonding percentage. In the excavation situation, and even more so where we are dealing with incineration service work, many of the payments to the contractor are subject to its performing satisfactorily. A default after partial performance requires that the Government procure another contractor to continue performance. This default situation, however, is substantially different from that faced where we are dealing with a building construction project. In the former case, the work to be completed is relatively easy to determine. This is in sharp contrast to the problem facing the Government where multiple subcontractors and complex design requirements must be determined and taken into consideration in a vertical

b. Require Increased Acquisition Planning. The contracting process, including the bonding issues, should be integrated into a project acquisition plan. An analysis of the risk trade offs to the Government may be incorporated into the acquisition planning process for HTW projects. Presently the Federal Government requires performance bonds to assure against the uncertainty of project non-performance on construction projects as mandated by the Miller Act. The cost of this protection should approximate the cost of the potential non-performance risk in the long run. The trade offs of this risk may be examined in the acquisition planning process for each project. The process will analyze the benefits and costs of the Government assuming slightly higher risks in project performance and the resultant benefits and costs of improving the competitive climate for HTW contracting and the consequent reduction in contract prices. This may involve the analysis of each phase of the cleanup and the appropriate level of bonding that would afford adequate protection for the Government's interests and still encourage participation by the bonding industry. Careful examination of the contract alternatives, service contracts or construction contracts, should be carried out by an interdisciplinary team, "recommending" to the contracting officer, although final disposition will be made by the Department of Labor. Meetings are being planned for early summer 1990 between EPA, Corps and Department of Labor representatives to clarify the classification of construction and service contracts under the Davis-Bacon and Service contract Acts.

Cost type contracts should be given careful consideration where there are significant technological unknowns associated with undertaking an HTW project. It is not in the program's interest for the contractor to be required to bear an inordinate share of the risk. Requiring fixed priced contracts under such conditions places both the contractor and surety in an unacceptable risk condition and would increase the cost to the government significantly.

Multiple contracts are another action which could be considered by the Government during its acquisition planning to limit the risk potential for the bonding community. The approach would be to structure the contract requirements so as to limit or isolate the activity requiring a surety bond

plan would place an administrative burden on the project. If additional firms participate, there is a chance of reduced project costs.

2. Clarify Surety Liability.

a. Background. Interviews conducted in the course of the study with contractors and sureties focused on the real concern in the surety community regarding the potential liability arising from their willingness to act as guarantors for HTW projects. This is consistent with the sureties' stand that they are bonding execution of plans and specs, not project performance. This is a perceived danger, not one based on any particular court ruling involving a surety guarantee situation. The perceived liability arises from potential third party injury claims and an ill-defined bond coverage completion period.

The surety's concern for liability results from the trend in cases arising from the monumental asbestos litigations where the courts have sought some deep pocket to compensate the injured party. In some cases, the courts have looked to insurance companies for such relief despite the insurance industry's disclaimer of any liability under their policies. The sureties view themselves as similar to these situations, with potential deep pockets from which injured parties may seek relief. They recognize that they are not insurers of such injury, but have little faith that the courts will take note of the distinction between insurer and guarantor if there is no other financially viable party against which a valid judgement can be executed.

The surety community, similar to the insurance industry, uses a secondary market to spread the risk associated with any particular bond arrangement. This secondary market has made it clear that it is not interested in sharing the risk associated with HTW projects. As a consequence, surety firms are more and more being called upon to undertake greater risk levels for such work. The insurance industry responded to the loss of its secondary insurers by withdrawing completely from the pollution liability coverage market. The surety industry, although still maintaining a reduced presence, does have certain members of its community which have followed the insurance industry lead and chosen to withdraw from providing bond coverage for such work.

c. Surety Indemnification. Another concern that needs to be clarified is the extent of indemnification, if any, that the surety would be entitled to as a result of providing bonding on the contract. Indemnification for remedial action contractors performing HTW work is permitted by 42 U.S.C. 9619, provided that certain requirements are met. Sureties question the applicability of this indemnification to them. Since it has a major impact on the evaluation of the risk for bonding such work, clarification is needed to allow the industry to adequately quantify its potential long-term risk.

d. Define bond completion period. The government will define the point at which bond completion requirements have been fulfilled. This definition is within the authority of the procuring agencies.

Recently, in reply to a surety's concern over its right to indemnification in the event of a default of the bonded contractor, EPA advised that the surety would be eligible for indemnification if it elected to stand in the shoes of the defaulted contractor and complete performance of the remedial action. A final decision has not been made as to how this will apply to a surety that elects to take on responsibility for performance, but does so through its procuring another contractor. It is clear that this issue must be clarified with respect to the EPA superfund projects.

3. Indemnification Guidelines.

a. Background. There is no defined limit of coverage in EPA's interim guidance on indemnification that can be addressed with certainty by surety or contractor interests in assessing their potential risk. Likewise, the requirements that will need to be met to become eligible for the indemnification are not completely clear with respect to the contractor. They are even more ambiguous regarding the surety. These unknowns appear to exacerbate an already bad situation and provide no incentive for industry to move forward and commit themselves and their assets to support the program.

It is unclear from the data compiled in the study the effect that clarification of this issue will have on the surety and contractor community. DOD, which has not provided indemnification, for its work, has been able to

hazardous and complex, many projects use proven engineering principles which have a long history of use and acceptance. The extreme caution on the part of the surety industry, limited number of projects constructed and reluctance of sureties to become involved in HTW projects, all mesh together to cause the surety to assume each HTW project is the same despite the considerable variation in the types of projects. A number of projects are water supply construction alternatives that have no direct involvement with hazardous wastes.

b. Outreach Program. To overcome this lack of understanding, the EPA and the Corps could sponsor outreach efforts aimed at bringing both sureties and contractors together for purposes of discussing with industry technical aspects of different types of HTW projects. The agencies should also focus on the different site conditions and various contractual provisions that can distinguish one site from another and the technical aspects of using state of the art technology. While not eliminating all impediments to surety involvement, this could go a long way toward lowering the surety industry's reticence to participate on some of the less complex projects.

5. Limit Risk Potential.

a. Background. Sureties expressed particular concern that the Government not package its procurements, as design-build contracts including the use of performance specifications. In these cases, the surety is concerned that its risks are significantly enlarged from the situation it faces where design has been completed and the contractor need only construct the designed project in order to satisfy performance.

b. Clarify Contract Policy. The government should consider accepting design responsibility where performance specification requirements have been met. Performance specifications are used to some extend in all construction contracts. Incineration and ground water treatment contracts have a very large performance specification component and will remain that way. The government will continue to allow contractors to propose the complex equipment needed to meet specific site treatment requirements. Once the contractor has demonstrated that the equipment meets the performance specification, the

1. Increase the coverage for indemnification. Expand the types of coverage for liability indemnification and make these available to the surety as well as the contractor.

2. Establish a dollar cap on HTW liability.

3. Preempt state laws covering strict liability, and provide universal indemnity.

4. Amend CERCLA and/or Miller Act to specify that the purpose of performance bonds is to assure the government that the contractor will complete all contractual requirements and obligations. Performance bonds shall not be a vehicle for third party liability claims.

EPA and Corps representatives should meet with Department of Labor to clarify the contract requirements of the HTW program and the relationship of these to the: Miller Act, Davis-Bacon Act and related regulations.

A program of continuing review of contract actions will insure continued competition in the contracting process.

Emphasis should be placed on appropriate acquisition planning which takes into consideration all factors that relate to the competitiveness of the contract situation.

2. Clarify Surety Liability Under SARA.

EPA should move immediately to clearly define the extent to which it will provide indemnification coverage to sureties on HTW projects. Extending indemnification by the Federal government to sureties should be explored when they fulfill these surety obligations by stepping in and completing the project for the defaulting contractor. Presently this area is not well defined. EPA should also institute, in conjunction with the Corps, an effort to revise the present FAR performance bond form to deal with the concerns raised by sureties on potential for third party actions looking to the bond for injury judgement recovery. A task force composed of appropriate personnel from both agencies should be established to work on having this revision instituted for HTW projects. At the same time, each agency should require its internal procurement elements to assure that wording is included in invitations and solicitations disclaiming any interest by the Government in having the performance bond being available to cover third party injury claims.

3. Indemnification Guidelines.

A new indemnification clause will be implemented by the Corps which will assure the indemnification of HTW contractors in the event that they are not able to secure adequate insurance for firm fixed price contracts. The indemnification will extend to third party liability by the surety.

4. Communication with Industry.

substantially reduce many of the concerns of the surety industry and contractor community in being involved with Superfund remedial action work.

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APPENDICES

Appendix A:

List of Contacts

APPENDIX A

HTW BONDING STUDY

List of Contacts

Name	Organization	Address	
John Steller	Ill. Dept land Pollution ctrl	Springfield	IL
Lynn Schubert	American Ins. Assn	Washington	DC
Brian Deery	Assn. Genl. Contr/Amer	Washington	DC
Stuart Binstock	Assn. Genl. Contr/Amer.	Washington	DC
Dave Johnson	Assn. Genl. Contr/Amer.	Washington	DC
Jack Mahon	CECC-C OCE	Washington	DC
Greg Noonan	CECC-C OCE	Washington	DC
Chuck Schroer	CEMP-C OCE	Washington	DC
Walter Norko	CEMP-CP OCE	Washington	DC
Sara Bunch	CEMP-RS OCE	Washington	DC
Jim Gibson	CEMP-RS OCE	Washington	DC
Paul Lancer	CEMP-RS OCE	Washington	DC
Noel Urban	CEMP-RS OCE	Washington	DC
Gene Jones	CEMRD-CT	Omaha	NE
Bruce Anderson	CEMRD-OC	Omaha	NE
Norm Spero	CEMRD-OC	Omaha	NE
August Spallo	CEMRK-OC	Kansas City	MO
Joan Chapman	CEMRK-CT	Kansas City	MO
Steven Switzer	CEMRK-CT-K	Kansas City	MO
Frank Bader	CEMRK-ED-T	Kansas City	MO
Lee Fuerst	CEMRK-ED-T	Kansas City	MO
Donald Robinson	CEMRO-CT	Omaha	NE
Cathy Vanetta	CEMRO-CT	Omaha	NE
Kirk Williams	CEMRO-CT	Omaha	NE
Stanley Karlock	CEMRO-ED-E	Omaha	NE
Gary Henninger	CEMRO-OC	Kansas City	Mo
Ann Wright	CEMRO-OC	Omaha	NE
Rick Heinz	CEORD-RS	Cincinatti	OH
Mary Melhorn	CEPR-ZA	Washington	DC
George Wischman	CEPR-ZA	Washington	DC
Richard Corrigan	CH2M Hill	Washinton	DC
S. McCallie	CH2M Hill	Denver	CO
Jim Lane	Corroon & Black	Madison	WI
Peter Bond	Davy Corp	San Francisco	CA
Mike Yates	Ebasco Constr. Inc.	Lyndhurst	NJ
William Bodie	Environmental Bus. Assn.	Washington	DC
Paul Nadeau	EPA HQ	Washington	DC
Tom Whalen	EPA HQ	Washington	DC
Carl Edlund	EPA Reg Off 6 (Dallas)	Dallas	TX
Tom Bosley	Fidelity & Deposit Co.	Baltimore	MD
John Herguth	Foster Wheeler Corp.	Clinton	NJ
Terre Belt	Hazardous Waste Action Co	Washington	DC
Joe Turner	Huntington Dist.	Huntington	WV
John Daniel	IT Corp	Washington	DC

Appendix B:

Sample Forms

CERTIFICATE OF SUFFICIENCY

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true.

NAME (Type or print)	SIGNATURE

OFFICIAL TITLE

ADDRESS (Number, Street, City, State, ZIP Code)

INSTRUCTIONS

1. This form shall be used whenever sureties on bonds to be executed in connection with Government contracts are individual sureties, as provided in governing regulations (see 41 CFR 1-10.203, 1-16.801, 101-45.3). There shall be no deviation from this form except as so authorized (see 41 CFR 1-1.009, 101-1.110).

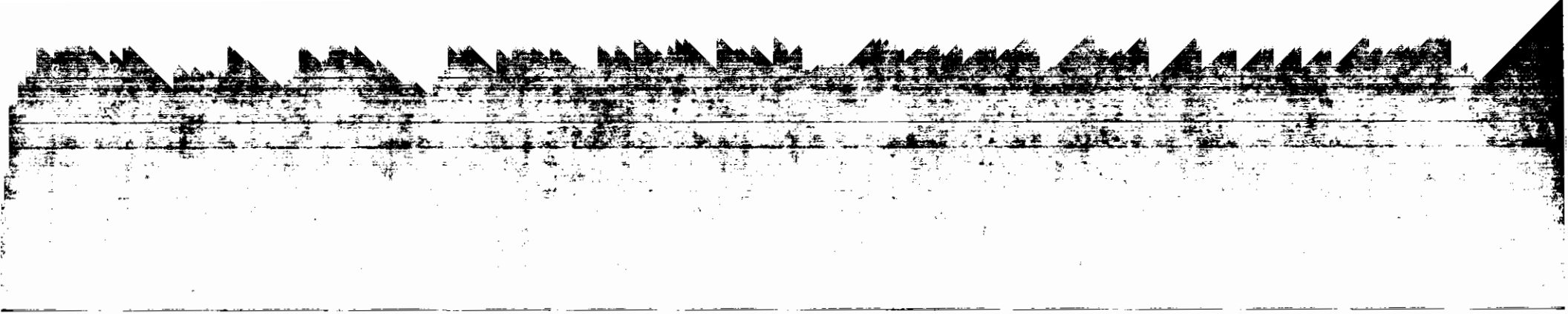
2. A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member. Stockholders of a corporate principal may be acccepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports.

3. An individual surety shall be a citizen of the United States, except that if the contract and bond are executed in any foreign country, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, or any other territory or possession of the United States, such surety need only be a permanent resident of the place of execution of the contract and bond.

4. The individual surety shall show net worth in a sum not less than the penalty of the bond by supplying the information required on the face hereof, under oath before a United States commissioner, a clerk of a United States Court, or notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal, it shall be affixed, otherwise the proper certificate as to his official character shall be furnished.

5. The certificate of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

U.S. GOVERNMENT PRINTING OFFICE : 1984 O - 437-307 STANDARD FORM 28 BACK (6-84)



CORPORATE SURETY(IES) *(Continued)*					
SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $	*Corporate Seal*
	Signature(s)	1.	2.		
	Name(s) & Title(s) *(Typed)*	1.	2.		

INSTRUCTIONS

1. This form is authorized for use when a bid guaranty is required. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. The bond may express penal sum as a percentage of the bid price. In these cases, the bond may state a maximum dollar limitation (e.g., 20% of the bid price but the amount not to exceed _____ dollars).

4. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)". In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed "Affidavit of Individual Surety" (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

5. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in or for New Hampshire, or any other jurisdiction requiring adhesive seals.

6. Type the name and title of each person signing this bond in the space provided.

7. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror".

CORPORATE SURETY(IES) (Continued)

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	

BOND PREMIUM ▶	RATE PER THOUSAND	TOTAL
	$	$

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorization person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)". In the space designated "SURETY(IES)" on the face of the form insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

CORPORATE SURETY(IES) *(Continued)*

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) *(Typed)*	1.	2.	

INSTRUCTIONS

1. This form for the protection of persons supplying labor and material, is used when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a–270e). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative's relationship to the Principal, member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction regarding adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

GPO : 1984 O - 433-366

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Alabama	Pollution Control Grant Fund (§ 22-22a-16)	No 22-229(m) includes wrongful acts, omissions and negligence	No	No	Yes
5/89	Alaska	No	Yes, but RA must have control over hazardous substances. (46.03.822)	No	Yes, but does not apply to RACs (34.20.100)	Anti-deficiency statute is limited to mortgage has no application RACs (34.20.100)
5/89	Arizona	Water Quality Assurance Revolving Fund (49-282)	No	No	Yes, for sole negligence in certain AE	Yes. Section 34-154 precludes public sector indemnities unless funds are appropriated
5/89	Arkansas	Remedial Action Trust Fund (8-7-508)	No. 8-7-420 holds RACs to a negligence standard	No. 8-7-512 requires RACs to indemnify states.	No.	No. DPCE contracts with consultants and contractors have received full state indemnification.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Delaware	Hazardous Waste Management Act, § 6316, allows Department of Conservation to receive funds in carrying out Act.	Yes, if RAC treated or disposed of wastes (7DE Code 6301-6309)	No.	Yes, for negligence of all parties in all phases of design and construction projects (6DE Code 2704).	Yes, sovereign immunity statutes exempt the state from liability (10 DE Code-4001, et seq)
5/89	District of Columbia	None.	No.	No.	No.	No.
5/89	Florida	Hazardous Waste Management Trust Fund (403.725)	Yes, if RAC arranged for disposal or treatment (Fla.Stat.Ann. 403.727)	Yes, for state and local contractors (376.319)	Yes. For acts or omissions in certain construction contexts unless indemnification capped or consideration given.	No.
5/89	Georgia	Hazardous Waste Trust Fund (12-8-68)	Yes, if RAC contributes to the release (12-8-81)	No.	Yes, for sole negligence in certain construction contexts (13-8-2)	No.
5/89	Hawaii	None, but Director has authority, with approval of the Governor, to receive money from the Federal and State government	No, however, Director was authorized in 1988 to bring state into compliance with federal law	No.	Yes, for sole negligence in certain construction contexts. (431.453)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
3/89	Iowa	Hazardous Waste Remedial Fund	Yes, if RAC has control over hazardous substance (§§38.392), but no (negligence standard) if transport hazardous waste	No.	No.	Yes, no state indemnification if paid to do the work
3/89	Kansas	Environmental Response Fund (65-3454a)	No, liability only for gross negligence or reckless wanton or intentional misconduct (65-3472)	No.	No.	No.
3/89	Kentucky	Hazardous Waste Assessment and Management Fund (224.076)	Yes, if RAC has possession or control over discharge or caused the discharge (224.077)	No.	Maybe. Kentucky Constitution §§ 50-177 arguably bars indemnification	Yes.
3/89	Louisiana	Hazardous Waste Protection Fund (30-2198) and Hazardous Waste Site Cleanup Fund (30-2205)	No. Statutory negligence standard (9-2800.3(a))	Yes, holds harmless state contractors from property damage and personal injuries caused by negligence (30-1149-1)	Yes, applicable to owners of facility or any person liable for discharge or disposal (30-2270)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Minnesota	Environmental Response, Compensation and Compliance Fund (§ 115 B.20)	No, so long as RAC is working under State or Federal Acts (115 B.03)	No.	Yes, cannot transfer liability to another person (115 B.10)	No.
5/89	Mississippi	Hazardous Waste Facility Sigint Fund (§ 115 B.20)	Yes, if it helps create necessity for cleanup	No.	Yes, for own negligence in certain construction contents (31-5-41)	No.
5/89	Missouri	Hazardous Waste Fund (260.391)	Yes, if RAC has control over hazardous substance (260.330), but liability capped at $3 million per occurrence (260.552)	No, but RACs right indemnification is preserved against other liable parties. (260.552: 1-(1))	No, 260.552:1-(1) recognizes right of a RAC to seek indemnification	No.
5/89	Montana	Environmental Quality Protection Fund (75-10-704)	No. Action taken to contain or remove a release is not an admission of liability for the discharge. (75-10-60, et seq.)	No.	Yes, for fraud or negligent violation of the law (28-2-702)	No.
5/89	Nebraska	None.	No, but negligence standard for those who cause discharges	No.	Yes, for own negligence in certain construction contents. (25-21,187)	Yes. The State constitution provides for immunity from suits. (Art. III.§ 18)

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	New Mexico	Hazardous Waste Emergency Fund (74-4-8)	No.	No.	Yes, for negligence, acts or omissions in certain construction contexts unless certain actions excluded (56-7-1)	Yes, New Mexico has a sovereign immunity statute
5/89	New York	Hazardous Waste Remedial Fund (NY Env. Cons. Law 27-0916)	No, no negligence standard is applied (NY Env. Cons. Law 27-1321(3))	No.	Yes, for negligence in certain construction AE and surveying contexts (Gen.Ob. Laws 5-322.1, 5-323, 5-324)	Contracts cannot be let for amounts exceeding the appropriation (State Fin. Law 136)
5/89	North Carolina	Hazardous Waste Fund and Hazardous Waste Site Remedial Fund (130 A-290 et seq.)	Yes, if RAC has control of hazardous waste discharge (143-215.93)	No, but RAC may reimburse state for role in inactive hazardous waste site. (130A-310-7)	Yes, for negligence in certain construction contexts (228-1)	Yes.
5/89	North Dakota	None.	No.	No.	Yes, for fraud or negligent violations of the law (9-08-02)	Yes, Article I § 21
5/89	Ohio	Hazardous Waste Cleanup Fund (3734.28)	Yes, if RAC transports or disposes of wastes (3734.13,16)	No. RAC may have to indemnify state (3734.22)	Yes, for negligence in certain construction contexts. (2305.31)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Pennsylvania (continued)	Solid Waste Management Act imposes strict liability on violators. (6018.401 +501) No, RACs must meet conditions set forth in Hazardous Sites Clean-up Act, § 702(e)				
5/89	Rhode Island	Environmental Response Fund (23-19-1-23)	No. Absolute liability only for unauthorized transportation, storage or disposal (23-19-1-22	No.	Yes, for negligence in certain construction contents (6-34-1)	Yes, state liable in tort actions subject to period of limitations and monetary limitations (9-31-1)
5/89	South Carolina	Hazardous Waste Contingency Fund (44-56-160)	Yes, for unpermitted water discharges (48-1-90) and for transporting or disposing of hazardous waste without reporting to Agency. (44-56-130, 140)	No.	Yes, for sole negligence in certain construction contents (32-2-10)	Yes.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Utah	Solid and Hazardous Waste Act (26-14-1, et seq)	Yes, if RAC contributed to the release. (26-14-19(4))	No.	Yes, for sole negligence in certain construction contexts (13-8-1)	Yes.
5/89	Vermont	Solid Waste Management Assistance Fund (Tit. 10,6618)	Yes, if RAC arranged for disposal of treatment (Tit. 10,6605)	No.	No.	No.
5/89	Virginia	Virginia Waste Management Act (10.1-8602)	No.	No.	Yes. Voids agreements by contractors to indemnify other for sole negligence (11-4.1)	Waiver of sovereign immunity (8.01.192)
5/89	Washington	Hazardous Waste Regulation (70.105B.010)	No.	Yes. (70.105 B.100(3))	Yes, for negligence in certain construction contexts (4.24.115)	No.
5/89	West Virginia	Hazardous Waste Emergency Response Fund (20-56-1)	No.	No.	Yes, for sole negligence in certain construction contexts. (55-8-14)	No.

PART B

Adequacy of Legal Protection in DRMS Hazardous Waste Disposal Contracts

REPORT TO CONGRESS ON LIABILITY, BONDING, AND INDEMNIFICATION ISSUES FOR DEPARTMENT OF DEFENSE RESTORATION PROGRAM AND HAZARDOUS WASTE CONTRACTS

Office of the Deputy Assistant Secretary of Defense
(Environment)

Response Action Contractors' Liability Issues

Regarding the Defense Environmental Restoration Program

Conclusions and Recommendations

Conclusions:

The Department of Defense (DoD) faces a major challenge to cleanup its contaminated sites quickly, effectively and without excessive cost to taxpayers. The DoD cleanup and remedial program relies on the architectural and engineering services and the design and construction capabilities of private sector remedial action contractors (RACs). The RAC community expresses reservations about its members' future willingness to undertake this work for the DoD because of perceived uncertain, but believed potentially large, risk to their firms inherent in DoD's remedial action work. In order to better understand the substance and basis of these concerns the Department of Defense has endeavored to work with representatives of the RAC community, other private sector contracting entities, as well as representatives knowledgeable about the practices and concerns regarding the insurance and surety sectors of the nation. The study concludes that contractors have the following deeply held perception of the current liability situation:

- RACs, because of joint strict and several liability under federal and state law, may be found liable when they are not at fault.

- The resulting probability of insolvency through imposition of liability without fault is uncertain and therefore unacceptable.

    - RACs are unable to secure adequate insurance due to the insurance industry's reluctance to become involved where the risk is so uncertain and potentially large.

    - RACs are also hampered in obtaining performance bonds required by the Miller Act for DoD construction contracts. Surety companies are reluctant to write bonds. The uncertain and potentially large risk for the situation has decreased availability and increased costs which are ultimately reflected in DoD's costs.

- RAC's believe they are assuming risks that properly go to DoD as the generator of hazardous waste and owner of the site.

These perceptions have serious implications for the continued progress of the DoD's cleanup program, as DoD may not be able to sustain rapid progress in its cleanup program without a heavy reliance on knowledgeable qualified contractors.

The Department has also concluded the following as to the current status of response action contracting and the legal liabilities of the Department:

- DoD is currently able to get adequate competition for our remediation contracts.

- Some well-regarded companies are not bidding on DoD contracts citing the risk issues as their reason not to compete.

- DoD is not able to determine, based on this study, what impact the contractor's perceived liability exposure is having on their bid pricing of DoD contracts.

- There is no evidence that quality of work on DoD contracts is being affected.

- The current liability picture particularly discourages contractor participation in innovative remedies as they place potential additional risk on the contractor. A contractor's prime defense to their perceived liability exposure is to use standard, conservative measures wherever possible, thus favoring an excessively conservative approach to remediation.

- RACs express a willingness to be liable for their failure to perform adequately on their remediation contracts.

- DoD as waste generator, facility owner, and overall manager of its remediation effort is and should be ultimately responsible for future problems associated with its remediation efforts, however, it should have a legal remedy against a non-performing contractor.

    - As a waste generator and owner of the contaminated site DoD is in a different liability relationship with its contractors than EPA with its contractors. As such liability shifting rules developed by EPA for dealing with its contractors may not be appropriate for DoD.

- Private firms hiring RACs for private cleanup work engage in risk sharing strategies with RAC contractors which may be adaptable to DoD contracts.

    - Different types of remediation projects have different inherent risks and therefore may call for different risk sharing strategies.

    - Appropriate risk sharing strategies should result in reduced cleanup cost to the Department and the taxpayer, without increasing the ultimate risk to the treasury.

    - Adoption of risk sharing strategies may require regulatory and legislative reform.

Recommendations:

Based on the foregoing conclusions, the Department is concerned remedial action contractors' perceptions may lead in the future to reduction in competition, escalation in costs, lowering of quality, and increased risk to the public. We are also very conscious that any recommendation we adopt for action or inaction, will have economic consequences. Any choice inevitably confers competitive advantage on some contractors and disadvantage on others. We must make sure we understand the nature and implications of the incentives and disincentives our choices imply. We must encourage responsible and professional behavior by our contractors. We must avoid creating incentives for behavior that diverts government resources from the primary goal of cleanup. Ultimately, whatever strategies we adopt should improve the Department's ability to perform effective cleanup in a timely manner at a responsible cost to the taxpayer.

Based on information developed in doing this report, the Department is implementing changes in its contracting strategies and policies within its control to resolve some of these issues. These include better acquisition planning including varying types of contract strategies, reducing amounts of bonds required on construction contracts or use of rolling or phased bonds, allowing irrevocable letters of credit in lieu of bonds, and retaining certain work elements under DoD control (e.g. signing hazardous waste manifests). The environmental and engineering arms of the military departments will continue to examine their current contracting practices with a view to recommending changes in guidance, policy, regulations, and legislation to enhance the effectiveness of our environmental and remedial action contracting. We have tasked them to ensure the scope of their study addresses appropriate and equitable risk sharing between the DoD and its contractors in the cleanup program, and to make specific recommendations for action to be taken. The DoD is now also engaged in a comprehensive review of the Federal Acquisition Regulations so as to ensure adequate treatment of environmental requirements.

Two recommendations merit further consideration. The first would resolve the extent of liability of a surety to a remedial action contract where their only involvement is in providing a bond. This issue was addressed in the last Congress by amending section 119(g) of the Comprehensive Response Compensation and Liability Act to specifically broaden coverage for sureties at National Priorities List sites. Extending this principle to all DoD sites, whether or not on the NPL, would help bring sureties back into writing bonds for DoD cleanup contracts at a reasonable prices. This should broaden competition for contracts, improve timeliness, and reduce overall costs to the Department. This should not work a disservice to innocent third parties, as ultimately it is the Department that is responsible for the remediation. The prime purpose of the surety is to ensure the Department receives the fiscal benefit of the contract.

A more wide-sweeping risk sharing concept evolved from discussions during the preparation of this report. This concept would involve limiting a Response Action Contractor's liability to outside persons. The Department and any other true

potentially responsible parties would be designated as those solely responsible for damages to innocent third parties for damages arising out of a remediation action at a DoD site--logical application of current law as to generators and operators of hazardous waste facilities. The DoD's contracts with its RACs would then provide for recovery by DoD from the RAC if the damages resulted from the RAC's negligence. This concept is similar to the latent damages clause currently used in construction contracts.

The time for preparation of this report was short considering the complexity of the issues. Among the areas that still need substantial further analysis are the total cost implications of various risk sharing strategies as compared with the long term liabilities of the government. We will continue working with the contractor community and other interested parties to explore these and other recommendations and solutions to improve the Department's clean-up program.

APPENDIX 1

SAME Forum Proceedings

SOCIETY OF MILITARY ENGINEERS

ENVIRONMENTAL CONTRACTS FORUM

30-31 JANUARY 1991
BOLLING AIR FORCE BASE

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

EXECUTIVE SUMMARY

On 30 - 31 January 1991, the executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting.

During the forum, the following key issues were raised:

a. There is a risk to the remedial action contractor (RAC) performing environmental work. Part of this risk are the unknowns associated with the work. Another part is the potential for third party liability suits resulting from the performance of such work.

b. RACs are unable to obtain professional performance liability insurance for hazardous waste site cleanup projects. The insurance industry is reluctant to provide such insurance due to the high risk of liability associated with the performance of such work. Available insurance only covers the period of work performance; not the period during which RACs are most susceptible to third party liability suits.

c. RACs are unable to obtain surety bonds required for Federal government hazardous waste cleanup projects because the surety bond industry sees a high risk from liability in issuing such bonds. Available bonds are generally for projects of less than $5M value. Some companies are self-bonding in order to meet governmental requirements.

d. RACs feel that the Department of Defense (DOD) is responsible for the presence of the hazardous material on the site and therefore, should be responsible for their portion of the risk associated with site cleanup. RACs believe that DOD should indemnify RACs performing work against third party liability to cover the government's portion of the risk.

In response to the concerns raised by RACs, DOD representatives indicated that they would consider the following potential solutions to resolve the issues raised:

a. Change the laws so that RACs are excluded as a potentially responsible party for liability suits resulting from cleanup actions.

b. Revise the Federal Acquisition Regulations (FAR) to extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program.

c. Limit the statute of limitations for contractors on environmental cleanup projects and limit the contractor's liability for a project.

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine equitable distribution of the risk between the contractor and the government as a part of the contract.

SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE

A. INTRODUCTION

The executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base on 30 and 31 January 1991 to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting. In attendance at this forum were representatives of the Office of the Deputy Assistant Secretary of Defense (Environment), Army, Navy, Air Force, and Coast Guard and executives representing remedial action contractors (RACs) that perform environmental cleanup services for the Department of Defense and private industry. A list of attendees for this forum is provided as Attachment A to this report.

This forum was co-chaired by Captain James A. Rispoli, CEC, USN, Vice President, Environmental Affairs, Society of American Military Engineers and Mr. Russ Milnes, Principal Deputy to the Deputy Assistant Secretary of Defense, (Environment).

Prior to this forum, invitees were asked to submit discussion papers on any aspect of the topic issues. Suggested discussion topics included: what are the liability concerns; what are the experiences with regard to liability and bonding; how is the risk of performing environmental work assessed; and how do the problems of liability and bonding affect competition. Seven papers were submitted in advance or during the forum. These papers were provided as attachments to the draft proceedings of the forum.

B. OPENING REMARKS

Captain Rispoli opened the forum by outlining the objective of the Environmental Contracts Forum, which is to facilitate an ongoing frank and open discussion of programmatic and contractual issues between industry and the military services. He indicated that this was the third session of this executive forum, and that SAME had been asked by the Office of the Deputy Assistant Secretary of Defense (Environment) to further address the issues of liability, indemnification, and bonding to assist them in obtaining views so that DOD might prepare a report to Congress. To increase the dialogue, CAPT Rispoli indicated that additional contractors had been invited to participate. CAPT Rispoli stated that proceedings of the forum would be issued. These proceedings would not provide any quotes or attribution. He asserted that the forum was not a place for debate, but was a means to discuss the issues so that all in attendance could listen and learn. He asked if there would be any objections in having submitted papers published as a part of the forum proceedings. No objections were raised.

Mr. Milnes addressed the forum stating that the only means of solving environmental cleanup liability problems was through an open forum. He indicated that the Department of Defense (DOD) has pledged to comply with its environmental obligations. The installation restoration effort is important, and as the DOD moves from the study phase, it recognizes that action must be taken to ensure site cleanup progresses smoothly. He emphasized that the DOD wants to finish the cleanup business. Mr. Milnes stated that his office wants to come to grips with the hazardous waste site cleanup contract issue. Performance bonding is an issue; legislative fixes may be possible, but he did not see this as a solution. He explained that if the DOD and the cleanup industry do not

for a cleanup in certain states, and therefore may choose not to bid. They indicated that in performing some work, they were staking the survivability of their corporation. When asked, the RACs explained that, in working with the private sector, the RAC shares the risk with the client. This protects the contractor. The point was raised that the owner of a waste site owns the waste, and the RAC is helping to clean it up. Therefore, the site owner must share a good portion of the risk.

The issue of strict liability was raised by the RAC representatives. If anyone has a connection with a hazardous waste site, they are liable. Proper behavior has not excused liability.

When working for the Environmental Protection Agency (EPA) on orphan sites, there is a greater risk to the RAC. The EPA indemnifies the RAC under Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This indemnification only covers negligence and not strict liability. The RAC must look at the state laws when deciding to accept a risk.

Another issue raised was that in some instances, a DOD activity required a RAC to sign hazardous waste manifests. This action places liability on the RAC for transporting of wastes. If the RAC had known it would be required to do this, it would not have bid on the job without indemnification. A DOD representative indicated that, generally, the DOD signs the manifest as the generator. The RAC representatives indicated that even if the contractor does not sign the manifest, but arranges for transport, the contractor could be liable, a potentially responsible party (PRP). Even if the contractor doesn't arrange the transport, but is on site, it may be sued. The contractors emphasized that defense costs are a real-time cash flow problem and a real risk even if the contractor is not involved or is innocent.

The problems for the RAC were summarized as follows:

a. There is an inherent risk associated with doing environmental work. RACs are dealing with anomalies which are inherently difficult to model.

b. There is an environmental risk of third party liability.

c. There is no incentive for innovation. Before innovation will be employed by contractors, there must be an agreement between the client and the contractor, and the beneficiary of the innovative practice is required to assume liability. Innovation is prohibitive in a regulatory atmosphere. There is generally no innovation in the U.S.

d. The architect-engineers (A-Es) are being expected to accept the liabilities of others. Liability insurance is not available in the market. If it is available, it is only for the period of the job.

e. Requirements vary from state to state. There is a bright spot for the RACs in that there is more flexibility shown when dealing with states than when dealing with the Federal government. Some states may change the specifications on their cleanup projects to permit innovative technology. Many see some states assuming the liability of PRPs. State regulators are a part of the Record of Decision (ROD), and this permits flexibility in dealing with the states.

"prior acts". RACs are paying premiums but are not receiving future coverage. The topic leader indicated that if states had negligence statements similar to Section 119 of CERCLA, then insurance companies might become more interested in providing such insurance. There are presently no magic solutions.

The topic leader was asked the insurance industry's plan of action. The response was that the insurance industry is "slugging out" solutions on a case-by-case basis. The industry has not been able to agree on alternatives to the current situation. A formal definition of "pollution exclusion" is a possibility. A general discussion on possible approaches (solutions) followed. A law similar to Price-Anderson which would be applicable to the toxic waste cleanup industry was mentioned as a potential solution. This solution would create three layers of protection in the event of liability: the insurance layer, the owner/operator layer, and the government layer.

3. Near and Long Term Environmental Restoration Contracting Strategies.

Each of the service representatives made a short presentation on environmental restoration contracting strategies. Described were current efforts, current problems, and actions being taken to clean up identified hazardous waste sites.

4. The Availability, Costs, and Limitations of Corporate Surety Bonds to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors.

The topic leader from the insurance industry indicated that there were considerable problems with the issuance of corporate surety bonds. Contractors must post a surety bond for Federal work under the Miller Act. At this time, there are few bonds available for work on hazardous waste sites.

The topic leader described the problems of issuing bonds for such tasks. Surety bonds are underwritten only to cover the performance of a contractor and the payment of suppliers for construction work. They are written based on the quality of the contractor (ability to do good work, quality of people on site, equipment, how well the contractor has done on similar efforts, and the availability of contractor finances to fulfill the contract requirements). Underwriters normally develop a long-standing relationship with the contractor. Liability from third party suits is not normally considered (this is normally covered by commercial general liability insurance). Recently, however, surety bond issuers have come under attack in the court room because they are the only "deep pocket" remaining in a law suit (RACs are normally people rich, but asset limited).

There has been a lack of indemnification for surety bond issuers for hazardous waste site work. Anyone involved in hazardous waste site work (including the surety bond underwriters who are only covering contractor performance and supply payments) have been found to be liable. If the RAC defaults on such work, the surety principal would be required to hire a completing contractor and, consequently, may be construed to have contracted for the removal of hazardous waste and subjected itself to liability.

Another issue with hazardous waste site bonding is the bond termination date. Normally, a bond is terminated when all work has been satisfactorily accomplished on a project. Due the possibility of long time periods associated with hazardous waste site cleanup action (including the prospect of having to reinitiate work), the bonding company may be required to pay claims long after work has been completed on a project.

5. Further Discussion on Industry's Liability Concerns with Regard to DOD Environmental Restoration Work and Potential Solutions to Address These Concerns.

A DOD representative led this topic to generate further discussion on the key issues and to explore potential solutions to these issues. The topic leader indicated that DOD was looking for solutions that would result in good (technical and timely) cleanups of its hazardous waste sites, at a good price, and maintain a good contractor base which earns a fair profit and is a viable community. The RAC representatives indicated that this would be possible if there was equitable risk sharing between the RACs and the DOD.

It was suggested that value-engineering clauses in contracts be utilized. Some contractors indicated that this effort doesn't work very well, due to lack of timeliness in the government's response. This lack of timeliness causes contractors to stop trying. A DOD representative indicated that in situations in which a technology is approved in the ROD, there is reluctance to consider value-engineering proposals because it may mean reopening the ROD. A Navy representative indicated that his service welcomes value-engineering. The services indicated that when they become aware of roadblocks, they would take action to eliminate them.

A question was raised whether the RACs normally revalidated the remedial investigation/feasibility study (RI/FS) when contracted to perform remedial design/remedial action (RD/RA). The RACs agreed that they would revalidate the data obtained by another contractor. The degree of revalidation would depend upon the contractor who performed the RI/FS. Such revalidation could cost up to 20 percent of the RD/RA effort.

The Navy's Comprehensive Long Term Environmental Action, Navy (CLEAN) contract was discussed. The RACs were asked why they bid on these contracts since they did not know the cleanup effort involved. The RACs said that cost-plus (rather than fixed fee) contracting of CLEAN was a plus. They remarked that they would be better able to define the work and get a good price to perform a full scope of each task. As long as the cleanup effort was on the base, the possibility of third party liability was low. The closer to the site boundaries, the greater the risk associated with a project. Under CLEAN, each task is negotiated, and the contractor can evaluate the risk for each task. Only one percent of the projects in a CLEAN contract are anticipated as being a problem.

In a discussion of contracting strategies versus risk, the RAC representatives indicated that third party liability is independent of the contract type. They did not look at fixed price contracts in the environmental area because there are too many unknowns and too much time and effort is spent in contract modifications. They wanted to be able to address, in the contract, the care to be taken in determining the risk of the project.

The RAC representatives were asked, what percentage of contracts are high risk? The response was, that a large percentage of environmental effort requires third party liability and therefore, is a high risk. One company representative indicated that his company will not perform any work without some form of indemnification. Defense costs for liability suits are the big problem. There is no method of predetermining how juries will apportion costs.

The RAC representatives reiterated that they have the ability to negotiate risks for commercial projects. That ability does not currently exist in dealing with the DOD. They also indicated that

The discussion continued with the RAC representatives indicating that a negligence standard exists in CERCLA, and they want a similar law modification for state laws and the Resource Conservation and Recovery Act (RCRA). They do not desire strict liability to apply to them. The overriding issue is that the RACs are concerned that they must assume responsibility for what they did not initially cause. The responsibility should be adjudged to the people who put the waste in the land.

The DOD topic leader asked what the DOD could do to help the contractors. There were four areas of potential change: the law, which would be most difficult to change; the regulations (DOD indicated that they would work with the EPA to determine how the regulations might be changed); policy; and the FAR/contract (DOD indicated that they could directly impact these last two areas and achieve the quickest results).

Indemnification of contractors is now addressed in Public Law (P.L.) 85-804 and FAR 52-228.7. Under P.L. 85-504, the contractor must identify the nature of the risk and then the Contracting Officer must raise the issue to the service Secretary for authorization. To support indemnification of contractors for environment risks would make each service's effort unique. The FAR clause is based on radioactive material risks and excludes construction. A change to the FAR appears to be appropriate, but it would have to be based on a change in the law. DOD representatives considered that such a change might be accomplished as a part of the Defense Reauthorization Act.

The following potential solutions were identified for evaluation by DOD in response to the issues raised by the RAC representatives regarding their risks:

a. Change the laws so that the RACs are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and determine an equitable distribution of the risk between the contractor and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

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March 28, 1991

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Re: Minutes of the Society of American Military Engineers January Conference

Dear Mr. Dobes:

Thank you for sending the draft minutes from the January 30-31, 1991 meeting of the Society of American Military Engineers. I was pleased to attend and discuss the issue of surety bonds for hazardous waste cleanup projects. As we discussed on the phone recently, I have only a few comments on the draft minutes, and you took care of the specific items while we spoke.

However, I also have a general comment which I wanted you to have in writing for the record. As you may remember, I was unable to stay for the entire program, and thus, missed the creation of the recommendations and potential solutions contained in the minutes. All of the recommendations and potential solutions developed by the attendees of the conference are excellent ideas. However, I was concerned that surety was not specifically included in some of the comments.

For example, recommendation "e" states that "The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable." This is an instance where the RAC's surety should specifically be included in the recommendation. Just such a provision is part of the Superfund amendment passed last year, and has been essential to the increase we have seen in the availability of surety bonds for those contracts covered by that amendment. The ideas contained in the recommendations should apply equally to the RAC and its surety.

The potential solutions also refer only to the contractor, while applying the solutions to the surety as well will be necessary to increase the sureties' ability to underwrite

bonds for these types of projects. Thus, it is my recommendation that the potential solutions be amended to read as follows (underlined portion is the proposed amendment):

a. Change the laws so that the RACs and their sureties are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.

b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor and surety work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor or surety liable to the government. (This may require a law change to accomplish.)

c. Limit the statute of limitations for contractors and their sureties on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's and surety's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).

d. Limit the contractor's and surety's liability to that resulting from their negligence.

e. Negotiate the risks of a project with the contractor and surety who takes over for a contractor and determine an equitable distribution of the risk between the contractor or surety and the government as a part of the contract.

f. The DOD should specify standards of practice for a project to which the contractor or surety must comply.

g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

These minor changes in the recommendations and potential solutions would express the necessity of protecting the surety of a response action contractor to the same extent as the contractor. Without this equity, it is most likely that bonds will continue to be difficult to obtain for all hazardous waste cleanup projects not covered by the Superfund amendment implemented last year.

Thank you for allowing us to submit these follow-up comments. Please let me know if there is anything else which I can do to assist you in putting together the final version of the minutes.

Very truly yours,

Lynn M. Schubert
Senior Counsel

LMS/lms/jdltr.sam

cc: Captain James A. Rispoli
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APPENDIX 2

Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

US Army Corps of Engineers
Water Resources Support Center
Institute for Water Resources

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

JULY 1990

IWR REPORT 90-R-1

Unclassified
SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE

Form Approved
OMB No 0704-0188
Exp Date Jun 30, 1986

1a REPORT SECURITY CLASSIFICATION U[illegible]assified	1b RESTRICTIVE MARKINGS
2a [illegible]CURITY CLASSIFICATION AUTHORITY	3 DISTRIBUTION/AVAILABILITY OF REPORT Approved for public release; unlimited
2b DECLASSIFICATION/DOWNGRADING SCHEDULE	
4. PERFORMING ORGANIZATION REPORT NUMBER(S) IWR Report 90-R-1	5. MONITORING ORGANIZATION REPORT NUMBER(S)
6a NAME OF PERFORMING ORGANIZATION USACE, Institute for Water Resources 6b. OFFICE SYMBOL (If applicable) CEWRC-IWR	7a. NAME OF MONITORING ORGANIZATION
6c. ADDRESS (City, State, and ZIP Code) Casey Building Telegraph & Leaf Roads Ft. Belvoir, VA 22060-5586	7b. ADDRESS (City, State, and ZIP Code)
8a. NAME OF FUNDING/SPONSORING ORGANIZATION USACE, Directorate of Military Programs 8b. OFFICE SYMBOL (If applicable)	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c. ADDRESS (City, State, and ZIP Code) Pulaski Building 20 Massachusetts Avenue, NW Washington, DC 20314-1000	10. SOURCE OF FUNDING NUMBERS PROGRAM ELEMENT NO. / PROJECT NO / TASK NO / WORK UNIT ACCESSION NO

11 TITLE (Include Security Classification)
Hazardous and Toxic Waste (HTW) Contracting Problems - A Study of the Contracting Problems Related to Surety Bonding in the HTW Clean-up Program

12 PERSONAL AUTHOR(S)
[illegible]rp, Francis, M.

13a TYPE OF REPORT	13b. TIME COVERED	14 DATE OF REPORT (Year, Month, Day)	15 PAGE COUNT
final	FROM _____ TO _____	1990/April	

16. SUPPLEMENTARY NOTATION

17 COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB-GROUP	Bonding, Miller Act, Service Contracts Act, Davis-Bacon Act, CERCLA, FAR , HTW, Surety, Performance Bond

19. ABSTRACT (Continue on reverse if necessary and identify by block number)

This study attempts to determine the impact of performance bond availability on the successful accomplishment of Hazardous & Toxic Waste (HTW) projects.

20 DISTRIBUTION/AVAILABILITY OF ABSTRACT	21 ABSTRACT SECURITY CLASSIFICATION
☐ UNCLASSIFIED/UNLIMITED ☒ SAME AS RPT ☐ DTIC USERS	
22a NAME OF RESPONSIBLE INDIVIDUAL Francis M. Sharp	22b TELEPHONE (Include Area Code) (202) 355-2369 / 22c OFFICE SYMBOL CEWRC-IWR-N

DD FORM 1473, 84 MAR — 83 APR edition may be used until exhausted. All other editions are obsolete.

SECURITY CLASSIFICATION OF THIS PAGE

HAZARDOUS AND TOXIC WASTE (HTW) CONTRACTING PROBLEMS

A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program

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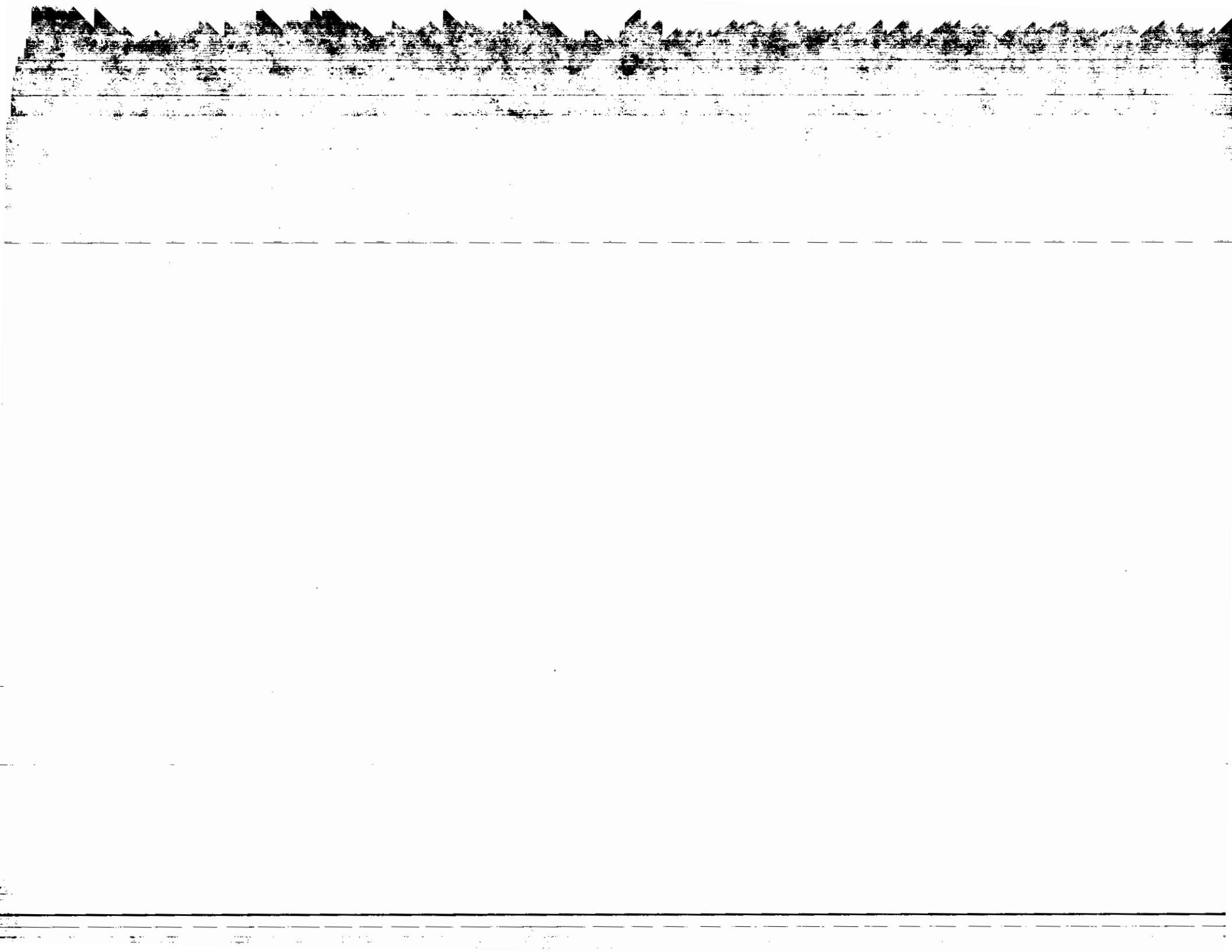
July 1990

IWR Report 90-R-1



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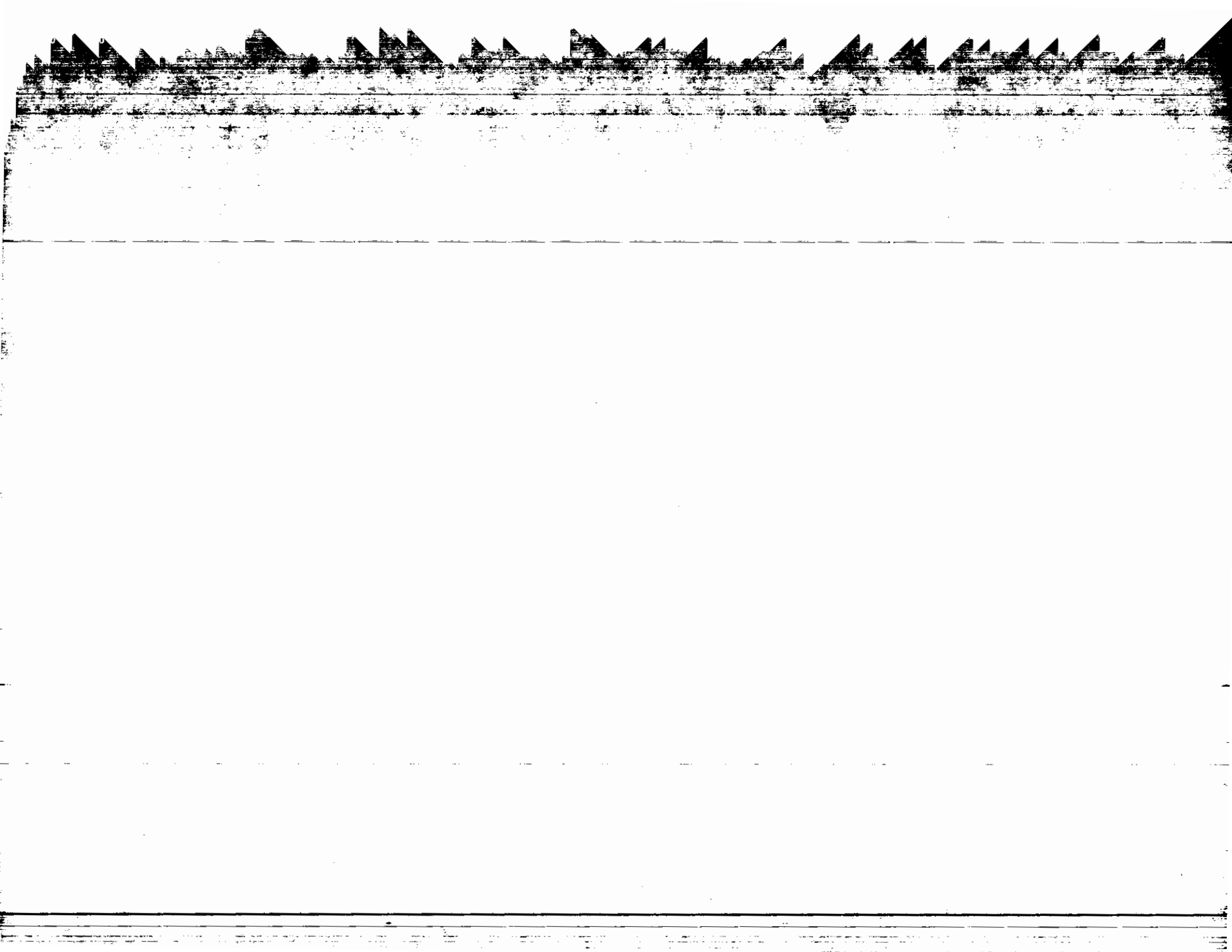

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I. SUMMARY

The EPA and the U.S. Army Corps of Engineers ("Corps") have experienced difficulties in contracting Hazardous and Toxic Waste (HTW) cleanup projects. The HTW cleanup industry has expressed concern that it could not obtain surety bonds required as a prerequisite for competing for remedial action construction projects. It was reported that Treasury Department listed corporate sureties, which provide the guarantee bonds for Government projects, had imposed stringent limitations on the provision of performance bonds which assure the government that the cleanup project will be completed. Essentially, the bonds guarantee that the surety will either complete performance or pay the Government its costs associated with completing the project to the limit of the penal amount of the bond. Various contracting industry firms stated that they have not been able to secure bonding for some projects. Those that have obtained bonds had a difficult time doing so, and some firms that had obtained bonds for previous projects were unable to obtain bonds for a subsequent project. The surety industry indicated its reluctance to guarantee performance on HTW projects primarily because of its concern for possible long-term liability exposure and changing state-of-the-art design requirements associated with such actions.

The EPA and the Corps commissioned the Institute for Water Resources to gather information on the subject; to analyze the data to determine the extent of the existing bonding problems; and to offer recommendations which could be implemented in an effort to alleviate problems noted. A survey was conducted of Corps district offices, the HTW cleanup industry, surety firms, and trade associations, to determine the extent and nature of the problem. A few survey activities extended to EPA and state offices involved in HTW work.

The study examined 24 ongoing remedial action and completed Corps HTW construction contracts. Statistics were gathered from actual Corps records on the contractors and sureties that participated in these contracts. In addition, a sample of the universe of HTW contractors and sureties was interviewed along with industry association representatives. The responses to these interviews appear later in this paper. They were analyzed to arrive at conclusions concerning industry views and perceptions of the surety problem.

will be issued on the appropriate factors to be taken into consideration in accomplishing this analysis.

- Analysis of the option of dividing the project into work elements with an appropriate level of bonding in each.

- Clarify the government's policy on indemnification of contractors and sureties.

- To the extent of its authority, each government agency will define its specific responsibility for the risk aspect of the cleanup project where appropriate (e.g. accept responsibility for performance specifications).

- The government will specifically accept the responsibility for project design where the performance specifications have been met.

The thrust of this study was specifically centered on the bonding issue. While the stated problem of many of the respondents was bonding, the underlying issue is the uncertainty about risk in general as it applies to the HTW Cleanup program. There is uncertainty by sureties and contractors concerning risk and liability. Surety bonds for performance, liability insurance and indemnification questions are closely related and difficult to separate when dealing with HTW risk questions.

There are two categories of options available to address these solutions. First, short term steps can be taken internally by the Corps and EPA that involve revising internal agency procedures to alleviate the contracting problem. Changes to government-wide construction procurement regulations, e.g. standard bond forms, should be pursued with the FAR Council. Finally, longer term actions could be carried out which concentrate on potential legislative revisions to the liability and indemnification provisions in the superfund statute.

Resources (IWR), a Corps research agency located at Fort Belvoir, VA, was selected to do the study. The study was initiated in late November 1989. IWR conducted a series of personal and telephone interviews of HTW industry contractors, as well as HTW industry associations. In addition, personnel from insurance and surety industry firms, surety associations, states, EPA, and the Corps were interviewed about the issue. A listing of the intervievees appears in Appendix A.

The intervievees were questioned regarding difficulties experienced in the HTW bonding area. They were also asked for their views on the nature and magnitude of any bonding problems and requested to provide suggestions on actions that could be taken to rectify the situation. IWR also gathered references, such as seminar papers, letters of concern to various agencies, testimony before Congress, government forms and regulations, and other relevant documents. A body of background material concerning the problem was assembled. The study also collected information concerning contracting for HTW cleanup, in particular information regarding the difficulties in the acquisition of surety bonds by contractors.

Table 1

STATUTES AND REGULATIONS PERTAINING TO HTW CONTRACTING

ACT	DESCRIPTION
Miller Act Construction Contract Bonding Requirement	Requires Federal agencies awarding construction contracts to utilize payment bonds to assure that the prime contractor pays his subcontractors and performance bonds to guarantee completion of work in accordance with the contract specifications.
McNamara-O'Hara Service Contract Act (SCA)	Defines the types of activity classified as service contracts for the purposes of Federal government procurement.
Davis-Bacon Act (DBA)	Applies to all Federally funded construction projects. Designates the Secretary of Labor as the sole authority on the classification of wage rates for construction projects.
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by Superfund Amendments & Reauthorization Act (SARA)	CERCLA enacted to eliminate past contamination caused by hazardous substancea pollutants or contaminants released into the environment. Authorizes EPA to recover cleanup costs. SARA enacted to strengthen CERCLA and tighten cleanup target dates. Requires use Davis-Bacon wage rates for construction projects funded under section 9604(G) of CERCLA.
Federal Acquisition Regulation (FAR)	Pursuant to the requirements of Public Law 93-400 as amended by Public Law 96-83: provides uniform policies and procedures for contracting by Federal executive agencies.

The procedure for obtaining performance and payment bonds from individual or corporate sureties for HTW cleanup contracts is incomplete without examining the background of the bonding requirement. The 1935 Miller Act specified that all construction contracts by the Federal Government would be covered by performance and payment bonds. The purpose of the performance bond is to insure that the project is completed in the event that the original contractor defaults.

The requirement for performance bonds varies with each project and is affected by the type of project being undertaken. A bond is required by the Miller Act on all fixed-price construction contracts over $25,000, but must be

the project. The Corps of Engineers is very sensitive to avoiding disputes with DOL arising from failure to use construction wage rates. EPA is equally concerned that the proper rate be used by the Corps.

1. Miller Act Construction Contract Bonding Requirements. In order to fully address the performance bonding requirement and its relationship to the contracting industry, we must first examine the Miller Act. The Miller Act requires performance and payment bonds for any contract over $25,000 for the "construction, alteration or repair of any public building or public work". P&P bonds are required on all FFP construction contracts and/or delivery orders over $25,000. The percentage needed for performance bonds is flexible. However, these bonds are not necessary for cost reimbursement contracts and/or delivery orders. The level of bonding required is determined by the Contracting Officer based on the level of risk associated with the project and the resulting need to protect the Government's interest. The performance bond guarantees the Government that the building or work will be completed in accordance with the terms and conditions of the contract or the Government will be compensated. The payment bond guarantees that subcontractors and suppliers of the prime contractor will be paid for their work. Performance and payment bonds are usually issued by the same surety for a particular project. These bonds protect against contractor non-performance. They are not intended as insurance for contractor actions which may prompt third party liability suits, or as a substitute for pollution or any other type of insurance. A third bond, generally required by agency or acquisition regulations where the contract solicitation is a formally advertised sealed bid, is the bid bond. The bid bond protects the Government by providing a penal amount that will be forfeited by the surety of the lowest responsible bidder if the bidder fails to accept the award or to provide the required performance and payment bonds after award has been made. Bid bonds generally are provided by the same surety that provides the performance and payment bonds for a particular contract. The surety's decision to issue the bonds appears to be controlled by the contractors bonding capacity and its analysis of the risk associated with each particular contract. Hence, it would seem that difficulties reported in contractors' ability to acquire bid bonds are in fact directly connected to the same factors causing those contractors inability to acquire performance bonds.

Inasmuch as the scope of possible service contracts is extensive, section 7 of the Act lists specific contracts outside the Act. Included among these exemptions are contracts for "construction, alteration and/or repair, including painting, or decorating of public buildings or public works." While DOL's regulations (29 CFR 4.130) contain a number of illustrative service contracts, none of those listed relate specifically to environmental restoration (HTW) projects.

The principal purpose emphasis is key inasmuch as a contract may be principally for services, but may at the same time involve more than incidental construction.

Existing DOL regulations do not define incidental construction. Guidance on this issue, however, may be derived from advisory memoranda issued by the DOL's wage and hour administration relating to construction projects comprised of different categories or schedules (building, heavy, highway and residential). As a general rule, DOL advises contracting officers to incorporate a separate schedule when such work is more than incidental to the overall or predominant schedule. "Incidental" is here defined as less than 20% of the overall project cost. DOL notes that 20% is a rough guide, inasmuch as items of work of a different category may be sufficiently substantial to warrant separate schedules even though these items of work do not specifically amount to 20% of the total project cost. This same rationale may apply to contracts involving services and construction.

Under such circumstances, both the SCA and the Davis-Bacon Act (see below) may apply. In this regard FAR 22.402(b)(1) prescribes that the DBA will apply when:

a. The construction is to be performed on a public building or work.

b. The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the DBA. The term substantial defines the type and quantity of the construction work and not merely the total value of the construction work as compared with the total contract value.

these activities standing alone may be properly characterized as construction, alteration or repair of a public work.

Section 9604(G) of CERCLA also specifically stipulates the wage rates to be paid on Response Action Construction projects are to be as determined by the Secretary of Labor in accordance with the Davis-Bacon Act as follows:

> "Sect. 9604(g)(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.
>
> (2)The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40 of the United States Code."

b. The essential point of the foregoing discussion of the Service Contract and Davis-Bacon Acts is that although the public policy objective (labor standard protection) of the statutes are similar, there are significant differences between the two which affect the cost of doing business. Clearly, the DOL's authority to require contracting agencies to retroactively modify contracts to add one set of wage rate provisions and/or delete another, will have consequences for project costs. In view of DOL's authority to issue determinations as to what comprises "construction" for purposes of the DBA, there may also be consequences for the coverage and extent of the bonds required under the Miller Act.

4. Superfund Statute. Inasmuch as considerable concern was expressed by the surety industry regarding its potential for liability arising from bonding of HTW projects, a brief discussion of the superfund statute is included in this section. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510)(CERCLA), commonly referred to as the Superfund law, authorized $1.6 billion to clean up abandoned dump sites. The

performance default on the same basis as such indemnification would be offered to any remedial action contractor provided the surety assumes substantially the same role as the original contractor. Some corporate sureties point to this liability potential as the basis for their refusal or reluctance to actively provide bonding for HTW work. These sureties urge that it be made clear that the surety performance bond is a guarantee of performance only and in no way is intended to serve as insurance for potential third party liability suits. Likewise, they urge that the application of the Section 119 indemnification to the corporate surety involved in a HTW project be clarified.

5. Federal Acquisition Regulation. HTW contracts, like other Federal government procurement procedures, are controlled by the Federal Acquisition Regulation (FAR). The Federal Acquisition Regulation provides uniform policies and procedures for all Federal executive agencies. These policies and procedures define construction and other government procurement activities. In addition, they specifically define contracting instruments such as performance and payment bonds (see Appendix B). The development of the FAR is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400) as amended by Pub. L. 96-83 and OFPP Policy Letter 85-1, Federal Acquisition Regulation System, dated August 18, 1985. The FAR is prepared, issued, and maintained, and the FAR system is prescribed jointly by the Secretary of Defense, the Administrator of General Services Administration (GSA) and the Administrator of the National Aeronautics and Space Administration (NASA). These agency heads rely on the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council) to perform this function. Agency heads are authorized to independently issue agency acquisition regulations provided such regulations implement or supplement the FAR.

By definition, the term "acquisition" refers to acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal government through purchase or lease -- whether the services or supplies are already in existence or must be created or developed, demonstrated, and evaluated. Acquisition begins at the point when agency

Bid Information	Bid Open Date	Project Size	Project Date
Award Amount/ Gov. Estimate	1A	1B	1C
High Bid/ Low Bid	2A	2B	2C
Number of Bids	3A	3B	3C

2. Analysis and Findings.

a. Ratio of Award Price to Government Estimate. Chart 1A illustrates the trend in the ratio of award price to the government estimate over the study period from 1987 to 1989. The ratio of award amount to government estimate rose from .8 to 1.2. In addition, the ratio of award amount to government estimate tended to increase with the size of the project, as shown in chart 1B. The type of remedy that was utilized also affected the award/estimate ratio. Award ratios of 1.3 were observed for the waste containment projects, on the average, as opposed to .85 on the other extreme for alternative water supply projects as displayed in chart 1C. The remainder of the projects were around the 1.0 area. The conclusion drawn from this information is that there is a tendency for large projects to run at a higher ratio of award/estimate and through time. This tends to lend credence to the fact that there is a tight market for HTW contracts.

b. High to Low Bid Ratio. An analysis of the contract data indicated that out of the 24 projects four contracts involved situations where the initial bid winner was not awarded the bid due to inability to secure bonding. These four contracts totaled about $31 million. $3.9 million additional costs were incurred because of the necessity to utilize the next lowest bidder. This was an average of a 14% increase in costs for the four contracts. The ratio of high bids to low bids has been found to drop from around 2 to 1 in 1987 to 1.3 to 1 in 1989 as illustrated in chart 2A. The range of bids also tends to decrease with the size of the project. Chart 2B shows this tendency. The high-low bid ratio also varies by the type of project. The collection and disposal of waste products has a large variation in the ratio of the bids

Deletion of the handling of hazardous material in the first phase of the project and shifting it to the second phase and deletion of a test burn of contaminated soil, thus removing the sureties' objections to bonding the first phase.

The writing of separate bond agreements for the two project phases and the precise definition of what liability is covered by the performance bond and the time limits of liability.

Reducing the dollar cap on the retainage for the last phase of the project from $6 million to $2 million and reducing the time the retainage is held from 60 to 18 months.

Giving the surety the right to choose the option of whether to complete the project or forfeit the bond if the contractor defaults on the performance bond.

Providing the requirements for the surety to obtain indemnification in case of contractor default and the surety assuming project completion.

d. Distribution of HTW Contracts. There is considerable variation in the distribution of contracts among HTW contractors. In the Kansas City District, about 400 firms are on the bidders' mailing list for all construction, including HTW contracts. In 1987 through January 1990, 24 contractors competed in the HTW program, and 14 received contracts. According to Corps District personnel, the same few companies continually appear in the final bidders' lists for HTW contracts.

Charts 5 and 6 list the contractors that have worked on Corps HTW construction projects and their market share of the total competed Corps HTW outlay or activity. Five contractors, individually or in partnerships, have received 78% of the HTW contract dollars (Chart 5). Five of the 14 firms obtained about 58% of all the projects (Chart 6). The firms receiving awards are, for the most part, large firms with experience in waste handling in general. They are not the only firms with the qualifications and credentials to do the work, nor are they the only firms that have expressed interest in the hazardous and toxic waste projects. There are many contractors interested in participating in these projects. There appears to be legitimate concern that contracting impediments, such as bonding, might lessen further the Government's ability to expand contractor participation. Contracting impediments must be carefully considered as to their relative significance.

TABLE 2B

CORPS HTW CONTRACTS

COST OF PROJECT COMPARED TO GOVERNMENT ESTIMATE

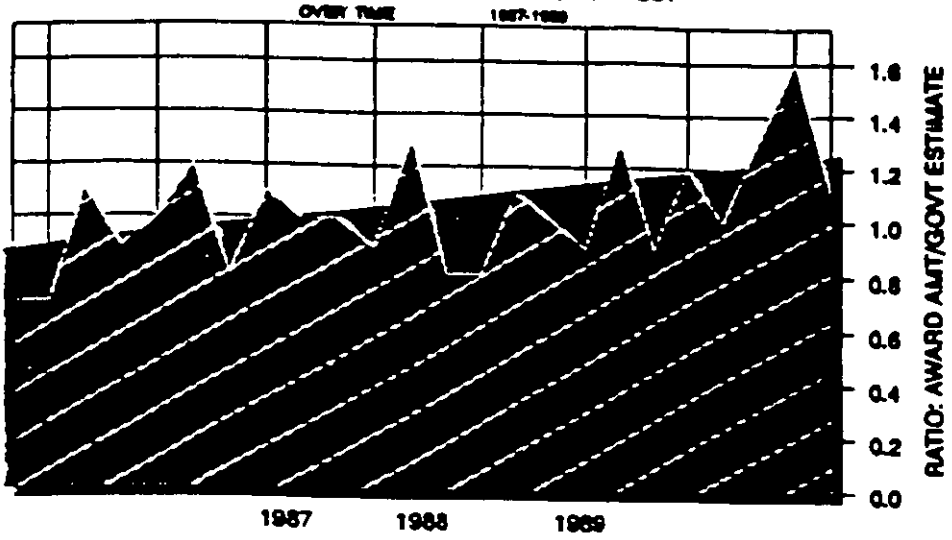
NUMBER OF BIDS PER PROJECT

BID DATE	ST	PROJECT NAME	PROGRAM	GOVT EST	AWARD AMT	AWARD AMT /GOVT EST	NO. BIDS
6/04/87	PA	Lackawanna Refuse	SF	23.0	15.9	0.7	7
3/23/88	MA	Nyanza Chemical Waste Dump	SF	13.0	8.6	0.7	13
5/17/88	MA	Charles George Landfill	SF	15.0	15.6	1.0	6
6/07/88	NJ	Lang Property	SF	4.1	3.6	0.9	6
6/07/88	NJ	Metaltec Aerosystems	SF	3.5	3.4	1.0	5
8/02/88	OH	New Lyme Landfill	SF	12.0	13.7	1.1	5
10/06/88	PA	Bruin Lagoon	SF	5.0	4.0	0.8	5
10/12/88	PA	Heleva Landfill	SF	4.7	5.4	1.1	8
10/18/88	IN	Lake Sandy Jo	SF	2.3	2.4	1.0	3
11/16/88	NJ	Bog Creek Farm	SF	14.0	14.0	1.0	4
12/06/88	CA	Del Norte Pesticide Storage	SF	1.3	1.2	0.9	11
2/02/89	NJ	Bridgeport Rental/Oil Svcs.	SF	42.0	52.5	1.3	5
3/28/89	NJ	Caldwell Truck Co.	SF	0.2	0.2	0.8	9
6/22/89	NH	Lipari Landfill on-site	SF	21.0	15.8	0.8	4
7/11/89	MD	Kane & Lombard St. Drums	SF	4.0	4.5	1.1	1
7/24/89	NY	Wide Beach Development	SF	15.6	15.6	1.0	2
8/01/89	KS	Cherokee County Storage Tanks	SF	0.7	0.6	0.9	2
8/01/89	DE	Delaware Sand/Gravel Landfill	SF	1.2	1.5	1.3	3
8/02/89	RI	Western Sand & Gravel	SF	1.0	0.9	0.9	9
8/23/89	MA	Baird & McGuire	SF	9.6	11.3	1.2	5
8/31/89	NJ	Montclair W orange Sites	SF	0.2	0.2	1.0	3
9/06/89	MD	S.Md.Wood Treating	SF	2.0	2.6	1.3	7
9/19/89	NJ	Helen Kramer Landfill	SF	36.0	55.7	1.5	4
9/19/89	PA	Moyers Landfill	SF	25.0	28.0	1.1	4
			TOTAL:	256.4	277.2	1.12	AVG.

$1,000,000s

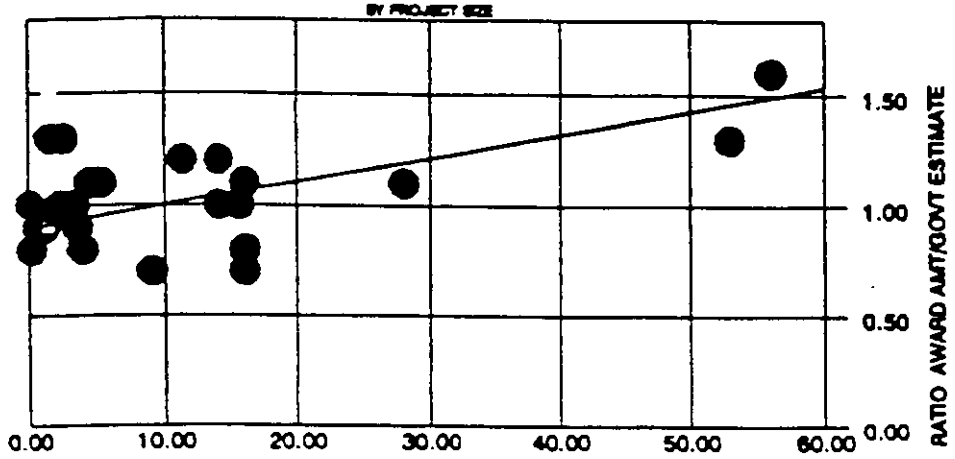
SF- SUPERFUND

CH 1A RATIO: AWARD AMOUNT/GOVT EST



AWD/EST AWD/EST REGRES

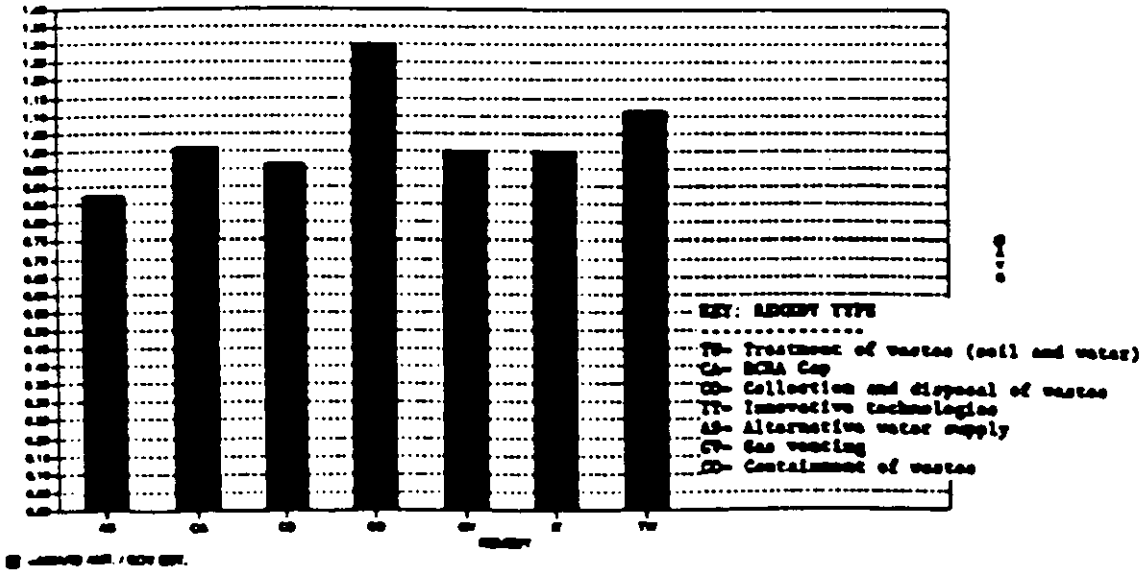
CH 1B RATIO: AWARD AMOUNT/GOVT ESTIMATE



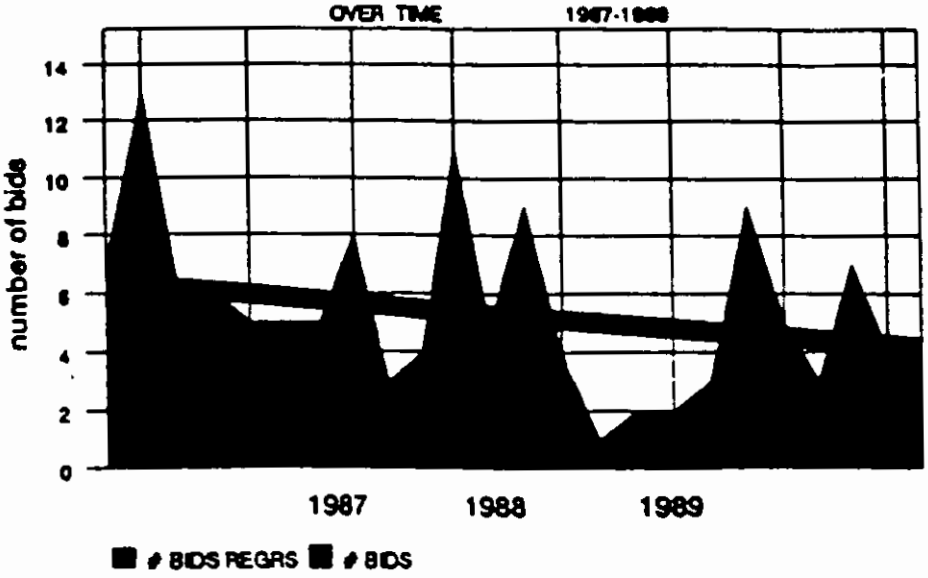
AWARD AMOUNT $1,000,000S

AWARD AMOUNT # BIDS NO. BIDS REGR

CHART 1C RATIO: AWARD AMOUNT/GOVERNMENT ESTIMATE
BY REMEDY TYPE



CH 3A · BIDS PER PROJECT



CH 3B NUMBER OF BIDS (BY AWARD AMOUNT)

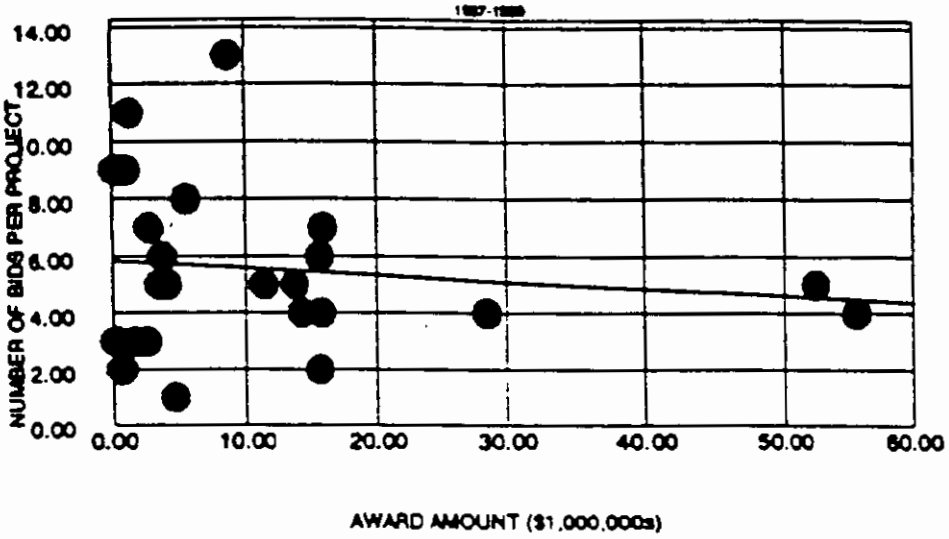


CHART 3C
AVERAGE NO. BIDS RECEIVED (BY REMEDY)

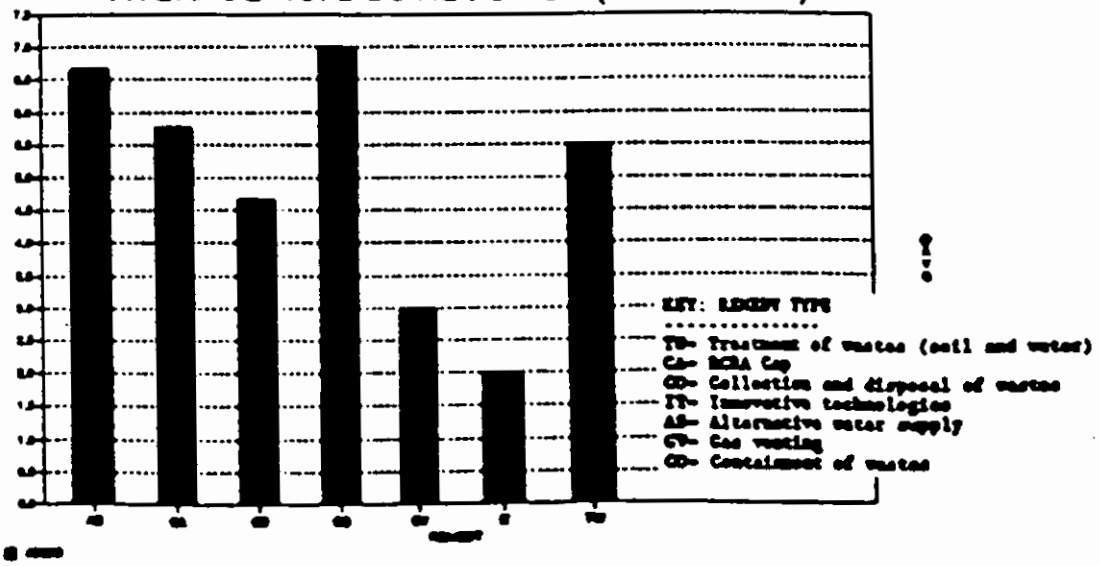


CHART 5 CORPS HTW PROGRAM
CONTRACTORS' SHARES ($280 MILLION TOTAL)

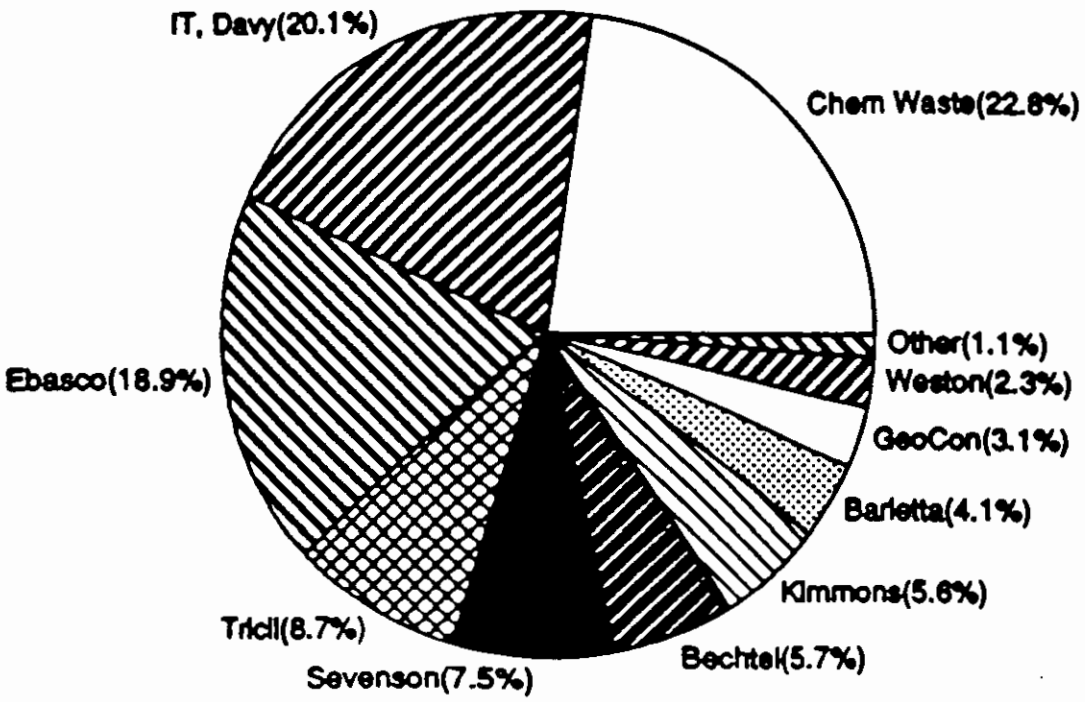


CHART 6
CONTRACTORS' SHARES (24 PROJECTS TOTAL)

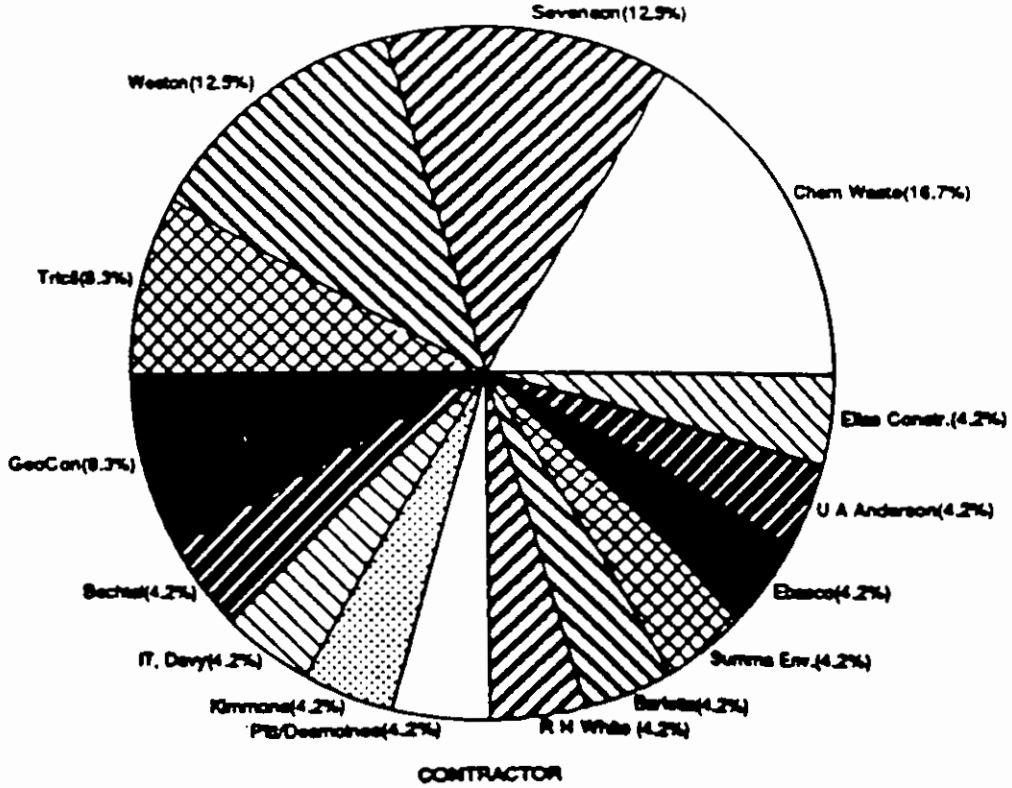


CHART 7 CORPS HTW PROGRAM 1987-9
SURETIES' SHARES ($280 MILLION TOTAL)

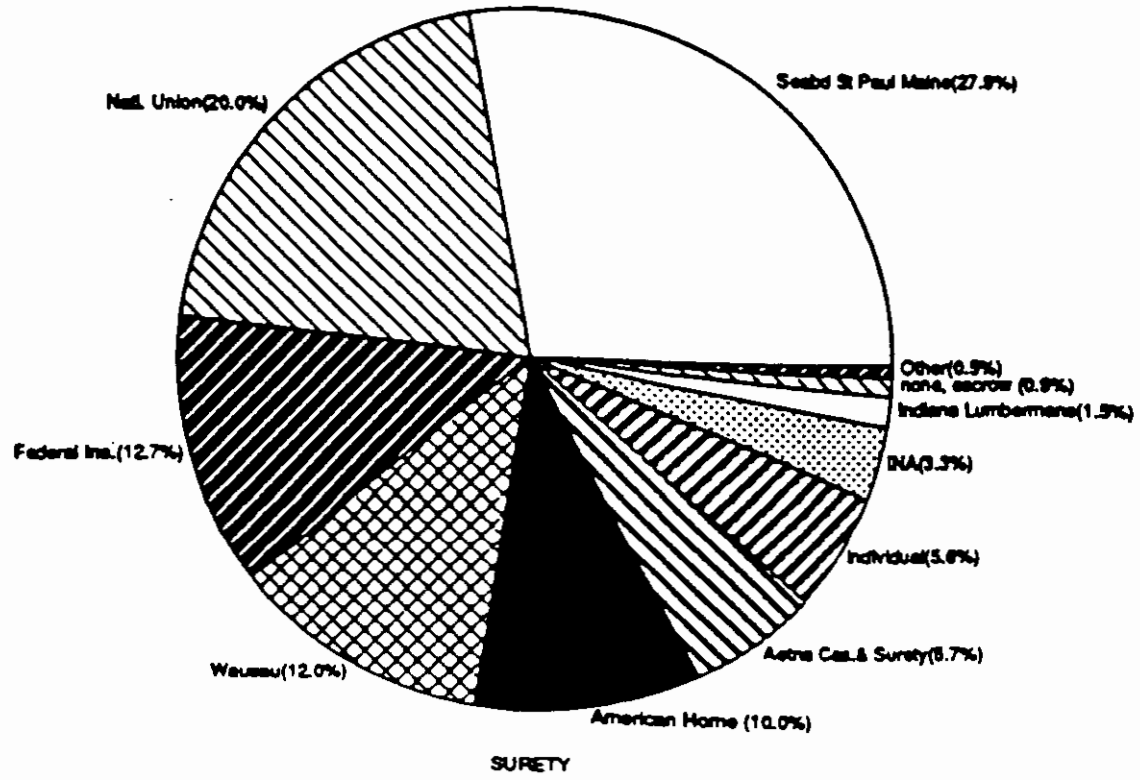
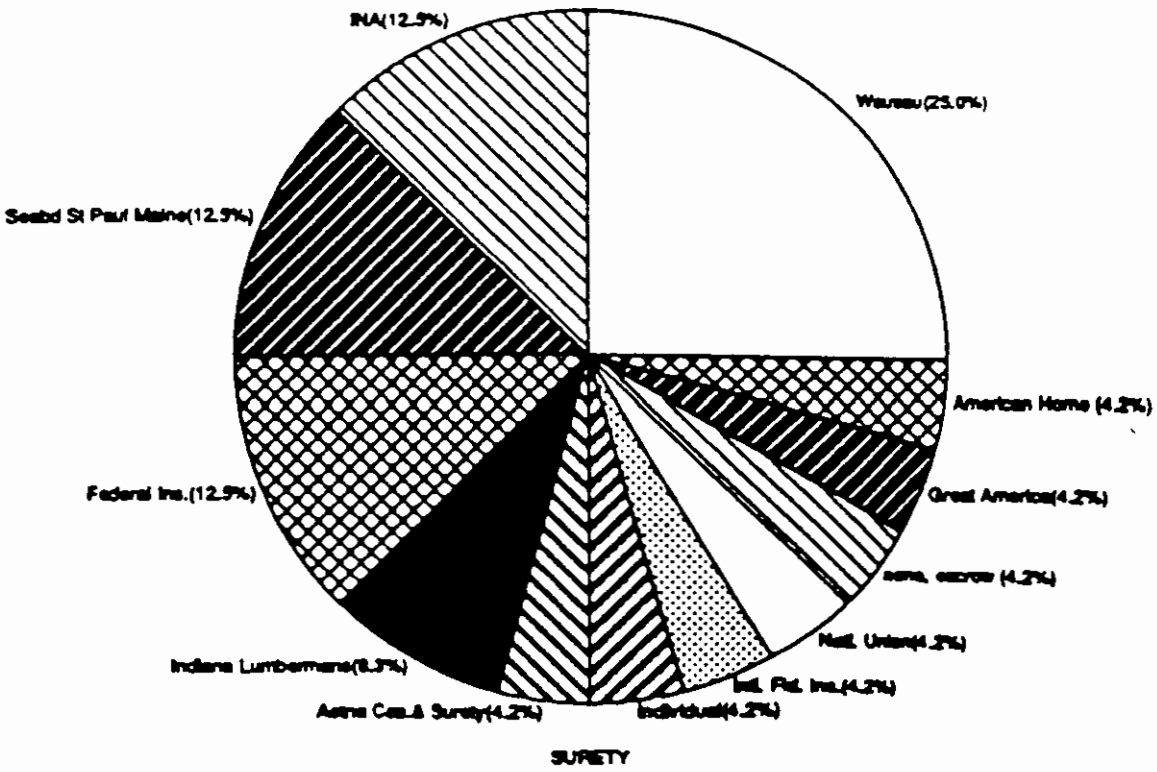


CHART 8
SURETIES' SHARES (24 PROJECTS TOTAL)



This had particular concern to contractors that had been awarded large, indefinite delivery contracts. They feared that sureties might use the total contract maximum, rather than actual work orders issued, to compute their bond capacity limitation.

Tables 2A-C illustrate the experience of the Omaha and Kansas City Corps districts. There were a small number of bids received on several HTW projects. This low number of bids is not necessarily due to the lack of interest in the projects. According to several HTW organizations interviewed, including the Hazardous Waste Action Coalition, Environmental Business Association, Associated General Contractors, National Solid Waste Management Association and the Remedial Contractors Institute, the key factor contributing to lower competition for some HTW projects is the inability of many contractors to secure bonding. It should be noted that in many cases firms cannot obtain bonding despite a proven history of competence in doing such work, strong financial assets and profitability and sound leadership and experience in the firm.

In some cases it was reported by both contractors and government contracting agencies that projects have been delayed due to the shortage of contractors who can obtain bonding and related surety problems. Contracting representatives for both the Corps and the states advised that they have had administrative delays as a result of contractors not being able to obtain appropriate bonding. This additional work has resulted in the slippage of project schedules.

The resulting shortage of qualified firms that are able to consistently arrange surety bonding may be reflected in higher costs to the government. Bonding's limitation on competition, with only four or five final bidders in many cases, may have resulted in higher contract bids than would otherwise be expected. Tables 2A and 2B illustrate the experience of two Corps districts in bid prices and number of bidders.

Smaller contractors, in particular, may be screened out of the HTW cleanup program market due to their inability to secure surety bonding. Several contractors stated that they do not have the extensive financial equity

surety community. Bonding companies perceive that the state of technology of the HTW cleanup process is constantly changing and very ambiguous. It is their opinion that little is known about the adequacy of the technology either concerning immediate or long-term experience. Technology may evolve that renders the present method inadequate. Sureties are concerned that this may leave the designer-builder potentially liable if the present HTW legal climate continues.

c. Surety firms have stated that the present unfavorable legal environment, with widespread litigation and large awards, has made insurance companies very cautious about insuring HTW projects. Although vocal in their assertions that they not be treated as a substitute for insurance, they fear that by bonding such work they may in the future be sought out based on a legal theory which would treat them as if they were insurance. The cause for liability, such as the appearance of a disease 20 or more years after exposure to toxic substances, leads to a very uncertain situation for sureties.

d. According to the surety firms interviewed, toxic tort litigation features are an important reason for their present reluctance to participate in the HTW cleanup field. In the toxic tort arena a very long time period (10 or 20 years) between exposure and development of injury is typical. Unlike other prototypical injury situations, toxic liability involves long time periods' between the alleged exposure and the discovery of damages. Since this litigation takes place in state courts, the indemnification under SARA is not helpful, nor legally binding on the states.

e. Insurance. The Hazardous Waste Action Coalition, an organization comprised of technical consulting firms in the HTW field, along with Marsh and McLennan, a large insurance broker, held a meeting in Washington, D.C. on September 13, 1989, in which a series of speakers outlined the insurance and indemnification problems confronting the contracting industry. The collected papers of this meeting are entitled "Pollution Insurance/Indemnification Issues for Engineers in Hazardous Waste Cleanup". The papers point out that the present insurance coverage is not adequate in many areas. They also express the insurance industry's concern that potential litigation uncertainties play a major part in their decisions to forego providing

by the courts as the insurer of last resort or a "deep pocket."[8] This unknown risk has led some corporate sureties to forego involvement in the HTW market. Surety bond producers that have made such a decision indicate that they would be more likely to participate in the market if the applicability of SARA indemnification to the surety was clarified. Moreover, that the performance surety bond be clearly represented as being intended by the Government solely as a guarantee of performance by the contractor and not in anyway as protection for the contractor's tortuous injuries to third parties.

f. Greater risk to Government. In response to claims by some contractor interests that bonding could be substantially reduced for certain categories of HTW work, surety sources stated that risks of non-performance increase if construction contracts are awarded either without surety bonds or with lower rated surety performance bonds. Surety officers contacted in the survey pointed out the trade-offs involved risks to the government if surety bonds were not used on projects that normally would be surety bonded. They emphasized that surety firms perform a valuable service for the government in screening out potential problem contractors from the pool of contractors competing on government construction projects.

g. Indemnification. The sureties and contractors have listed many perceived problems with the present SARA[9] indemnity law. There is dissatisfaction over the amount of indemnification coverage, as well as the extent of the coverage and even what events are indemnified. Sureties find that the definition of what is the maximum dollar coverage of the indemnity is not specific. CERCLA sets the upper limit of the indemnification amount as the funding that is remaining in the Superfund account. However Section 119 says "If sufficient funds are unavailable in the...Superfund... to make payments pursuant to such indemnification or if the fund is repeated. There are authorized to be appropriated such amounts as may be necessary to make such payments. Sureties and contractors are of the opinion that such limitation on indemnification may prove inadequate in the future if there are limited funds available in the Superfund account at the time indemnification requests ripen. The EPA is presently addressing the limit on indemnification problem in proposed draft guidelines for implementing Section 119 of SARA.

conclusive, indicate a pattern of competition in the field that shows a limited availability of eligible contractors. The expanding HTW cleanup requirement will exacerbate this situation

Relationship of project type. Examination of the relationship of the ratio of award amount to government estimate shows that the ratio is acceptable, except for containment projects where the ratio was 1.3 to 1. The largest spread for the variation of high and low bids was in the projects involving collection and disposal of wastes, 2.2 to 1, while the next greatest variation was for gas venting projects which ran 2 to 1. The heaviest competition was evidenced in the average number of bids (7) received for waste containment projects with the next highest number (6.5) bids for alternate water supply projects. It is noted that the average number of bids received for RFP's was only 3, compared with nearly double that amount for Invitations for bids.

Contractors' project market shares. The shares of the HTW cleanup market (24 Corps projects) are heavily concentrated in a relatively small number of contractors. Chart 5 shows that three firms or joint partnerships have about 60% of the dollar market of HTW projects and 5 of the 15 firms have successfully bid for about 58% of the total number of projects. The rest of the projects are being spread among the remainder of contractors, some of which are quite large. While the total is still small, the concentration of activity in a few firms tends to persist and is not assuring to those aspiring to participate in the program.

Sureties' market shares. Surety bond providers are also unequally represented in the list of sureties shares of the project pie. Five sureties or surety combinations account for 83% of the project bond dollars and five sureties or combinations bonded 70% of the Corps 24 projects analyzed in the study. This illustrates the case that few sureties are interested in providing bonding for HTW projects.

The foregoing experience presented in the contracting information from the Corps Kansas City and Omaha Districts reinforces the story presented by the

level of risk does not disappear; it is merely transferred from one entity of society to another. It is not reasonable to expect private industry to voluntarily participate in a high risk enterprise unless a high premium is paid. Many government programs are structured to reduce this uncertainty in new high tech and experimental enterprises to a level that is manageable by the private sector.

Indemnification, insurance, bonding and contractual agreements are all mechanisms to transfer risk. The present situation in the HTW cleanup area brings this aspect of risk, and who must assume risks for the nation's cleanup, into focus. There is a need in the HTW program for the definition of the risk involved and the assignment of each risk to the proper entity. Guidelines are necessary to spell out and clarify the appropriate responsibilities that will be borne by government agencies and those that are within the purview of private enterprise.

Indemnification is a tool that transfers the risks from private industry to the government. One problem with indemnification in HTW cleanups is the uncertainty of coverage. It is not known at the time of bid openings whether coverage will be available to the contractor or the surety, and, if it is, the maximum amount of coverage is unknown.

Another tool commonly used to manage uncertainty is insurance. Insurance presently available to contractors is inadequate. The maximum amount available is much too low, the time period of coverage is too limited, and third parties are not covered. Thus, the transfer of risk to the insurance industry is quite limited.

The bonding process is another way to transfer uncertainties from the government. It is a traditional way to transfer risk in the construction area where construction occurs over a long time period and commitments must be made for the entire project before the project can proceed. The traditional risk covered by construction performance bonds was that the project be completed as designed, that the contractor assumed responsibility during the construction period, the warranty and the latent defect period. Problems have arisen in

industry fears. The underlying industry concern is risk to the contractor and/or the surety. Factors affecting risk include: indemnification, insurance and bonding. These risk factors influence one another, e.g., if indemnification is available to the surety, then bonding may be more readily available. No single action will solve all the bonding problems. Additional conclusions are listed below:

- The government must select the most appropriate acquisition strategy early in the solicitation process. Risk to sureties, contractors and the government should be considered in addition to other site requirements.
- The government acquisition strategy should address the need to make an early decision whether to use a service or construction contract. In some cases, different contract types may be used for different project phases within the same contract. Miller Act, Davis-Bacon Act and Service Contract Act decisions should be made on their merits and without regard to bonding or cost implications.
- Contracts should be structured, the type of contracts selected and bonding requirements established, to appropriately protect the government's interests. These interests include: insuring that contractors capable of performing the contract remain eligible and that the selected contractor performs as promised.
- HTW cleanup agencies should explicitly decide how much performance bonding is required and how that bonding should be structured. Normal practice is to require 100% performance bonding for construction contracts and zero bonding for service contracts, although the contracting officer can select other percentages. We need to assure that the amount selected is only that needed to protect government interests.
- Sureties only want to assure that the remedial action contractor constructs what was required by the plans and specifications. They wish to avoid design/construct contracts or contracts containing major performance specifications.
- There is a strong perception by the industry that difficulties with bonds is limiting competition. RA contractors report that they have not bid projects due to unavailability of bonding. Sureties indicate that the risk is too large.

V. OPTIONS EXAMINED

A. INTRODUCTION

Discussions conducted during the study with industry, contractor, and government personnel raised several possible alternatives that might be taken to increase the availability of bonds to HTW construction contractors. These alternatives fall into two general categories as follows:

- o Non-Legislative Changes. Internal Corps and EPA non-legislative changes in procedures related to contracting strategy and implementation of the authorities which each agency already possesses.

- o Legislative Changes. includes revisions to regulations which guide each agency but which neither possesses the authority to revise independently; revisions to existing statutes so as to, (1) eliminate requirements that serve to lessen the corporate surety industry's interest in bonding of HTW projects and, (2) to clarify that performance bonds are to be used only to assure that the contractor will complete all contractual requirements and are not a vehicle by which third party claims may be satisfied.

Of the options available to the government to alleviate the bonding problem, many are centered on the concept of management of risk by the government. Financial and physical risk exist in the cleanup process and the government needs to incorporate risk analysis into its planning process to examine the trade offs in costs and benefits of the transfers of these risks between government and the private sector. In the case of bonding HTW cleanup projects, the government must examine the assumption of higher risks in non-performance of contracts for HTW cleanup against the gains of more competition by the cleanup industry and the resultant lower prices for projects.

It should be pointed out that the bonding community generally does perform a service for the Government contracting agency in making its evaluation to bond a particular contractor. In making this decision, it carefully analyses the contractor's financial and technical competence to do the work as well as

TABLE 3

TYPES OF OPTIONS

Options	Advantages	Disadvantages	Implemented By
NON-LEGISLATIVE CHANGES			
1. Improved Acquisition Planning and Bond Structuring:			
A. Require increased acquisition planning. Incorporate analysis of service contracts vs. construction contracts and incorporate cost type contracts into acquisition plan.	May reduce obstacles, induces more participation by contractors	Use of service contracts with no bonds may increase risk to government. May request use of bonds from USACE. S.O. Procurement.	Each agency
B. Provide Guidance on Bonding Requirements. Reduction of penal amount of bond. BTW Policy Guidance, 2 year test program.	Reduces bond portion project costs, induces more and greater variety of contractors to bid (e.g. smaller firms).	Limits non-performance protection to government, more marginal contractors.	Each agency
C. Clarify performance period.	Same as above.	All bonds must be in place before notice to proceed is issued. Initially difficult to set up guidance. Can be accomplished more simply by reduction of penal amount of bond.	Each agency
2. Clarify surety liability under SARA: A. Define third party risk. Bond form and contract modifications including 3rd party exclusion clauses, exclusion of bond as liability insurance substitute. Requires a change in the regulations.	Removal of sureties' stated objections to contractual clauses. Inducement to participate in BTW program.	Will take one and one-half years to implement interagency coordination needed.	Each agency
B. Surety Indemnification. Provide indemnification for sureties if they assume project control.	Induce more surety and contractor participation in BTW program.	May increase Federal liability for indemnification.	EPA
C. Define bond completion period.	Induces more surety and participation in program.	None.	Each agency
3. Indemnification guidelines: Modify proposed indemnification regulations, establish high maximum limits and clarify qualifying requirements.	Limits Federal liability for idemnification.	May discourage participation by sureties, if limits are set too low.	EPA
4. Communication with Industry: Outreach program for contractors and sureties. Technology education program.	May encourage contractors sureties to participate in program.	Effectiveness unknown.	Each agency
5. Limit Risk Potential: A. Clarify contract policy on RFP performance specifications and design-build.	Seperating out design portion may encourage sureties to participate in program.	Imprecise clause could limit contractor performance obligations more than necessary.	Each agency
B. Use of irrevocable letters of credit vs. bonds.	Enables some contractors to participate in program.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
LEGISLATIVE CHANGES:			
A. Increase separate dollar limit reserves from SARA fund and increase types of coverage for indemnification and types of coverage for indemnification.	Induce more sureties and contractors to participate.	Additional administrative burden, increased financial costs to contractors ties up assets.	Each agency
B. Specify a dollar cap on liability.	Induce more contractor and surety participation.	Federal government assumes more risk.	EPA
C. Preempt state's strict liability sureties. Provide universal indemnity.	Induce sureties and contractors to participate in program.	Reduction of public protection against BTW hazards.	EPA
D. Modify CERCLA or Miller Act. Specify performance bonds area only to assure completion of contract requirements.	Induce sureties and contractors to participate in program.	Reduction of public protection against BTW liability hazards.	Each agency

Government. This should be done early in the acquisition process to assure that the competition benefits that might be gained by such effort can be fully maximized. The decision of whether to use a service contract or a construction contract must be made on their respective merits and not on the impacts of securing performance bonding. A separate set of procedures is required to establish the bonding requirement.

In making this bonding determination it is also important to recognize that the surety community's concern regarding the risk associated with HTW work will probably lead to the surety not stepping forward to complete the project in the event of a contractor default. Consequently, it is likely that the Government will benefit only from the surety's providing the penal sum of the performance bond. The Government probably will still need to reprocure the work. Contractors pointed out that sureties were requiring substantial financial commitments from contractors as a prerequisite to providing bonding. This fact would tend to make the surety even more inclined to buy itself out rather than assume the greater risk burden associated with its takeover of the defaulted contract. The reality then appears to be that the performance bond is primarily protecting the Government's financial stake in the contract rather than its interest in not having to deal with reprocurement upon default.

In looking at the character of work to be performed under an HTW contract, it may well be that the nature of the work and the payment arrangements employed by the Government may provide a measure of protection in themselves that could warrant a lower bonding percentage. In the excavation situation, and even more so where we are dealing with incineration service work, many of the payments to the contractor are subject to its performing satisfactorily. A default after partial performance requires that the Government procure another contractor to continue performance. This default situation, however, is substantially different from that faced where we are dealing with a building construction project. In the former case, the work to be completed is relatively easy to determine. This is in sharp contrast to the problem facing the Government where multiple subcontractors and complex design requirements must be determined and taken into consideration in a vertical

b. Require Increased Acquisition Planning. The contracting process, including the bonding issues, should be integrated into a project acquisition plan. An analysis of the risk trade offs to the Government may be incorporated into the acquisition planning process for HTW projects. Presently the Federal Government requires performance bonds to assure against the uncertainty of project non-performance on construction projects as mandated by the Miller Act. The cost of this protection should approximate the cost of the potential non-performance risk in the long run. The trade offs of this risk may be examined in the acquisition planning process for each project. The process will analyze the benefits and costs of the Government assuming slightly higher risks in project performance and the resultant benefits and costs of improving the competitive climate for HTW contracting and the consequent reduction in contract prices. This may involve the analysis of each phase of the cleanup and the appropriate level of bonding that would afford adequate protection for the Government's interests and still encourage participation by the bonding industry. Careful examination of the contract alternatives, service contracts or construction contracts, should be carried out by an interdisciplinary team, "recommending" to the contracting officer, although final disposition will be made by the Department of Labor. Meetings are being planned for early summer 1990 between EPA, Corps and Department of Labor representatives to clarify the classification of construction and service contracts under the Davis-Bacon and Service contract Acts.

Cost type contracts should be given careful consideration where there are significant technological unknowns associated with undertaking an HTW project. It is not in the program's interest for the contractor to be required to bear an inordinate share of the risk. Requiring fixed priced contracts under such conditions places both the contractor and surety in an unacceptable risk condition and would increase the cost to the government significantly.

Multiple contracts are another action which could be considered by the Government during its acquisition planning to limit the risk potential for the bonding community. The approach would be to structure the contract requirements so as to limit or isolate the activity requiring a surety bond

plan would place an administrative burden on the project. If additional firms participate, there is a chance of reduced project costs.

2. Clarify Surety Liability.

a. Background. Interviews conducted in the course of the study with contractors and sureties focused on the real concern in the surety community regarding the potential liability arising from their willingness to act as guarantors for HTW projects. This is consistent with the sureties' stand that they are bonding execution of plans and specs, not project performance. This is a perceived danger, not one based on any particular court ruling involving a surety guarantee situation. The perceived liability arises from potential third party injury claims and an ill-defined bond coverage completion period.

The surety's concern for liability results from the trend in cases arising from the monumental asbestos litigations where the courts have sought some deep pocket to compensate the injured party. In some cases, the courts have looked to insurance companies for such relief despite the insurance industry's disclaimer of any liability under their policies. The sureties view themselves as similar to these situations, with potential deep pockets from which injured parties may seek relief. They recognize that they are not insurers of such injury, but have little faith that the courts will take note of the distinction between insurer and guarantor if there is no other financially viable party against which a valid judgement can be executed.

The surety community, similar to the insurance industry, uses a secondary market to spread the risk associated with any particular bond arrangement. This secondary market has made it clear that it is not interested in sharing the risk associated with HTW projects. As a consequence, surety firms are more and more being called upon to undertake greater risk levels for such work. The insurance industry responded to the loss of its secondary insurers by withdrawing completely from the pollution liability coverage market. The surety industry, although still maintaining a reduced presence, does have certain members of its community which have followed the insurance industry lead and chosen to withdraw from providing bond coverage for such work.

c. Surety Indemnification. Another concern that needs to be clarified is the extent of indemnification, if any, that the surety would be entitled to as a result of providing bonding on the contract. Indemnification for remedial action contractors performing HTW work is permitted by 42 U.S.C. 9619, provided that certain requirements are met. Sureties question the applicability of this indemnification to them. Since it has a major impact on the evaluation of the risk for bonding such work, clarification is needed to allow the industry to adequately quantify its potential long-term risk.

d. Define bond completion period. The government will define the point at which bond completion requirements have been fulfilled. This definition is within the authority of the procuring agencies.

Recently, in reply to a surety's concern over its right to indemnification in the event of a default of the bonded contractor, EPA advised that the surety would be eligible for indemnification if it elected to stand in the shoes of the defaulted contractor and complete performance of the remedial action. A final decision has not been made as to how this will apply to a surety that elects to take on responsibility for performance, but does so through its procuring another contractor. It is clear that this issue must be clarified with respect to the EPA superfund projects.

3. Indemnification Guidelines.

a. Background. There is no defined limit of coverage in EPA's interim guidance on indemnification that can be addressed with certainty by surety or contractor interests in assessing their potential risk. Likewise, the requirements that will need to be met to become eligible for the indemnification are not completely clear with respect to the contractor. They are even more ambiguous regarding the surety. These unknowns appear to exacerbate an already bad situation and provide no incentive for industry to move forward and commit themselves and their assets to support the program.

It is unclear from the data compiled in the study the effect that clarification of this issue will have on the surety and contractor community. DOD, which has not provided indemnification, for its work, has been able to

hazardous and complex, many projects use proven engineering principles which have a long history of use and acceptance. The extreme caution on the part of the surety industry, limited number of projects constructed and reluctance of sureties to become involved in HTW projects, all mesh together to cause the surety to assume each HTW project is the same despite the considerable variation in the types of projects. A number of projects are water supply construction alternatives that have no direct involvement with hazardous wastes.

b. Outreach Program. To overcome this lack of understanding, the EPA and the Corps could sponsor outreach efforts aimed at bringing both sureties and contractors together for purposes of discussing with industry technical aspects of different types of HTW projects. The agencies should also focus on the different site conditions and various contractual provisions that can distinguish one site from another and the technical aspects of using state of the art technology. While not eliminating all impediments to surety involvement, this could go a long way toward lovering the surety industry's reticence to participate on some of the less complex projects.

5. Limit Risk Potential.

a. Background. Sureties expressed particular concern that the Government not package its procurements, as design-build contracts including the use of performance specifications. In these cases, the surety is concerned that its risks are significantly enlarged from the situation it faces where design has been completed and the contractor need only construct the designed project in order to satisfy performance.

b. Clarify Contract Policy. The government should consider accepting design responsibility where performance specification requirements have been met. Performance specifications are used to some extend in all construction contracts. Incineration and ground water treatment contracts have a very large performance specification component and will remain that way. The government will continue to allow contractors to propose the complex equipment needed to meet specific site treatment requirements. Once the contractor has demonstrated that the equipment meets the performance specification, the

1. Increase the coverage for indemnification. Expand the types of coverage for liability indemnification and make these available to the surety as well as the contractor.

2. Establish a dollar cap on HTW liability.

3. Preempt state laws covering strict liability, and provide universal indemnity.

4. Amend CERCLA and/or Miller Act to specify that the purpose of performance bonds is to assure the government that the contractor will complete all contractual requirements and obligations. Performance bonds shall not be a vehicle for third party liability claims.

EPA and Corps representatives should meet with Department of Labor to clarify the contract requirements of the HTW program and the relationship of these to the: Miller Act, Davis-Bacon Act and related regulations.

A program of continuing review of contract actions will insure continued competition in the contracting process.

Emphasis should be placed on appropriate acquisition planning which takes into consideration all factors that relate to the competitiveness of the contract situation.

2. Clarify Surety Liability Under SARA.

EPA should move immediately to clearly define the extent to which it will provide indemnification coverage to sureties on HTW projects. Extending indemnification by the Federal government to sureties should be explored when they fulfill these surety obligations by stepping in and completing the project for the defaulting contractor. Presently this area is not well defined. EPA should also institute, in conjunction with the Corps, an effort to revise the present FAR performance bond form to deal with the concerns raised by sureties on potential for third party actions looking to the bond for injury judgement recovery. A task force composed of appropriate personnel from both agencies should be established to work on having this revision instituted for HTW projects. At the same time, each agency should require its internal procurement elements to assure that wording is included in invitations and solicitations disclaiming any interest by the Government in having the performance bond being available to cover third party injury claims.

3. Indemnification Guidelines.

A new indemnification clause will be implemented by the Corps which will assure the indemnification of HTW contractors in the event that they are not able to secure adequate insurance for firm fixed price contracts. The indemnification will extend to third party liability by the surety.

4. Communication with Industry.

substantially reduce many of the concerns of the surety industry and contractor community in being involved with Superfund remedial action work.

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5. Hazardous Waste and the Surety. American Bar Assn. William Ryan and Robert Wright. November 1989.

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APPENDICES

Appendix A:

List of Contacts

APPENDIX A

HTW BONDING STUDY

List of Contacts

Name	Organization	Address	
John Steller	Ill. Dept land Pollution ctrl	Springfield	IL
Lynn Schubert	American Ins. Assn	Washington	DC
Brian Deery	Assn. Genl. Contr/Amer	Washington	DC
Stuart Binstock	Assn. Genl. Contr/Amer.	Washington	DC
Dave Johnson	Assn. Genl. Contr/Amer.	Washington	DC
Jack Mahon	CECC-C OCE	Washington	DC
Greg Noonan	CECC-C OCE	Washington	DC
Chuck Schroer	CEMP-C OCE	Washington	DC
Walter Norko	CEMP-CP OCE	Washington	DC
Sara Bunch	CEMP-RS OCE	Washington	DC
Jim Gibson	CEMP-RS OCE	Washington	DC
Paul Lancer	CEMP-RS OCE	Washington	DC
Noel Urban	CEMP-RS OCE	Washington	DC
Gene Jones	CEMRD-CT	Omaha	NE
Bruce Anderson	CEMRD-OC	Omaha	NE
Norm Spero	CEMRD-OC	Omaha	NE
August Spallo	CEMRK-OC	Kansas City	MO
Joan Chapman	CEMRK-CT	Kansas City	MO
Steven Switzer	CEMRK-CT-K	Kansas City	MO
Frank Bader	CEMRK-ED-T	Kansas City	MO
Lee Fuerst	CEMRK-ED-T	Kansas City	MO
Donald Robinson	CEMRO-CT	Omaha	NE
Cathy Vanetta	CEMRO-CT	Omaha	NE
Kirk Williams	CEMRO-CT	Omaha	NE
Stanley Karlock	CEMRO-ED-E	Omaha	NE
Gary Henninger	CEMRO-OC	Kansas City	Mo
Ann Wright	CEMRO-OC	Omaha	NE
Rick Heinz	CEORD-RS	Cincinatti	OH
Mary Melhorn	CEPR-ZA	Washington	DC
George Wischman	CEPR-ZA	Washington	DC
Richard Corrigan	CH2M Hill	Washinton	DC
S. McCallie	CH2M Hill	Denver	CO
Jim Lane	Corroon & Black	Madison	WI
Peter Bond	Davy Corp	San Francisco	CA
Mike Yates	Ebasco Constr. Inc.	Lyndhurst	NJ
William Bodie	Environmental Bus. Assn.	Washington	DC
Paul Nadeau	EPA HQ	Washington	DC
Tom Whalen	EPA HQ	Washington	DC
Carl Edlund	EPA Reg Off 6 (Dallas)	Dallas	TX
Tom Bosley	Fidelity & Deposit Co.	Baltimore	MD
John Herguth	Foster Wheeler Corp.	Clinton	NJ
Terre Belt	Hazardous Waste Action Co	Washington	DC
Joe Turner	Huntington Dist.	Huntington	WV
John Daniel	IT Corp	Washington	DC

Appendix B:

Sample Forms

CERTIFICATE OF SUFFICIENCY

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true.

NAME (Typewritten)	SIGNATURE

OFFICIAL TITLE

ADDRESS (Number, Street, City, State, ZIP Code)

INSTRUCTIONS

1. This form shall be used whenever sureties on bonds to be executed in connection with Government contracts are individual sureties, as provided in governing regulations (see 41 CFR 1-10.203, 1-16.801, 101-45.3). There shall be no deviation from this form except as so authorized (see 41 CFR 1-1.009, 101-1.110).

2. A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member. Stockholders of a corporate principal may be acccepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports.

3. An individual surety shall be a citizen of the United States, except that if the contract and bond are executed in any foreign country, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, or any other territory or possession of the United States, such surety need only be a permanent resident of the place of execution of the contract and bond.

4. The individual surety shall show net worth in a sum not less than the penalty of the bond by supplying the information required on the face hereof, under oath before a United States commissioner, a clerk of a United States Court, or notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal, it shall be affixed, otherwise the proper certificate as to his official character shall be furnished.

5. The certificate of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

U.S. GOVERNMENT PRINTING OFFICE : 1984 O - 437-307 STANDARD FORM 28 (REV. 10-83)

CORPORATE SURETY(IES) (Continued)

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	

INSTRUCTIONS

1. This form is authorized for use when a bid guaranty is required. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. The bond may express penal sum as a percentage of the bid price. In these cases, the bond may state a maximum dollar limitation (e.g., 20% of the bid price but the amount not to exceed _____ dollars).

4. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

5. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

6. Type the name and title of each person signing this bond in the space provided.

7. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror".

CORPORATE SURETY(IES) (Continued)

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	

BOND PREMIUM ▶	RATE PER THOUSAND	TOTAL
	$	$

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorization person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)". In the space designated "SURETY(IES)" on the face of the form insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require these sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

APPENDIX 3

Summary Table of State Law Relevant to RACs

CORPORATE SURETY(IES) (Continued)

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT $
	Signature(s)	1.	2.	Corporate Seal
	Name(s) & Title(s) (Typed)	1.	2.	

INSTRUCTIONS

1. This form for the protection of persons supplying labor and material is used when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a–270e). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces ("Surety A," "Surety B," etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, two or more responsible persons shall execute the bond. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the sureties to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction regarding adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

GPO : 1984 O - 433-364

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Alabama	Pollution Control Grant Fund (§ 22-22a-16)	No 22-229(m) includes wrongful acts, omissions and negligence	No	No	Yes
5/89	Alaska	No	Yes, but RA must have control over hazardous substances. (46.03.822)	No	Yes, but does not apply to RACs (34.20.100)	Anti-deficiency statute is limited to mortgage has no application RACs (34.20.100)
5/89	Arizona	Water Quality Assurance Revolving Fund (49-282)	No	No	Yes, for sole negligence in certain AE	Yes. Section 34-134 precludes public sector indemnities unless funds are appropriated
5/89	Arkansas	Remedial Action Trust Fund (8-7-508)	No. 8-7-420 holds RACs to a negligence standard	No. 8-7-512 requires RACs to indemnify states.	No.	No. DPCE contracts with consultants and contractors have received full state indemnification.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Delaware	Hazardous Waste Management Act, § 6316, allows Department of Conservation to receive funds in carrying out Act.	Yes, if RAC treated or disposed of wastes (7DE Code 6301-6309)	No.	Yes, for negligence of all parties in all phases of design and construction projects (6DE Code 2704).	Yes, sovereign immunity statutes exempt the state from liability (10 DE Code-4001, et seq)
5/89	District of Columbia	None.	No.	No.	No.	No.
5/89	Florida	Hazardous Waste Management Trust Fund (403.725)	Yes, if RAC arranged for disposal or treatment (Fla.Stat.Ann. 403.727)	Yes, for state and local contractors (376.319)	Yes. For acts or omissions in certain construction contexts unless indemnification capped or consideration given.	No.
5/89	Georgia	Hazardous Waste Trust Fund (12-8-68)	Yes, if RAC contributes to the release (12-8-81)	No.	Yes, for sole negligence in certain construction contexts (13-8-2)	No.
5/89	Hawaii	None, but Director has authority, with approval of the Governor, to receive money from the Federal and State government	No, however, Director was authorized in 1988 to bring state into compliance with federal law	No.	Yes, for sole negligence in certain construction contexts. (431.453)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Iowa	Hazardous Waste Remedial Fund	Yes, if RAC has control over hazardous substance (§558.392), but no (negligence standard) if transport hazardous waste	No.	No.	Yes, no state indemnification if paid to do the work
5/89	Kansas	Environmental Response Fund (65-3454a)	No, liability only for gross negligence or reckless wanton or intentional misconduct (65-3472)	No.	No.	No.
5/89	Kentucky	Hazardous Waste Assessment and Management Fund (224.876)	Yes, if RAC has possession or control over discharge or caused the discharge (224.877)	No.	Maybe. Kentucky Constitution §§ 50-177 arguably bars indemnification	Yes.
5/89	Louisiana	Hazardous Waste Protection Fund (30-2190) and Hazardous Waste Site Cleanup Fund (30-2205)	No. Statutory negligence standard (9-2800.3(a))	Yes, holds harmless state contractors from property damage and personal injuries caused by negligence (30-1169-1)	Yes, applicable to owners of facility or any person liable for discharge or disposal (30-2278)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Minnesota	Environmental Response, Compensation and Compliance Fund (§ 115 B.20)	No, as long as RAC is working under State or Federal Acts (115 B.05)	No.	Yes, cannot transfer liability to another person (115 B.10)	No.
5/89	Mississippi	Hazardous Waste Facility Sigint Fund (§ 115 B.20)	Yes, if it helps create necessity for cleanup	No.	Yes, for own negligence in certain construction contexts (31-5-41)	No.
5/89	Missouri	Hazardous Waste Fund (260.391)	Yes, if RAC has control over hazardous substance (260.530), but liability capped at $3 million per occurrence (260.552)	No, but RACs right indemnification is preserved against other liable parties. (260.552: 1-(1))	No, 260.552:1-(1) recognizes right of a RAC to seek indemnification	No.
5/89	Montana	Environmental Quality Protection Fund (75-10-704)	No. Action taken to contain or remove a release is not an admission of liability for the discharge. (75-10-60, et seq.)	No.	Yes, for fraud or negligent violation of the law (28-2-702)	No.
5/89	Nebraska	None.	No, but negligence standard for those who cause discharges	No.	Yes, for own negligence in certain construction contexts. (25-21,187)	Yes. The State constitution provides for immunity from suits. (Art. III.§ 18)

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	New Mexico	Hazardous Waste Emergency Fund (74-4-8)	No.	No.	Yes, for negligence, acts or omissions in certain construction contracts unless certain actions excluded (56-7-1)	Yes, New Mexico has a sovereign immunity statute
5/89	New York	Hazardous Waste Remedial Fund (NY Env. Cons. Law 27-0916)	No, no negligence standard is applied (NY Env. Cons. Law 27-1321(3))	No.	Yes, for negligence in certain construction AE and surveying contracts (Gen.Ob. Laws 5-322.1, 5-323, 5-324)	Contracts cannot be let for amounts exceeding the appropriation (State Fin. Law 136)
5/89	North Carolina	Hazardous Waste Fund and Hazardous Waste Site Remedial Fund (130 A-298 et seq.)	Yes, if RAC has control of hazardous waste discharge (143-215.93)	No, but RAC may reimburse state for role in inactive hazardous waste site. (130A-310-7)	Yes, for negligence in certain construction contracts (22B-1)	Yes.
5/89	North Dakota	None.	No.	No.	Yes, for fraud or negligent violations of the law (9-08-02)	Yes, Article 1 § 21
5/89	Ohio	Hazardous Waste Cleanup Fund (3734.28)	Yes, if RAC transports or disposes of wastes (3734.15,16)	No. RAC may have to indemnify state (3734.22)	Yes, for negligence in certain construction contracts. (2305;31)	No.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Pennsylvania (continued)	Solid Waste Management Act imposes strict liability on violators. (6018.601 6503) No, RACs must meet conditions set forth in Hazardous Sites Clean-up Act, § 702(e)				
5/89	Rhode Island	Environmental Response Fund (23-19-1-23)	No. Absolute liability only for unauthorized transportation, storage or disposal (23-19-1-22	No.	Yes, for negligence in certain construction contexts (6-34-1)	Yes, state liable in tort actions subject at period of limitations and monetary limitations (9-31-1)
5/89	South Carolina	Hazardous Waste Contingency Fund (44-56-160)	Yes, for unpermitted water discharges (48-1-90) and for transporting or disposing of hazardous waste without reporting to Agency. (44-56-130, 140)	No.	Yes, for sole negligence in certain construction contexts (32-2-10)	Yes.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)--continued

Last Update	State	Mini S. Fund Law	Strict Liability for RAC's by Statute	Indemnity Statutes for RAC's	Anti-Indemnity Statutes	Restrictions on Public Sector Indemnities
5/89	Utah	Solid and Hazardous Waste Act (26-14-1, et seq)	Yes, if RAC contributed to the release. (26-14-19(4))	No.	Yes, for sole negligence in certain construction contexts (13-8-1)	Yes.
5/89	Vermont	Solid Waste Management Assistance Fund (Tit. 10,6618)	Yes, if RAC arranged for disposal of treatment (Tit. 10,6605)	No.	No.	No.
5/89	Virginia	Virginia Waste Management Act (10.1-0402)	No.	No.	Yes. Voids agreements by contractors to indemnify other for sole negligence (11-4.1)	Waiver of sovereign immunity (8.01.192)
5/89	Washington	Hazardous Waste Regulation (70.105B.010)	No.	Yes. (70.105 B.100(3))	Yes, for negligence in certain construction contexts (4.24.115)	No.
5/89	West Virginia	Hazardous Waste Emergency Response Fund (20-56-1)	No.	No.	Yes, for sole negligence in certain construction contexts. (55-8-14)	No.

PART B

Adequacy of Legal Protection in DRMS Hazardous Waste Disposal Contracts

draft

DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
WASHINGTON, DC 20350-2000

IN REPLY REFER TO
5090
Ser 453D/1U600126

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE NAVY (INSTALLATIONS AND ENVIRONMENT)

Subj: EXPERIENCE WITH ENVIRONMENTAL RESPONSE ACTIONS AND PROPERTY TRANSFER - INFORMATION MEMORANDUM

Ref: (a) DASD memo 28 Jun 91

Encl: (1) Comments on Environmental Response Issues

1. In response to reference (a) we have prepared enclosure (1). Answers to these questions raised by the Environmental Response Task Force contain our experience with environmental response actions and property transfer at military installations closed pursuant to Public Law 100-526.

2. My point of contact is Patricia L. Ferrebee, OP-453D, at 602-3031.

F. R. CLEMENTS
CAPT, CEC, USN
Director, Environmental Protection, Safety and Occupational Health Division

FOR Hayden Bryan
DASD(E)

FAX 693-6362

COMMENTS ON ENVIRONMENTAL RESPONSE ISSUES

ISSUE 1.

Question:

What experience have you had with outleasing facilities when the facility is within the scope of an investigation of potential contamination by hazardous substances or an ongoing cleanup of such contamination? What barriers or complications have you identified?

Answer:

Our only experience is our current effort to lease all or a portion of Hunters Point Naval Shipyard to the city of San Francisco. P. L. 101-510 directed the Navy to lease at least 260 acres of the shipyard to the city. Hunters Point is an NPL site and it is impossible to find 260 contiguous acres which are not contaminated or being studied for potential contamination. Currently, the city of San Francisco does not want a lease, but wants a management agreement with an option to lease, and indemnification to toxic torts liability. The Navy considers that our legislative directive is to lease the property and negotiations are stalemated.

We foresee that potential lessees will be concerned about becoming liable for harmful effects from contamination during future use of the property. Also, it may be difficult for a lessee to obtain financing to improve the property if there is a possibility that the improvements may have to be removed to undertake environmental restoration. Because of these and other uncertainties, we expect lease arrangements to be difficult to conclude.

Question:

With response to excess property, or bases slated for closure, what policies, procedures or standard lease forms have been established for leasing base facilities that may be affected by an investigation or cleanup of hazardous substance contamination in the interim before the base is closed?

Answer:

To date, none. Our current outleasing policies allow our contracting officers discretion to deal with these issues.

Question:

What policies, procedures or standard deed provisions have been established to protect the rights of the Department, and to enable it to discharge its responsibilities to clean up contaminated sites, when transferring parcels of a closing base that are within an "area of concern?"

Answer:

Policies and procedures for transferring property outside of DOD are contained in the Federal Property Management Regulations. The Navy has not developed any new policies, procedures or standard deed provisions to protect the rights of the Department, and to enable it to clean up contaminated sites when transferring parcels of a closing base that are within an "area of concern."

ISSUE 2.

Question:

To what extent has response to recurring environmental problems, such as petroleum contamination of soils, been standardized? Have standard or generic feasibility studies/corrective measures studies been developed for such recurring problems? If so, please describe the elements of such a study or attach an example.

Answer:

The remedial approach to recurring environmental problems has been standardized as much as possible. NAVFAC Engineering Field Divisions have developed standard scopes of work and use "CLEAN" contracts to enable the Navy to have one contractor for work at many locations. This has the added benefit of reducing the "learning curve" since the contractor will be familiar with the Navy managers, regulators, and the individual sites. However, since the exact response to a contaminated site varies depending on the hazardous substance released, the dynamics of the site (hydrogeology, environmental sensitivity, etc.) and the state and local environmental regulations, studies conducted and response actions taken reflect these unique site conditions.

Question:

Have RI/FI requirements been integrated with NEPA requirements at any bases to expedite cleanup?

Answer:

The Department of Navy has concluded that present law does not require the development of distinct or integrated NEPA documentation for the CERCLA remedial actions taken by DoD on its installations. Department of Navy procedures and programs for installation restoration include opportunities for public participation and full evaluation of alternatives for action; the purposes and values of the National Environmental Policy Act are satisfied by the CERCLA/IR procedures. Because the two statutes are inconsistent in procedures and in the timing and effect of judicial remedies, superimposition of NEPA procedures would not, in our view, expedite remedial actions, but would be counterproductive in that respect.

ISSUE 3.

Question:

How many current or formerly used defense sites are potentially contaminated with unexploded ordnance? Please provide a list of these sites.

Answer:

Formerly used defense sites are managed by the Army for all DOD sites. Installations on the Base Closure List with sites where unexploded ordnance has been found are listed below: NS Puget Sound (Sand Point), NAS Chase Field, NAS Moffett Field, and NWS China Lake (Salton Sea Test Range).

ISSUE 4.

Question:

Are there any specific examples where the oversight and regulatory responsibilities of environmental regulatory agencies were combined or reconciled? Did this expedite the process of environmental restoration at the base? Would IAGs at all base closure sites provide a method to identify regulatory responsibilities?

Answer:

Many, if not most, Federal Facility Agreements attempt to reconcile CERCLA and RCRA requirements, and the federal and state authorities granted under those statutes and regulations. At some locations, this has allowed for rapid response to releases from underground storage tank (UST) systems at National Priorities List sites by applying the RCRA UST cleanup regulations, rather than the CERCLA response requirements. At other locations, the State has agreed to observe the cleanup actions at our NPL sites and determine if progress and scope are satisfactory; if they do not believe that the progress or scope are acceptable, they are reserving their rights to take legal action to try and direct necessary cleanup actions. We do not believe that agreements, per se, for non-NPL sites would expedite the cleanup and transfer of property at bases to be closed. Formal agreements are a useful option where there is a potential or actual disagreement or point of contention between states and the federal agency. Where no problem exists, the authority given DOD in the National Contingency Plan is sufficient to clean up the site.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0110

REPLY TO
ATTENTION OF

23 JUL 1991

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF DEFENSE
(ENVIRONMENT)

SUBJECT: Experience with Environmental Response Actions and Property Transfer

Reference is made to your memorandum of 28 Jun 91 on this subject. The Army comments and response to the issues and questions you raised are provided at the attachment.

Point of contact in this office is Mr. Rick Newsome at extension 614-9531.

Lewis D. Walker
Deputy Assistant Secretary of the Army
(Environment, Safety and Occupational Health)
OASA(I,L&E)

Attachments

cf (w/o attachments):
SAGC
AMCEN-CC
ENVR-EH
CEMP-R

ISSUE # 1

What experience have you [the Army] had with out-leasing facilities when the facility is within the scope of an investigation of potential contamination by hazardous substances or an ongoing cleanup of such contamination?

What barriers or complications have you identified?

1. To date, under BRAC I the Army has actually transferred only a few housing units:

Shelton, CT: Leased (through the Social Services Administration) to charitable organizations under the McKinney Act.

Midway, WA: Leased (through the SSA) with UST's and some soil pollution present (non-threatening to health or environment). Lease terms specifically provide for continued Army access in order to complete remedial actions. No transfer of deed is contemplated prior to completing remedial action.

Croom, MD: Was sold at auction, with at least three competing bidders. Remedial action was completed prior to the auction. Entire acreage purchased for 245,000 dollars, including its 12 housing units, even though the location is zoned for single family occupancy.

2. Commercial/industrial site experience.

a. Kapalama, Hawaii: Kapalama could present some good object lessons concerning parceling and disposition for similar re-use. The already completed portions of the Kapalama transfer were not a part of the Base Closure Program. Property transfers and parceling were begun under a "sell and replace" program.

Kapalama I
Time period: sold in 1987
Acreage: 14.4 acres
Army use: port and warehouse facility
Sold to: Servco Corp.
Current Use: Vehicle Storage

Post transfer legal/clean up experience: Prior to disposal, the Army removed a large number of Underground Storage Tanks without testing soils or groundwater. Demolition and construction activity by the new owner disclosed the

presence of petroleum contaminated soil and groundwater in the area of one of the removed storage tanks. The new owner excavated the contaminated soil and disposed of it in a local landfill, upsetting the Hawaiian regulatory authorities. The new owner is seeking to recover cleanup costs from the Army.

Kapalama IIa
Time period: Sold March 1990
Acreage: 7.8 acres
Army use: --
Sold to: Dia Showa
Current use: warehouse
Post transfer legal/clean up experience:
Sale price 12.2 million

Kapalama IIb
Time Period: Sold October 1990
Acreage: 35.9 acres
Army use: Storage & warehouses
Sold to: Hawaii
Current use: Storage
Post transfer legal/clean up experience:
Sale price 57.1 million

Kapalama III
Time period: BRAC I
Acreage: 22
Army use: Port & Warehouse facility
To be sold to: Hawaii
Expected use: Storage
Expected price: 34.9 million

b. Alabama AAP: This may be an example of what can be done with "parceling" at an NPL site.

1) Time Period: <u>"Leaseback" Area</u> sold in 1977

Acreage: 1354 acres
Army Use: Nitrocellulose and smokeless powder production area
Sold to: Kimberly-Clark
Current use: Expanded pulp mill operations

<u>Post transfer legal/clean up issues</u>: Army has "leased-back" 272 acres to in order to decontaminate former manufacturing areas

2) Time period: <u>Area A</u> sold in 1990
Acresge: 2803 acres
Army use: Former magazine area and burning ground

Sold to: Woodlander Inc. and Jones Lands
Price: 1.86 million
Current use: Hunting; owner may eventually lease ammunition storage igloos for commercial storage

Post transfer legal/clean up issues: After sale was complete, EPA Region IV requested the Army conduct additional sampling to confirm all contamination had been removed.

3) Area B composed of 2246 acres is subject to BRAC I, but is not deemed to be cost effective to remediate because it contains the center of the former plant's manufacturing operations and is very heavily contaminated. Clean up costs would far exceed market value.

3. Lexington AAP is a good example of issues relating to leasing base property while its environmental investigations are still in progress:

a. At Lexington AAP, which is scheduled for closure, the Army has leased parcels for grazing an other agricultural use on a year-to-year basis.

b. Positive Aspects: This type of lease obviously minimizes lessee exposure to any latent contaminants and maximizes the Army's flexibility to adjust parcels and lease terms based on developments in the RI/FS and Base Closure schedule. The limited term of the lease may also make it easier to offer the property as a whole to a future buyer. And specifically, such limited use, annual leasing should leave the property "unencumbered" with tenants or tenant generated pollution prior to the 1995 deadline for returning proceeds from land sales to the Army.

c. Negative Aspects: The limitations to one-year terms and agricultural uses may preclude offers from potential lessees who might be willing to make long term investments in more intensive uses which might create more jobs and bring a higher financial return to the government.

d. With most Base Closures, it may be impractical to lease parcels containing motor pools, warehouses, machine shops and other industrial/commercial type sites during the course of the site investigation, because they may require the most repeated, and most intrusive studies.

e. In most cases, (whether a Base is scheduled for closure or not) there is no incentive for the installation to

declare property unused and available for lease. The Installation Commander is losing a great deal of control over the property, while the rents are not paid to his installation.

4. Although the Army lacks experience in this area, except at Alabama AAP, general concerns a Superfund listing mislabels an entire installation and depresses the market for potential commercial reusers may be overdrawn:

a. If the descriptions were more narrowly drawn, those same purchasers would be put off by the "threat" of being adjacent to a Superfund site.

b. The most sophisticated and serious commercial purchasers will closely study the details behind the listing.

c. Unlike a private seller, the United States cannot go bankrupt. The United States is one PRP which will always be capable of returning to the site to perform cleanups. That fact, combined with the warranty provision of 120(h)(3) could make Army properties, including Superfund sites, more marketable than their private counterparts to commercial users and their financial institutions.

ISSUE #1

With respect to excess property, or bases slated for closure, what policies, procedures or standard lease forms have been established for leasing base facilities that may be affected by an investigation or cleanup of hazardous substance contamination in the interim before the base is closed?

What policies, procedures or standard deed provisions have been established to protect the rights of the Department, and to enable it to discharge its responsibilities to clean up contaminated sites, when transferring parcels of a closing base that are within an area of concern?

1. General Comment: Although arguably, the warranty provisions of CERCLA 120(h)(3) may preclude issuing deeds (transferring title) for government property prior to completion of remedial action; the statute does not explicitly forbid parceling or leasing subject to use restrictions.

2. ASA Livingstone and DASA Walker have indicated the Army goal in environmental restoration efforts is cleanup to "unrestricted use." However, each have indicated that, on a case-by-case basis, technological and financial return factors may require that goal to be readjusted. Each have indicated transfers of contaminated property subject to use restrictions will be considered. In all cases, the minimum standard is full protection of human health and the environment. Policy statements include:

Walker, (SAILE-ESOH), 31 January 1990, Memorandum, Subject: Base Realignment and Closure Environmental Restoration Strategy

Owen, (SAILE), 10 December 1990, Memorandum, Subject: Excessing of Contaminated Army Lands

Ferry, (CERE-MM) 15 April 1991, Memorandum, Subject: Guidance on Compliance with the Comprehensive Environmental Response, Compensation and Liability Act, (applicable to both outgrants and property disposals).

Livingstone, (SAILE) 7 June 1991, Memorandum, subject: BRAC 91 Environmental Restoration Management

Walker, (SAILE-ESOH), 27 June 1991, Memorandum, Subject, Joint Hearing, Jun 21, 1991, before the Senate Subcommittee on Readiness, Sustainability and support

ISSUE #2

To what extent has response to recurring environmental problems, such as petroleum contamination of soils, been standardized?

Have standard or generic feasibility studies/corrective measures studies been developed for such recurring problems? If so, please describe the elements of such a study or attach an example.

1. Obviously, many environmental contamination problems are recurring: Soil and/or groundwater contamination with POL, solvents, RDX and munitions related contaminants, friable asbestos and UXO are problems identified at many sites. To the extent Base Closure site investigations are being centrally managed by the Army (thru USATHAMA), time and effort is saved. Project Managers can draw upon their own and others experience to identify critical scientific issues and regulatory concerns. A Project Manager can adapt plans successfully used at other installations within that EPA Region or state to circumstances at his own project.

2. However, a "programmatic" Remedial Investigation/Feasibility Study is probably an impossibility, with the possible exception of friable asbestos and some UST removals associated with housing units. The industrial and training operations which caused the most serious pollution problems require so much site specific analysis of site history, soils, aquifers, levels of contamination etc., a "programmatic" approach would not save any time.

3. Another difficulty with attempting a "programmatic" approach is the lack of a consistent regulatory approach.

   a. Different states emphasize different concerns. Even within the federal government, EPA Regions take different approaches.

   b. In a related vein, over a multi-year investigation, scientific developments and shifting priorities lead federal and state regulatory agencies to direct changes or additions to previously approved Army studies or clean ups. For example listing of a site on the NPL generates requirements for addition al studies from EPA. This has occurred at:

      Cornhusker AAP
      Louisiana AAP
      Alabama AAP
      Milan AAP

Savanna AD
Letterkenny AD

ISSUE # 2

Have RI/FS requirements been integrated with NEPA requirements at any bases to expedite cleanup?

General Comment:

1. Paragraph 2-2a(8), Army Regulation 200-2, "Environmental Effects of Army Actions," requires the Army to fully consider the impacts, evaluate alternatives and obtain public input before completing Feasibility Studies. In most cases, the FS is expected to satisfy NEPA requirements.

2. The CEQ has identified the Army as one of the federal agencies most successfully integrating NEPA into CERCLA requirements.

Army Experience:

1. The Army began BRAC I with a goal of completing NEPA documents for closing installations within 18 months. The Army did not meet this goal.

2. The problems experienced during BRAC I with respect to integrating land reuse planning, NEPA analyses, and studies of environmental contamination (eg. RI/FS) were primarily due to the attempt to develop and finalize a single NEPA document prior to the completion of essential support activities such as the reuse study and the RI/FS. The Enhanced Preliminary Assessment which must precede the RI/FS effort usually require 6 to 8 months to complete. The RI/FS or other follow-on studies may then take between 19 to 46 months to complete. Information from the RI/FS is critical to any NEPA assessment of environmental impacts and analysis of cleanup and reuse alternatives.

3. This apparent flaw of trying to complete a single NEPA document too early in the process was driven by the perceived need to analyze the environmental impacts of construction activities at receiving bases with sufficient lead time to allow needed facilities to be available as the troops arrived. Under BRAC 91, the Army expects to conduct separate NEPA analyses of the installation disposal and force realignment issues.

ISSUE #3

How many currently listed base closure sites are potentially contaminated with unexploded ordnance? Please provide a list of those sites.

General Comment:

Approximately 80 active installations may have multiple sites containing munitions contamination. Three such installations are listed on BRAC I. A list of those BRAC I and potential BRAC 91 installations is attached.

Army Experience:

1. Mr. Joseph Rouse of the U.S. Army Claims Service, Tort Claims Division, was interviewed in the time available. He did not have statistics readily available. However he indicates:

   a. To the extent a problem exists, it is not limited to inactive installations. The public frequently may have authorized or unauthorized access to maneuver and/or impact areas at active installations.

   b. The Army Claims Service very rarely receives munitions related claims. (At Fort Meade, an area of special interest to the Task Force, Mr. Rouse relates in thirty years, even with hunting and other public access to the former impact areas, only one munitions related claim has occurred. (Someone found a World War I era Stokes mortar bomb and placed it in the road, where it was struck by a vehicle).

   c. The Army "never" receives small arms ammunition related claims. To the limited extent claims are received, they are linked to explosive ammunition, particularly grenades and similar sized round which are easy to pick up and carry as souvenirs. (For similar reasons, the artillery simulators and similar devices occasionally left behind on active training ranges generate more claims than UXO's at existing and former impact ranges).

   d. Small arms ranges v. artillery/mortar impact areas

do not pose equivalent risks:

1) If fired, small caliber ammunition has no explosive properties;

2) Range control mechanisms ("counting brass") collect most unfired or misfired and ejected rounds.

3) Most rounds missed, are probably being concealed by individual soldiers and removed from the site.

4) In contrast, overtime, a percentage of even properly manufactured, stored and fired large caliber ammunition will not detonate on impact.

e. Obviously, if an incident does occur, explosive or pyrotechnic ammunition poses a great risk of severe injury or death.

2. Unexploded Ordnance [UXO] has been of special concern at three installations closing under BRAC I. In order of severity, they are:

a. Jefferson Proving Ground. This is the most serious problem because its impact areas is estimated to contain over 15 million unexploded rounds of large caliber ammunition. In addition, over 10,000 depleted uranium penetrators are also present in the impact area. Cleanup to a depth of 10 feet is estimated to cost 5 billion dollars. Cleanup to unrestricted use is thought to be technologically and fiscally impossible.

b. Fort Meade. Part of the problem at this location is simply the lack of adequate historic data. Large portions of the area of concern may be uncontaminated with UXO's, it is just impossible to tell from the record. DoD regulations require an impact area to be "rendered innocuous." At Fort Meade, it is technically impossible to conduct the subsurface search required to even try to reach this level, without destroying the woods and wetlands which led Congress to direct its transfer to the Department of the Interior in 1992. It is also physically impossible for the Army to meet this statutory deadline if more than a surface survey is conducted.

c. Fort Sheridan. From the 1920's to the 1940's, Coastal Artillery training at Fort Sheridan fired an undetermined number of rounds into Lake Michigan.

There is no record indicating any rounds have washed up on the shoreline or that bathers, boaters, or fishermen have been in contact with UXO's.

3. A thorough statistical study of experience in this area would require further consultations with the Army Claims Service (for civilian accidents), the Army Safety Office (for military accidents), and Huntsville Division, Corps of Engineers.

ISSUE #4

Are there any specific examples where the oversight and regulatory responsibilities of environmental regulatory agencies were combined or reconciled?

Did this expedite the process of environmental restoration at the base?

1. USATHAMA has had a number of BRAC sites where EPA review has been slow or simply unresponsive. Examples include:

Pontiac	EPA took 98 days to review technical plans
Indiana AAP	EPA took 7 months to review technical plans
New Orleans	EPA never returned comments on technical plans
Gaithersburg	EPA has never provided comments or responded to correspondence
Presidio Hamilton AAF Kapalama	EPA Region has declined an active role because they are non-NPL facilities

2. California is in the process of negotiating a series of IAG's at non-NPL installations within its borders. The Army has signed an agreement for Sierra Army Depot (which is not a Base Closure site) and is negotiating an agreement for the Presidio of San Francisco (a BRAC I site). An attractive feature of these agreements is they designate the California Department of Health Services as the state's "lead" agency. Disputes between DHS and the Regional Water Quality Control Board must be resolved internally, so the Army should receive coherent, non-conflicting regulatory guidance. The Army also needs to resort to only one Dispute Resolution mechanism.

3. The Sierra agreement has just been signed. As yet, no actual experience has been gained using this "Lead Agency" concept.

ISSUE #4

Would IAG's at all base closure sites provide a method to identify regulatory responsibilities?

1. Yes, to the extent:

   a. Negotiations are completed and agreement reached to allow the Army to make a timely start on its site investigation without undue concern regulators will use the agreement to justify redoing work.

   b. All relevant state or federal agencies are included in the agreement or are at least considered bound by its terms.

   c. One lead regulatory agency is defined by the agreement.

   d. Deadlines are realistic, adjustable to meet the demands new evidence or circumstances may require, and are treated as applicable to the regulators as well as the Army.

2. IAG's should not be an absolute condition precedent for conducting Base Closures. Sometimes, negotiations will just hit snags. States deeply concerned about the environmental condition of a particular base, or simply reluctant to see it closed may never be ready to sign an agreement.

STATE OF CALIFORNIA

JAMES M. STROCK
Secretary for Environmental Protection
555 Capitol Mall, P.O. Box 2815
Sacramento, CA 95812
(916) 445-3846

PETE WILSON, *Governor*

August 15, 1991

Mr. Kevin Doxey
The Pentagon, Room 3D833
Washington, DC 20301-8000

Dear Mr. Doxey:

In response to your memorandum we received on August 2, 1991 enclosed is a brief presentation on the concept of the Joint Services Regional Environmental Office. As you are aware, this concept is from the State of California and does not necessarily reflect the views of the National Governor's Association.

If you have any questions or comments, please call me at the telephone number above.

Sincerely,

Brian Runkel

Brian Runkel
Executive Officer

Enclosure

PROPOSED JOINT SERVICES REGIONAL ENVIRONMENTAL OFFICES

BACKGROUND

In the cleanup of hazardous waste on military facilities, there are several points of contact in the Department of Defense (DoD), and the decision-making process has been very lengthy and convoluted. There can even be different policies and decisions within the same service branch. This situation results in a slowdown of the cleanup process because frequently the State and the United States Environmental Protection Agency (USEPA) are forced to negotiate with each command of each service branch. This also results in a tie-up of precious resources from both the military and regulatory agencies.

PROPOSAL

In order to streamline the process and unify decision making, we propose that the military set up a joint services office, made up of staff from each branch that would evaluate and standardize military actions on military cleanups with base closure as a priority. These offices should be located in each USEPA region or state as appropriate. They will be particularly useful for the upcoming expedited base closure cleanups. These offices would also have direct access to the office of the Deputy Assistant Secretary of Defense (Environment) so that questions of broad policy and funding can be resolved quickly and consistently.

DISCUSSION

California supports this concept because we have at least 13 closing bases that will require cleanup, eight of which are on the National Priority List. We have seen cases where an issue is resolved with one branch, or even command within a branch, and when the same issue comes up in another branch or command, extended time is spent on renegotiation. Having a joint services office would prevent this delay and waste of resources.

Because of the accelerated cleanup schedules that the base closure activities will impose, it will be critical that decisions are made quickly and consistently. As was discussed at the task force meeting in July, a different way of thinking may be involved with the cleanups on these bases. California will reconsider its position of worst first, if a consistent, logical approach is presented, and if there are assurances that information is flowing to us in a timely manner for better coordination. This will allow the State to reprioritize and reallocate its resources. A central point of contact which can provide timely information and which can take decisive action could play a key role in the new relationship between the DoD and the states.

The military has begun the centralization process in California, with the Base Closure office set up by the Air Force, and with the Navy's two central points of contact; one in

closing bases, it would be most helpful to have one closure office to consolidate all of the decision-making relating to cleanup.

From California's point of view, it would not make a difference as to whether the office served the State only, or all of Region 9 EPA. Other states might not share this view, but would support the centralization concept in general.

California believes that both the regulated community and the regulatory community should strive to have a single point of contact. In California, in the oversight of the cleanup process, there is only one regulatory lead, and it is determined on a facility-by-facility basis. Lead agency determination, and roles and responsibilities of the two main oversight agencies, the Regional Water Quality Control Boards, and the Department of Toxic Substances Control (DTSC), is governed by a memorandum of understanding between the two agencies. There should be no question who is the lead agency, and this agency is the voice of the State on the cleanup. Within the DTSC, our headquarters staff is the single coordination point for policy consistency on DTSC lead facilities and the State Water Resources Control Board (SWRCB) is the single point of contact for policy consistency on SWRCB lead facilities. With the formation of the California EPA, these two agencies come under one common agency secretary, and this should enhance this situation even further. The Air Resources Board, the Integrated Waste Management Board, the Department of Pesticide Regulation, and the Office of Environmental Health Hazard Assessment are also in the new agency, giving California a true single point of contact on environmental issues.

(3) These data shall also be separated into two categories by geographic location as follows:

(i) The States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands; and

(ii) All other areas of the world.

(b) The summaries shall not include any property that was initially designated for exchange/sale but which was transferred for further Federal utilization or was subsequently redesignated as excess or surplus property.

(c) Reports shall be addressed to the General Services Administration (FB), Washington, DC 20406.

(d) The report required by this regulation has been assigned interagency report control number 1528-GSA-AN in accordance with FIRMR 201-45.6 (41 CFR 201-45.6).

(e) Negative reports are required.

Subparts 101–46.4—101–46.48—[Reserved]

PART 101–47—UTILIZATION AND DISPOSAL OF REAL PROPERTY[1]

Sec.

[1] For a temporary regulation affecting Part 101–47, see Temp. Reg. H–27 in the appendix to this subchapter.

Sec.

Subpart 101–47.4—Management of Excess and Surplus Real Property

Subpart 101–47.5—Abandonment, Destruction, or Donation to Public Bodies

Subpart 101–47.6—Delegations

Sec.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 29 FR 16126, Dec. 3, 1964, unless otherwise noted.

§ 101-47.000 Scope of part.

This part prescribes the policies and methods governing the utilization and disposal of excess and surplus real property and related personal property within the States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

[47 FR 4521, Feb. 1, 1982]

Subpart 101-47.1—General Provisions

§ 101-47.100 Scope of subpart.

This subpart sets forth the applicability of this Part 101-47, and other introductory information.

§ 101-47.101 Applicability.

The provisions of this Part 101-47 apply to all Federal agencies, except as may otherwise be specifically provided under each section or subpart.

§ 101-47.102 [Reserved]

§ 101-47.103 Definitions.

As used throughout this Part 101-47, the following terms shall have the meanings as set forth in this Subpart 101-47.1.

§ 101-47.103-1 Act.

The Federal Property and Administrative Srvices Act of 1949, 63 Stat. 377, as amended.

§ 101-47.103-2 GSA.

The General Services Administra

[29 FR 16126, Dec. 3, 1964, as amended at 42 FR 40698, Aug. 11, 1977]

§ 101-47.201-2 Guidelines.

(a) Each executive agency shall:

(1) Survey real property under its control (including property assigned on a permit basis to other Federal agencies, or outleased to States, local governments, other public bodies, or private interests) at least annually to identify property which is not needed, underutilized, or not being put to optimum use. When other needs for the property are identified or recognized, the agency shall determine whether continuation of the current use or another Federal or other use would better serve the public interest, considering both the agency's needs and the property's location. In conducting each review, agencies shall be guided by § 101-47.801(b), other applicable General Services Administration regulations, and such criteria as may be established by the Federal Property Council;

(2) Maintain its inventory of real property at the absolute minimum consistent with economical and efficient conduct of the affairs of the agency; and

(3) Promptly report to GSA real property which it has determined to be excess.

(b) Each executive agency shall, so far as practicable, pursuant to the provisions of this subpart, fulfill its needs for real property by utilization of excess real property.

(c) To preclude the acquisition by purchase of real property when excess or surplus property of another Federal agency may be available which would meet the need, each executive agency shall notify GSA of its needs and ascertain whether any such property is available. However, in specific instances where the agency's proposed acquisition of real property is dictated by such factors as exact geographical location, topography, engineering, or similar characteristics which limit the possible use of other available property, the notification shall not be required. For example, for a dam site or reservoir area or the construction of a

notification.

(d) In every case of a proposed transfer of excess real property, the paramount consideration shall be the validity and appropriateness of the requirement upon which the proposal is based.

(1) A proposed transfer should not establish a new program of an executive agency which has never been reflected in any previous budget submission or congressional action; nor should it substantially increase the level of an agency's existing programs beyond that which has been contemplated in the President's budget or by the Congress.

(2) Before requesting a transfer of excess real property, an executive agency should:

(i) Screen the holdings of the bureaus or other organizations within the agency to determine whether the new requirement can be met through improved utilization. Any utilization, however, must be for purposes that are consistent with the highest and best use of the property under consideration; and

(ii) Review all real property under its accountability which it has assigned on a permit basis to other Federal agencies, or outleased to States, local governments, other public bodies, or private interests and terminate the permit or lease for any property, or portion thereof, that is suitable for the proposed need whenever such termination is not prohibited by the terms of the permit or lease.

(3) Property found to be available under § 101-47.201-2(d)(2) (i) or (ii), should be utilized for the proposed need in lieu of requesting a transfer of excess real property. Reassignments of such property within the agency should be made in appropriate cases.

(4) The appraised fair market value of the excess real property proposed for transfer should not substantially exceed the probable purchase price of other real property which would be suitable for the intended purpose.

(5) The size and quantity of excess real property to be transferred should be limited to the actual requirements.

Other portions of an excess installation which can be separated should be withheld from transfer and made available for disposal to other agencies or to the public.

(6) Consideration should be given to the design, layout, geographic location, age, state of repair, and expected maintenance costs of excess real property proposed for transfer. It should be clearly demonstrated that the transfer will prove more economical over a sustained period of time than acquisition of a new facility specifically planned for the purpose.

(7) Excess real property should not be permanently transferred to agencies for programs which appear to be scheduled for substantial curtailment or termination. In such cases, the property may be temporarily transferred on a conditional basis, with an understanding that the property will be released for further Federal utilization or disposal as surplus property, at a time agreed upon when the transfer is arranged (see § 101-47.203-8).

(e) Excess real property of a type which may be used for office, storage, and related purposes normally will be assigned by, or at the direction of, GSA for use to the requesting agency in lieu of being transferred to the agency.

(f) Federal agencies which normally do not require real property, other than for office, storage, and related purposes, or which may not have statutory authority to acquire such property, may obtain the use of excess real property for an approved program when authorized by GSA.

[29 FR 16126, Dec. 3, 1964, as amended at 39 FR 11281, Sept. 2, 1965; 37 FR 5029, Mar. 9, 1972; 40 FR 12078, Mar. 17, 1975]

§ 101-47.201-3 Lands withdrawn or reserved from the public domain.

(a) Agencies holding lands withdrawn or reserved from the public domain, which they no longer need, shall send to the GSA regional office for the region in which the lands are located an information copy of each notice of intention to relinquish filed with the Department of the Interior (43 CFR Part 2372, et seq.).

(b) Section 101-47.202-6 prescribes the procedure for reporting to GSA as excess property, certain lands or portions of lands withdrawn or reserved from the public domain for which such notices have been filed with the Department of the Interior.

[29 FR 16126, Dec. 3, 1964, as amended at 42 FR 40698, Aug. 11, 1977]

§ 101-47.201-4 Transfers under other laws.

Pursuant to section 602(c) of the Act, transfers of real property shall not be made under other laws, but shall be made only in strict accordance with the provisions of this subpart unless the Administrator of General Services, upon written application by the disposal agency, shall determine in each case that the provisions of any such other law, pursuant to which a transfer is proposed to be made, are not inconsistent with the authority conferred by this Act. The provisions of this section shall not apply to transfers of real property authorized to be made by section 602(d) of the Act or by any special statute which directs or requires an executive agency named therein to transfer or convey specifically described real property in accordance with the provisions of such statute.

§ 101-47.202 Reporting of excess real property.

§ 101-47.202-1 Reporting requirements.

Each executive agency shall report to GSA, pursuant to the provisions of this section, all excess real property except as provided in § 101-47.202-4. Reports of excess real property shall be based on the agency's official real property records and accounts.

(a) All excess related personal property shall be reported as a part of the same report covering the excess real property.

(b) Upon request of the Administrator of General Services, executive agencies shall institute specific surveys to determine that portion of real property, including unimproved property, under their control which might be excess and suitable for office, storage, and related facilities, and shall report promptly to the Administrator of General Services as soon as each survey is completed.

§ 101-47.202-2 Report forms.

Reports of excess real property and related personal property shall be prepared on Standard Form 118, Report of Excess Real Property (see § 101-47.4902), and accompanying Standard Form 118a, Buildings Structures, Utilities, and Miscellaneous Facilities, Schedule A (§ 101-47.4902-1); Standard Form 118b, Land, Schedule B (see § 101-47.402-2); and Standard Form 118c, Related Personal Property, Schedule C (see § 101-47.4902-3). Instructions for the preparation of Standard Forms 118, 118a, 118b, and 118c are set forth in § 101-47.4902-4.

(a) Property for which the holding agency is designated as the disposal agency under the provisons of § 101-47.302-2 and which is required to be reported to GSA under the provisions of this section shall be reported on Standard Form 118, without the accompanying Schedules A, B, and C, unless the holding agency requests GSA to act as disposal agency and a statement to that effect is inserted in Block 18, Remarks, of Standard Form 118.

(b) In all cases where Government-owned land is reported, there shall be attached to and made a part of Standard Form 118 (original and copies thereof) a report prepared by a qualified employee of the holding agency on the Government's title to the property based upon his review of the records of the agency. The report shall recite:

(1) The description of the property.

(2) The date title vested in the United States.

(3) All exceptions, reservations, conditions, and restrictions, relating to the title acquired.

(4) Detailed information concerning any action, thing, or circumstance that occurred from the date of the acquisition of the property by the United States to the date of the report which in any way affected or may have affected the right, title, and interest of the United States in and to the real property (together with copies of such legal comments or opinions as may be contained in the file concerning the manner in which and the extent to which such right, title, or interest may have been affected). In the absence of any such action, thing, or circumstance, a statement to that effect shall be made a part of the report.

(5) The status of civil and criminal jurisdiction over the land that is peculiar to the property by reason of it being Government-owned land. In the absence of any special circumstances, a statement to that effect shall be made a part of the report.

(6) Detailed information regarding any known flood hazards or flooding of the property and, if located in a floodplain or wetlands, a listing of and citations to those uses that are restricted under identified Federal, State, or local regulations as required by Executive Orders 11988 and 11990 of May 24, 1977.

(7) The specific identification and description of fixtures and related personal property that have possible historic or artistic value.

(8) The historical significance of the property, if any, and whether the property is listed, is eligible for, or has been nominated for listing in the National Register of Historic Places or is in proximity to a property on the National Register. If the holding agency is aware of any effort by the public to have the property listed on the National Register, this information should be included.

(9) To the extent such information is reasonably available or ascertainable from agency files, personnel, and other inquiry, a description of the type, location and condition of asbestos incorporated in the construction, repair, or alteration of any building or improvement on the property (e.g., fireproofing, pipe insulation, etc.) and a description of any asbestos control measures taken for the property. To assist GSA in considering the disposal options for the property, agencies shall also provide to GSA any available indication of costs and/or time necessary to remove all or any portion of the asbestos-containing materials. Agencies are not required to conduct any specific studies and/or tests to obtain this information. (See also § 101-47.200(b).)

(c) There shall be transmitted with Standard Form 118:

(1) A legible, reproducible copy of all instruments in possession of the

agency which affect the right, title, or interest of the United States in the property reported or the use and operation of such property (including agreements covering and licenses to use, any patents, processes, techniques, or inventions). In cases where the agency considers it to be impracticable to transmit the abstracts of title and related title evidence, such documents need not be transmitted; however, the name and address of the custodian of such documents shall be stated in the title report referred to in § 101-47.202-2(b) and they shall be furnished if requested by GSA;

(2) Any appraisal reports in the possession of the holding agency of the fair market value or the fair annual rental of the property reported; and

(3) A certification by a responsible person that the property does or does not contain polychlorinated biphenyl (PCB) transformers or other equipment regulated by the Environmental Protection Agency under 40 CFR Part 761. If the property does contain any equipment subject to 40 CFR Part 761, the certification must include an assurance on behalf of the holding agency that each item of such equipment is now and will be maintained in a state of compliance with such regulations until disposal of the property.

[29 FR 16126, Dec. 3, 1964, as amended at 31 FR 15541, Dec. 9, 1966; 34 FR 8166, May 24, 1969; 40 FR 22256, May 22, 1975; 44 FR 19406, Apr. 3, 1979; 52 FR 46467, Dec. 8, 1987; 53 FR 29893, Aug. 9, 1988]

§ 101-47.202-3 Submission of reports.

Reports of excess shall be filed with the regional office of GSA for the region in which the excess property is located, as follows:

(a) Government-owned real property and related personal property shall be reported by the holding agencies 90-calendar days in advance of the date such excess property shall become available for transfer to another Federal agency or for disposal. Where the circumstances will not permit excess real property and related personal property to be reported a full 90-calendar days in advance of the date it will be available, the report shall be made as far in advance of such date as possible.

(b) Leasehold interests in real property determined to be excess shall be reported at least 60-calendar days prior to the date on which notice of termination or cancellation is required by the terms of the instrument under which the property is occupied.

(c) All reports submitted by the Department of Defense shall bear the certification "This property has been screened against the known needs of the Department of Defense." All reports submitted by civilian agencies shall bear the certification "This property has been screened against the known needs of the holding agency."

§ 101-47.202-4 Exceptions to reporting.

(a) A holding agency shall not report to GSA leased space assigned to the agency by GSA and determined by the agency to be excess.

(b) Also, except for those instances set forth in § 101-47.202-4(c) a holding agency shall not report to GSA property used, occupied, or controlled by the Government under a lease, permit, license, easement, or similar instrument when:

(1) The lease or other instrument is subject to termination by the grantor or owner of the premises within nine months;

(2) The remaining term of the lease or other instrument, including renewal rights, will provide for less than nine months of use and occupancy;

(3) The term of the lease or other instrument would preclude transfer to, or use by, another Federal agency or disposal to a third party; or

(4) The lease or other instrument provides for use and occupancy of space for office, storage, and related facilities, which does not exceed a total of 2,500 sq. feet.

(c) Property, which otherwise would not be reported because it falls within the exceptions set forth in § 101-47.202-4(b) shall be reported:

(1) If there are Government owned improvements located on the premises; or

(2) If the continued use, occupancy, or control of the property by the Government is needful for the operation, production, or maintenance of other property owned or controlled by the

Government that has been reported excess or is required to be reported to GSA under the provisions of this section.

§ 101–47.202–5 Reporting after submissions to the Congress.

Reports of excess covering property of the military departments and of the Office of Emergency Planning prepared after the expiration of 30 days from the date upon which a report of the facts concerning the reporting of such property was submitted to the Committees on Armed Services of the Senate and House of Representatives, 10 U.S.C. 2662 and the Act of August 10, 1956, 70A Stat. 636, as amended (50 U.S.C. App. 2285), shall contain a statement that the requirements of the statute have been met.

§ 101–47.202–6 Reports involving the public domain.

(a) Agencies holding land withdrawn or reserved from the public domain which they no longer need, shall report on Standard Form 118, with appropriate Schedules A, B, and C, land or portions of land so withdrawn or reserved and the improvements thereon, if any, to the regional office of GSA for the region in which the lands are located when the agency has:

(1) Filed a notice of intention to relinquish with the Department of the Interior and sent a copy of the notice to the regional office of GSA (§ 101–47.201–3);

(2) Been notified by the Department of the Interior that the Secretary of the Interior, with the concurrence of the Administrator of General Services, has determined the lands are not suitable for return to the public domain for disposition under the general public land laws because the lands are substantially changed in character by improvements or otherwise; and

(3) Obtained from the Department of the Interior a report as to whether any agency (other than the holding agency) claims primary, joint, or secondary jurisdiction over the lands and whether the Department's records show the lands to be encumbered with any existing valid rights or privileges under the public land laws.

(b) Should the Department of the Interior determine that minerals in the lands are not suitable for disposition under the public land mining and mineral leasing laws, the Department will notify the appropriate regional office of GSA of such determination and will authorize the holding agency to include the minerals in its report to GSA.

(c) When reporting the property to GSA, a true copy of the notification (§ 101–47.202–6(a)(2)) and report (§ 101–47.202–6(a)(3)) shall be submitted as a part of the holding agency's report on the Government's legal title which shall accompany Standard Form 118.

§ 101–47.202–7 Reports involving contaminated property.

Any report of excess covering property which in its present condition is dangerous or hazardous to health and safety, shall state the extent of such contamination, the plans for decontamination, and the extent to which the property may be used without further decontamination. In the case of properties containing asbestos-containing materials and in lieu of the requirements of the foregoing provisions of § 101–47.202–7, see subsection 101–47.202–2(b)(9).

[53 FR 28984, Aug. 9, 1988]

§ 101–47.202–8 Notice of receipt.

GSA shall promptly notify the holding agency of the date of receipt of each Report of Excess Real Property (Standard Form 118).

§ 101–47.202–9 Expense of protection and maintenance.

When there are expenses connected with the protection and maintenance of the property reported to GSA, the notice to the holding agency of the date of receipt (see § 101–47.202–8) will indicate, if determinable, the date that the provisions of §101–47.402–2 will become effectivce. Normally this will be the date of the receipt of the report. If because of actions of the holding agency the property is not available for immediate disposition at the time of receipt of the report, the holding agency will be reminded in the

notice that the period of its responsibility for the expense of protection and maintenance will be extended by the period of the delay.

[49 FR 1348, Jan. 11, 1984]

§ 101-47.202-10 Examination for acceptability.

Each report of excess shall be reviewed by GSA to ascertain whether the report was prepared in accordance with the provisions of this section. Within fifteen calendar days after receipt of a report, the holding agency shall be informed by letter of the findings of GSA.

(a) Where it is found that a report is adequate to the extent that GSA can proceed with utilization and disposal actions for the property, the report shall be accepted and the holding agency shall be informed of the date of such acceptance. However, the holding agency shall, upon request, promptly furnish such additional information or documents relating to the property as may be required by GSA to accomplish a transfer or a disposal.

(b) Where it is found that a report is insufficient to the extent that GSA would be unable to proceed with any utilization or disposal actions for the property, the report shall be returned and the holding agency shall be informed of the facts and circumstances that required the return of the report. The holding agency promptly shall take such action as may be appropriate to submit an acceptable report to GSA. Should the holding agency be unable to submit an acceptable report, the property shall be removed from under the provisions of § 101-47.402-2.

§ 101-47.203 Utilization.

§ 101-47.203-1 Reassignment of real property by the agencies.

Each executive agency shall, as far as practicable and within the policies expressed in this Subpart 101-47.2, make reassignments of real property and related personal property under its control and jurisdiction among activities within the agency in lieu of acquiring such property from other sources.

[42 FR 40698, Aug. 11, 1977]

§ 101-47.203-2 Transfer and utilization.

Each executive agency shall, as far as practicable and within the policies expressed in this Subpart 101-47.2, transfer excess real property under its control to other Federal agencies and to the organizations specified in § 101-47.203-7, and shall fulfill its requirements for real property by obtaining excess real property from other Federal agencies. Transfers of property shall be made in accordance with the provisions of this subpart.

[42 FR 40698, Aug. 11, 1977]

§ 101-47.203-3 Notification of agency requirements.

Each executive agency shall notify the proper GSA regional office whenever real property is needed for an authorized program of the agency. The notice shall state the land area of the property needed, the preferred location or suitable alternate locations, and describe the type of property needed in sufficient detail to enable GSA to review its records of property that it knows will be reported excess by holding agencies, its inventory of excess property, and its inventory of surplus property, to ascertain whether any such property may be suitable for the needs of the agency. The agency shall be informed promptly by the GSA regional office as to whether or not any such property is available.

[33 FR 571, Jan. 17, 1968]

§ 101-47.203-4 Real property excepted from reporting.

Agencies having transferable excess real property and related personal property in the categories excepted from reporting by § 101-47.202-4 shall, before disposal, satisfy themselves in a manner consistent with the provisions of this section that such property is not needed by other Government agencies.

§ 101-47.203-5 Screening of excess real property.

Excess real property and related personal property reported by executive agencies shall, unless such screening is

waived, be screened by GSA for utilization by Federal real property holding agencies (listed in § 101-47.4907), which may reasonably be expected to have use for the property as follows:

(a) Notices of availability will be submitted to each such agency which shall, within 30 calendar days from the date of notice, advise GSA if there is a firm requirement or a tentative requirement for the property. Agencies having tentative or firm requirements for surplus Federal real property for replacement housing for displaced persons, as authorized by section 218 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1902), shall review these notices for the additional purpose of identifying properties for which they may have such a requirement. When such a requirement exists, the agency shall so advise the appropriate GSA regional office.

(1) In the event a tentative requirement exists, the agency shall, within an additional 30 calendar days, advise GSA if there is a firm requirement.

(2) Within 60 calendar days after advice to GSA that a firm requirement exists, the agency shall furnish GSA a request for transfer of the property pursuant to § 101-47.203-7.

(b) Notices of availability for information of the Secretary of Health and Human Services and the Secretary of Education in connection with the exercise of the authority vested in them under the provisions of section 203(k)(1) of the Act, and for information of the Secretary of the Interior in connection with the exercise of the authority vested in him under the provisions of section 203(k)(2) of the Act or a possible determination under the provisions of section 203(k)(3) of the Act, will be sent to the offices designated by the Secretaries to serve the areas in which the properties are located. A similar notice of availability for the information of the Attorney General in connection with a possible determination under the provisions of section 203(p)(1) of the Act will be sent to the Office of Justice Programs, Department of Justice.

(c) The Departments of Health and Human Services, Education, Interior, and Justice shall not attempt to interest a local applicant in a property until it is determined surplus, except with the prior consent of GSA on a case-by-case basis or as otherwise agreed upon. When such consent is obtained, the local applicant shall be informed that consideration of the application is conditional upon the property being determined surplus to Federal requirements and made available for the purposes of the application. However, these Departments are encouraged to advise the appropriate GSA regional office of those excess properties which are suitable for their programs.

(d) Concurrently with the 30-day Federal agency use screening period, those Federal agencies that sponsor public benefit disposals at less than fair market value as permitted by the statutory authorities in § 101-47.4905 may provide the disposal agency with a recommendation, together with a brief supporting rationale, as illustrated in § 101-47.4909, that the highest and best use of the property is for a specific public benefit purpose. The recommendation may be made by the agency head, or designee, and will be considered by the disposal agency in its final highest and best use analysis and determination. After a determination of surplus has been made, if the disposal agency agrees with a sponsoring Federal agency that the highest and best use of a particular property is for a specific public benefit purpose, local public bodies will be notified that the property is available for that use.

[29 FR 16126, Dec. 3, 1964, as amended at 36 FR 11438, June 12, 1971; 47 FR 37175, Aug. 25, 1982; 49 FR 37091, Sept. 21, 1984; 52 FR 9832, Mar. 27, 1987]

§ 101-47.203-6 Designation as personal property.

(a) Prefabricated movable structures such as Butler-type storage warehouses, quonset huts, and housetrailers (with or without undercarriages) reported to GSA with the land on which they are located may, in the discretion of GSA, be designated for disposition as personal property for offsite use.

(b) Related personal property may, in the discretion of the disposal

agency, be designated for disposition as personal property. Consideration of such designation shall be given particularly to items having possible historic or artistic value to ensure that Federal agencies, including the Smithsonian Institution (see § 101-43.302), are afforded the opportunity of obtaining them through personal property channels for off-site use for preservation and display. Fixtures such as murals and fixed sculpture which have exceptional historical or artistic value may be designated for disposition by severance for off-site use. In making such designations, consideration shall be given to such factors as whether the severance can be accomplished without seriously affecting the value of the realty and whether a ready disposition can be made of the severed fixtures.

(c) When a structure is to be demolished, any fixtures or related personal property therein may, at the discretion of the disposal agency, be designated for disposition as personal property where a ready disposition can be made of these items through such action. As indicated in paragraph (b) of this section, particular consideration should be given to designating items of possible historical or artistic value as personal property in such instances.

[34 FR 8166, May 24, 1969]

§ 101–47.203–7 Transfers.

(a) The agency requesting transfer of excess real property and related personal property reported to GSA shall prepare and submit to the proper GSA regional office GSA Form 1334, Request for Transfer of Excess Real and Related Personal Property (§ 101-47.4904). Instructions for the preparation of GSA Form 1334 are set forth in § 101-47.4904-1.

(b) Upon determination by GSA that a transfer of the property requested is in the best interest of the Government and that the requesting agency is the appropriate agency to hold the property, the transfer may be made among Federal agencies, to mixed-ownership Government corporations, and to the municipal government of the District of Columbia.

(c) [Reserved]

(d) Transfers of property to executive agencies shall be made when the proposed land use is consistent with the policy of the Administrator of General Services as prescribed in § 101-47.201-1 and the policy guidelines prescribed in § 101-47.201-2. In determining whether a proposed transfer should be approved under the policy guidelines, GSA and OMB may consult informally to obtain all available data concerning actual program needs for the property.

(e) GSA will execute or authorize all approved transfers to the requesting agency of property reported to GSA. Agencies may transfer without reference to GSA excess real property which is not reported to GSA under the provisions of § 101-47.202-4(b) (1), (2), and (4). However, such transfers shall be made in accordance with the principles set forth in this section.

(f) Pursuant to an agreement between the Director, Office of Management and Budget, and the Administrator of General Services, reimbursement for transfers of excess real property is prescribed as follows:

(1) Where the transferor agency has requested the net proceeds of the transfer pursuant to section 204 (c) of the Act, or where either the transferor or transferee agency (or organizational unit affected) is subject to the Government Corporation Control Act (31 U.S.C. 841) or is a mixed-ownership Government corporation, or the municipal government of the District of Columbia, reimbursement for the transfer shall be in an amount equal to the estimated fair market value of the property requested as determined by the Administrator: *Provided*, That where the transferor agency is a wholly owned Government corporation, the reimbursement shall be either in an amount equal to the estimated fair market value of the property requested, or the corporation's book value thereof, as may be agreed upon by GSA and the corporation.

(2) Reimbursement for all other transfers of excess real property shall be:

(i) In an amount equal to 100 percent of the estimated fair market value of the property requested, as determined by the Administrator, or if

the transfer is for the purpose of upgrading facilities (i.e., for the purpose of replacing other property of the transferee agency which because of the location, nature, or condition thereof, is less efficient for use), the reimbursement shall be in an amount equal to the difference between the estimated fair market value of the property to be replaced and the estimated fair market value of the property requested, as determined by the Administrator.

(ii) Without reimbursement when the transfer is to be made under either of the following conditions:

(A) Congress has specifically authorized the transfer without reimbursement, or

(B) The Administrator with the approval of the Director, Office of Management and Budget, has approved a request for an exception from the 100 percent reimbursement requirement.

(1) A request for exception from the 100 percent reimbursement requirement shall be endorsed by the head of the executive department or agency requesting the exception.

(2) A request for exception from the 100 percent reimbursement requirement will be submitted to GSA for referral to the Director, Office of Management and Budget, and shall include an explanation of how granting the exception would further essential agency program objectives and at the same time be consistent with Executive Order 12348, dated February 25, 1982. The unavailability of funds alone is not sufficient to justify an exception. The above required data and documentation shall be attached to GSA Form 1334 by the transferee agency on submission of that form to GSA.

(3) If the Administrator with the approval of the Director, Office of Management and Budget, approves the request for an exception, the Administrator may then complete the transfer. A copy of the Office of Managment and Budget approval will be sent to the Property Review Board.

(4) The agency requesting the exception will assume responsibility for protection and maintenance costs where the disposal of the property is deferred for more than 30 days because of the consideration of the request for an exception to the 100 percent reimbursement requirement.

(g) Excess property may be transferred to the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction, pursuant to the provisions of section 602(e) of the Act. The amount of reimbursement for such transfer shall be the same as would be required for a transfer of excess property to an executive agency under similar circumstances.

[29 FR 16126, Dec. 3, 1964, as amended at 37 FR 5029, Mar. 9, 1972; 40 FR 12078, Mar. 17, 1975; 42 FR 40698, Aug. 11, 1977; 47 FR 56499, Dec. 17, 1982; 49 FR 29222, July 19, 1984]

§ 101-47.203-8 Temporary utilization.

(a) Whenever GSA determines that the temporary assignment or reassignment to a Federal agency of any space in excess real property for office, storage, or related facilities would be more advantageous than the permanent transfer of the property to a Federal agency, it will execute or authorize such assignment or reassignment for such period of time as it shall determine. The agency to which the space is made available shall make appropriate reimbursement for the expense of maintaining such space in the absence of appropriation available to GSA therefor.

(b) GSA may approve the temporary assignment or reassignment to a Federal agency of excess real property other than space for office, storage, or related facilities whenever such action would be in the best interest of the Government. In such cases, the agency to which the property is made available may be required to pay a rental or users charge based upon the fair value of such property, as determined by GSA. Where such property will be required by the agency for a period of more than 1 year, it may be transferred on a conditional basis, with an understanding that the property will be reported excess at a time agreed upon when the transfer is arranged (see § 101-47.201-2(d)(7)).

§ 101–47.203–9 Non-Federal interim use of property.

The holding agency may, with the approval of GSA, grant rights for non-Federal interim use of excess property reported to GSA, or portions thereof, when it is determined that such interim use is not required for the needs of any Federal agency.

§ 101–47.203–10 Withdrawals.

Subject to the approval of GSA, and to such conditions as GSA considers appropriate, reports of excess real property may be withdrawn in whole or in part by the reporting agency at any time prior to transfer to another Federal agency or prior to the execution of a legally binding agreement for disposal as surplus property. Requests for withdrawals shall be addressed to the GSA regional office where the report of excess real property was filed.

[35 FR 17256, Nov. 6, 1970]

§ 101–47.204 Determination of surplus.

§ 101–47.204–1 Reported property.

Any real property and related personal property reported excess under this Subpart 101–47.2 which has been screened for needs of Federal agencies or waived from such screening by GSA, and not been designated by GSA for utilization by a Federal agency, shall be subject to determination as surplus property by GSA.

(a) The holding agency, the Secretary of Health and Human Services, the Secretary of Education, the Secretary of the Interior, and the Attorney General will be notified of the date upon which determination as surplus becomes effective. Any Federal agency that has identified a property as being required for replacement housing for displaced persons under section 218 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 will also be notified of the date upon which determination as surplus becomes effective. The Secretary of the Department of Energy will be notified when real property is determined surplus and advised of any known interest in the property for its use or development for energy facilities. Appropriate steps will be taken to ensure that energy site needs are considered along with other competing needs in the disposal of surplus real property, since such property may become available for use under sections 203(e)(3) (G) and (H) of the Federal Property and Administrative Services Act of 1949, as amended.

(b) The notices to the Secretary of Health and Human Services, the Secretary of Education, the Secretary of the Interior, and the Secretary of Energy will be sent to the offices designated by them to serve the area in which the property is located. The notices to the Attorney General will be sent to the Office of Justice Programs, Department of Justice. The notices to the Federal agencies having a requirement pursuant to section 218 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 will be sent to the office making the request unless another office is designated.

(c) With regard to surplus property which GSA predetermines will not be available for disposal under the above-mentioned programs, or whenever the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the Act, the notice to the affected department(s) will contain advice of such determination or request for reimbursement. The affected department(s) shall not screen for potential applicants for such property.

[29 FR 16126, Dec. 3, 1964, as amended at 36 FR 8041, Apr. 29, 1971; 47 FR 37175, Aug. 25, 1982; 52 FR 9832, Mar. 27, 1987]

§ 101–47.204–2 Property excepted from reporting.

Any property not reported to GSA due to § 101–47.202–4, and not designated by the holding agency for utilization by other agencies pursuant to the provisions of this Subpart 101–47.2, shall be subject to determination as surplus by the holding agency.

Subpart 101-47.3—Surplus Real Property Disposal

§ 101-47.300 Scope of subpart.

This subpart prescribes the policies and methods governing the disposal of surplus real property and related personal property within the States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands. This subpart does not apply to the abandonment, destruction, or donation to public bodies, under section 202(h) of the Act (covered by Subpart 101-47.5).

[47 FR 4522, Feb. 1, 1982]

§ 101-47.301 General provisions of subpart.

§ 101-47.301-1 Policy.

It is the policy of the Administrator of General Services:

(a) That surplus real property shall be disposed of in the most economical manner consistent with the best interests of the Government.

(b) That surplus real property shall ordinarily be disposed of for cash consistent with the best interests of the Government.

(c) That surplus real property shall be disposed of by exchange for privately owned property only for property management considerations such as boundary realignment or provision of access or in those situations in which the acquisition is authorized by law, the requesting Federal agency has received approval from the Office of Management and Budget and clearance from its congressional oversight committees to acquire by exchange, and the transaction offers substantial economic or unique program advantages not otherwise obtainable by any other method of acquisition.

[29 FR 16126, Dec. 3, 1964, as amended at 42 FR 47205, Sept. 20, 1977; 42 FR 56123, Oct. 21, 1977]

§ 101-47.301-2 Applicability of antitrust laws.

(a) In any case in which there is contemplated a disposal to any private interest of real and related personal property which has an estimated fair market value of $3,000,000 or more, or of patents, processes, techniques, or inventions, irrespective of cost, the disposal agency shall transmit promptly to the Attorney General notice of any such proposed disposal and the probable terms or conditions thereof, as required by section 207 of the Act, for his advice as to whether the proposed disposal would tend to create or maintain a situation inconsistent with antitrust laws, and no such real property shall be disposed of until such advice has been received. If such notice is given by any executive agency other than GSA, a copy of the notice shall be transmitted simultaneously to the office of GSA for the region in which the property is located.

(b) Upon request of the Attorney General, GSA or any other executive agency shall furnish or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the requested advice or to determine whether any other disposition or proposed disposition of surplus real property violates or would violate any of the antitrust laws.

[29 FR 16126, Dec. 3, 1964, as amended at 54 FR 12198, Mar. 24, 1989]

§ 101-47.301-3 Disposals under other laws.

Pursuant to section 602(c) of the act, disposals of real property shall not be made under other laws but shall be made only in strict accordance with the provisions of this Subpart 101-47.3 unless the Administrator of General Services, upon written application by the disposal agency, shall determine in each case that the provisions of any such other law, pursuant to which disposal is proposed to be made, are not inconsistent with the authority conferred by this Act. The provisions of this section shall not apply to disposals of real property authorized to be made by section 602(d) of the act or by any special statute which directs or requires an executive agency named therein to transfer or convey specifically described real property in accordance with the provisions of such statute.

§ 101-47.301-4 Credit disposals and leases.

Where credit is extended in connection with any disposal of surplus property, the disposal agency shall offer credit pursuant to the provisions of § 101-47.304-4. The disposal agency shall administer and manage the credit lease; or permit and any security therefor and may enforce, adjust, or settle any right of the Government with respect thereto in such manner and upon such terms as that agency considers to be in the best interests of the Government.

[42 FR 47205, Sept. 20, 1977]

§ 101-47.302 Designation of disposal agencies.

§ 101-47.302-1 General.

In accordance with applicable provisions of this Subpart 101-47.3, surplus real property shall be disposed of or assigned to the appropriate Federal department for disposal for public use purposes by the disposal agency.

[36 FR 8042, Apr. 29, 1971]

§ 101-47.302-2 Holding agency.

(a) The holding agency is hereby designated as disposal agency for:

(1) Leases, permits, licenses, easements, and similar real estate interests held by the Government in non-Government-owned property (including Government-owned improvements located on the premises), except when it is determined by either the holding agency or GSA that the Government's interest will be best served by the disposal of such real estate interests together with other property owned or controlled by the Government, that has been or is being reported to GSA as excess; and

(2) Fixtures, structures, and improvements of any kind to be disposed of without the underlying land with the exception of Government-owned machinery and equipment, which are fixtures being used by a contractor-operator, where such machinery and equipment will be sold to the contractor-operator.

(3) Standing timber and embedded gravel, sand, stone and underground water to be disposed of without the underlying land.

(b) GSA may act as the disposal agency for the type of property described in paragraphs (a)(1) and (2) of this section, whenever requested by the holding agency to perform the disposal functions. Where GSA acts as the disposal agency for the disposal of leases and similar real estate interests as described in paragraph (a)(1) of this section, the holding agency nevertheless shall continue to be responsible for the payment of the rental until the lease is terminated and for the payment of any restoration or other direct costs incurred by the Government as an incident to the termination. Likewise, where GSA acts as disposal agency for the disposal of fixtures, structures, and improvements as described in paragraph (a)(2) of this section, the holding agency nevertheless shall continue to be responsible for payment of any demolition and removal costs not offset by the sale of the property.

[29 FR 16126, Dec. 3, 1964, as amended at 31 FR 2658, Feb. 11, 1966; 31 FR 16780, Dec. 31, 1966; 33 FR 8737, June 14, 1968; 48 FR 12526, Mar. 25, 1983; 50 FR 28403, July 12, 1985]

§ 101-47.302-3 General Services Administration.

GSA is the disposal agency for all real property and related personal property not covered by the above designations or by disposal authority delegated by the Administrator of General Services in specific instances.

§ 101-47.303 Responsibility of disposal agency.

§ 101-47.303-1 Classification.

Each surplus property, or, if the property is subdivided, each unit of property shall be classified by the disposal agency to determine the methods and conditions applicable to the disposal of the property. Classification shall be according to the estimated highest and best use for the property. The property may be reclassified from time to time by the disposal agency or by GSA whenever such action is deemed appropriate.

Department of Transportation; and

(7) Office of Justice Programs, Department of Justice.

(h) When the disposal agency has made a determination as to what constitutes a reasonable period of time to develop and submit a formal application, the public agency shall be so notified. The public agency shall be advised of the information required in connection with an application to procure the property.

(i) Upon receipt of the formal application for the property, the disposal agency shall consider and act upon it in accordance with the provisions of the statute and applicable regulations. If comments are received indicating that the disposal is incompatible with State, regional, or local development plans and programs, the disposal agency shall attempt to resolve the differences consistent with its statutory responsibilities in the disposal of surplus property.

[29 FR 16126, Dec. 3, 1964, as amended at 34 FR 11209, July 3, 1969; 35 FR 8486, June 2, 1970; 36 FR 9776, May 28, 1971; 40 FR 22256, May 22, 1975; 52 FR 9829, Mar. 27, 1987]

§ 101–47.303–2a Notice for zoning purposes.

(a) Where the surplus land is located in an urban area as defined in section 806 of the Act, that copy of the notice to public agencies required under § 101-47.303-2(b) which is sent to the head of the local governmental unit having jurisdiction over zoning and land use regulation in the area shall be accompanied by a copy of section 803 of the Act (see § 101-47.4906a) and the transmittal letter in such instances shall include an additional paragraph requesting information concerning zoning as set forth in § 101-47.4906b.

(b) Information which is furnished by the unit of general local government pursuant to the action taken in paragraph (a) of this section shall be included in Invitations for Bid in advertised sales. In negotiated sales, this information shall be presented to prospective purchasers during the course of the negotiations and shall be included in the sales agreements. In be followed by a written statement, substantially as follows:

> The above information was obtained from ---------- and is furnished pursuant to section 803 of the Federal Property and Administrative Services Act of 1949, as amended. The Government does not guarantee that the information is necessarily accurate or will remain unchanged. Any inaccuracies or changes in the above information shall not be cause for adjustment or rescission of any contract resulting from this Invitation for Bid or Sales Agreement.

(c) If no response to a request for such zoning information is received, the property may be offered for sale without furnishing such information to prospective purchasers. If the unit of general local government notifies the disposal agency of its desire to zone the property, it shall be afforded a 30-calendar-day period (in addition to the 20-calendar days afforded in the notice of surplus determination) to issue such zoning regulations. If the zoning cannot be accomplished within this time frame, the sale may proceed but the prospective purchasers shall be advised of the pending zoning of the property.

[34 FR 11209, July 3, 1969]

§ 101–47.303–3 Studies.

The disposal agency shall compile from the title documents and related papers appropriate information, for use in disposal actions, regarding all real property and related personal property available for disposal.

§ 101–47.303–4 Appraisal.

(a) Except as otherwise provided in this Subpart 101-47.3, the disposal agency shall in all cases obtain an appraisal of the fair market value, and in appropriate cases the fair annual rental, of property available for disposal.

(b) No appraisal need be obtained in any one of these situations:

(1) The property is classified and is to be disposed of as airport property.

(2) The property is suitable for historic monument purposes and is to be disposed of with the use limited to such purpose to a State, political sub-

division instrumentality thereof, or municipality.

(3) The estimated fair market value of property to be offered on a competitive sale basis does not exceed $10,000.

(c) The disposal agency shall have the property appraised by experienced and qualified persons familiar with the types of property to be appraised by them. Any person engaged to collect or evaluate information pursuant to this subsection shall certify that he has no interest, direct or indirect, in the property which would conflict in any manner with the preparation and submission of an impartial appraisal report.

[29 FR 16126, Dec. 3, 1964, as amended at 34 FR 16545, Oct. 16, 1969]

§ 101-47.304 Advertised and negotiated disposals.

§ 101-47.304-1 Publicity.

(a) The disposal agency shall widely publicize all surplus real property and related personal property which becomes available for disposal hereunder, giving information adequate to inform interested persons of the general nature of the property and its possible uses, as well as any reservations, restrictions, and conditions imposed upon its disposal.

(b) A condensed statement of proposed sales of surplus real property by advertising for competitive bids, except where the estimated fair market value of the property is less than $2,500, shall be prepared and submitted, for inclusion in the U.S. Department of Commerce publication "Commerce Business Daily," to: U.S. Department of Commerce (S-Synopsis), Room 1300, 433 West Van Buren Street, Chicago, Illinois 60604.

§ 101-47.304-2 Soliciting cooperation of local groups.

The disposal agency may consult with local groups and organizations and solicit their cooperation in giving wide publicity to the proposed disposal of the property.

§ 101-47.304-3 Information to interested persons.

The disposal agency shall, upon request, supply to bona fide potential purchasers and lessees adequate preliminary information, and, with the cooperation of the holding agency where necessary, shall render such assistance to such persons as may enable them, insofar as feasible, to obtain adequate information regarding the property. The disposal agency shall establish procedures so that all persons showing due diligence are given full and complete opportunity to make an offer.

§ 101-47.304-4 Invitation for offers.

In all advertised and negotiated disposals, the disposal agency shall prepare and furnish to all prospective purchasers or lessees written invitations to make an offer, which shall contain or incorporate by reference all the terms and conditions under which the property is offered for disposal, including all provisions required by statute to be made a part of the offer. The invitation shall further specify the form of the disposal instrument, which specifications shall be in accordance with the appropriate provisions of §§ 101-47.307-1 and 101-47.307-2.

(a) When the disposal agency has determined that the sale of specific property on credit terms is necessary to avoid retarding the salability of the property and the price obtainable, the invitation shall provide for submission of offers on the following terms:

(1) Offers to purchase of less than $2,500 shall be for cash.

(2) When the purchase price is $2,500 or more but less than $10,000, a cash downpayment of not less than 25 percent shall be required with the balance due in 8 years or less.

(3) When the purchase price is $10,000 or more, a cash downpayment of not less than 20 percent shall be required with the balance due in 10 years or less.

(4) The purchaser shall furnish a promissory note secured by the purchase money mortgage or deed of trust on the property, whichever the Government determines to be appropriate.

(5) Payment will be in equal quarterannual installments of the principal together with interest on the unpaid balance.

(6) Interest on the unpaid balance will be at the General Services Administration's established interest rate.

(b) Where the disposal agency has determined that an offering of the property on credit terms that do not meet the standards set forth in § 101-47.304-4(a) is essential to permit disposal of the property in the best interests of the Government, the invitation may provide for submission of offers on such alternate terms of payment as may be recommended by the disposal agency and approved by the Administrator of General Services on the basis of a detailed written statement justifying the need to deviate from the standard terms. The justification shall be based on the needs of the Federal Government as distinguished from the interests of the purchaser. The sale in those cases where the downpayment is less than 20 percent shall, unless otherwise authorized by the Administrator of General Services, be under a land contract which shall provide, in effect, for conveyance of title to the purchaser by quitclaim deed or other form of conveyance in accordance with the appropriate provisions of §§ 101-47.307-1 and 101-47.307-2 upon payment of one-third of the total purchase price and accrued interest, or earlier if the Government so elects, and execution and delivery of purchaser's note and purchase money mortgage (or bond and deed of trust) satisfactory to the Government, to secure payment of the unpaid balance of the purchase price.

(c) The disposal agency may increase the cash downpayment requirement or shorten the period of amortization whenever circumstances warrant and in the case of sales of farms, may provide for payment of the unpaid balance on equal semiannual or annual installment basis.

(d) Where a sale is to be made on credit, the invitation shall provide that the purchaser agrees by appropriate provisions to be incorporated in the disposal instruments that he will not lease (unless the property was offered without leasing restrictions by the Government) or sell the property, or any part thereof or interest therein, without prior written authorization of the Government.

(1) In appropriate cases, except as provided in § 101-47.304-4(d)(2), the invitation shall state that the disposal instrument may include provisions specifically authorizing leasing and/or resale and release of portions of the property as desired by the purchaser, provided that such provisions shall, in the judgment of the Government, be adequate to protect its security for the credit extended to the purchaser.

(2) In the case of timber or mineral lands, or lands containing other saleable products, the invitation shall state that the disposal instrument may specifically provide for granting future partial releases to permit the resale of timber, minerals, and other saleable products, or authorize the leasing of mineral rights, upon payment to the Government of such amounts as may be required by the Government but not less than the proceeds of any sale or lease less such amounts as may be determined by the Government to represent the cost of the sale or lease.

(3) All payments for such authorizations and/or releases shall, at the option of the Government, be applied against the unpaid balance of the indebtedness in inverse order of its maturity, or upon any delinquent installments of principal and interest, or used for payments of any delinquent taxes or insurance premiums.

(e) Where property is offered for disposal under a land contract or lease, the terms and conditions contained in the invitation shall provide that the purchaser or lessee will be required to pay to the proper taxing authorities or to the disposal agency, as may be directed, all taxes, payments in lieu of taxes (in the event of the existence or subsequent enactment of legislation authorizing such payments), assessments or similar charges which may be assessed or imposed on the property, or upon the occupier thereof, or upon the use or operation of the property and to assume all costs of operating obligations.

(f) Whenever property is offered for sale on credit terms or for lease, the terms and conditions contained in the invitation shall provide that the purchaser or lessee shall procure and maintain at his expense during the

term credit is extended, or the period of the lease, such insurance in such amounts as may be required by the Government; required insurance shall be in companies acceptable to the Government and shall include such terms and provisions as may be required to provide coverage satisfactory to the Government.

[29 FR 16126, Dec. 3, 1964, as amended at 33 FR 12003, Aug. 23, 1968; 42 FR 47205, Sept. 20, 1977]

§ 101–47.304–5 Inspection.

All persons interested in the acquisition of surplus property available for disposal under this Subpart 101–47.3 shall, with the cooperation of the holding agency, where necessary, and with due regard to its program activities, be permitted to make a complete inspection of such property, including any available inventory records, plans, specifications, and engineering reports made in connection therewith, subject to any necessary restrictions in the interest of national security and subject to such rules as may be prescribed by the disposal agency.

(See § 101–47.304–13 and § 101–47.403.)

[53 FR 29894, Aug. 9, 1988]

§ 101–47.304–6 Submission of offers.

All offers to purchase or lease shall be in writing, accompanied by any required earnest money deposit, using the form prescribed by the disposal agency and, in addition to the financial terms upon which the offer is predicated, shall set forth the willingness of the offeror to abide by the terms, conditions, reservations, and restrictions upon which the property is offered, and shall contain such other information as the disposal agency may request.

§ 101–47.304–7 Advertised disposals.

(a) All disposals or contracts for disposal of surplus property, except as provided in §§ 101–47.304–9 and 101–47.304–10, shall be made after publicly advertising for bids.

(1) The advertising for bids shall be made at such time previous to the disposal or contract, through such methods and on such terms and conditions as shall permit that full and free competition which is consistent with the value and nature of the property involved. The advertisement shall designate the place to which the bids are to be delivered or mailed, and shall state the place, date, and time of public opening.

(2) All bids shall be publicly disclosed at the time and place stated in the advertisement.

(3) Award shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when it is in the public interest to do so.

(b) Disposal and contracts for disposal of surplus property may be made through contract auctioneers when authorized by GSA. The auctioneer retained under contract shall be required to publicly advertise for bids in accordance with the applicable provisions of this § 101–47.304–7.

§ 101–47.304–8 [Reserved]

§ 101–47.304–9 Negotiated disposals.

(a) Disposal agencies shall obtain such competition as is feasible under the circumstances in all negotiations of disposals and contracts for disposal of surplus property. They may dispose of surplus property by negotiation only in the following situations:

(1) When the estimated fair market value of the property involved does not exceed $15,000;

(2) When bid prices after advertising therefor are not reasonable (either as to all or some part of the property) or have not been independently arrived at in open competition;

(3) When the character or conditions of the property or unusual circumstances make it impractical to advertise publicly for competitive bids and the fair market value of the property and other satisfactory terms of disposal can be obtained by negotiation;

(4) When the disposals will be to States, Commonwealth of Puerto Rico, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market

value of the property and other satisfactory terms of disposal are obtained by negotiation; or

(5) When negotiation is otherwise authorized by the Act or other law, such as:

(i) Disposals of power transmission lines for public or cooperative power projects (see § 101-47.308-1).

(ii) Disposals for public airport utilization (see § 101-47.308-2).

(b) Appraisal data required pursuant to the provisions of § 101-47.303-4, when needed for the purpose of conducting negotiations under § 101-47.304-9(a) (3), (4), or (5)(i) shall be obtained under contractual arrangements with experienced and qualified real estate appraisers familiar with the types of property to be appraised by them: *Provided, however,* That in any case where the cost of obtaining such data from a contract appraiser would be out of proportion to the expected recoverable value of the property, or if for any other reason employing a contract appraiser would not be in the best interest of the Government, the head of the disposal agency or his designee should authorize any other method of obtaining an estimate of the fair market value of the property or the fair annual rental he may deem to be proper.

(c) Negotiated sales to public bodies under 40 U.S.C. 484(e)(3)(H) will be considered only when the disposal agency has made a determination that a public benefit will result from the negotiated sale which would not be realized from a competitive sale disposal. The offer to purchase and the conveyance document concerning such negotiated sales shall contain an excess profits covenant. A standard Excess Profits Covenant for Negotiated Sales to Public Bodies is illustrated in § 101-47.4908. The standard covenant is provided as a guide, and appropriate modifications may be made provided that its basic purpose is retained. The disposal agency shall monitor the property involved and inspect records related thereto as necessary to ensure compliance with the terms and conditions of the sale and may take any actions which it deems reasonable and prudent to recover any excess profits realized through the resale of the property.

(d) The annual report of the Administrator under section 212 of the Act shall contain or be accompanied by a listing and description of any negotiated disposals of surplus real property having an estimated fair market value of over $15,000, other than disposals for which an explanatory statement has been transmitted under § 101-47.304-12.

[29 FR 16126, Dec. 3, 1964, as amended at 40 FR 22256, May 22, 1975; 51 FR 23760, July 1, 1986; 54 FR 12198, Mar. 24, 1989]

§ 101-47.304-10 Disposals by brokers.

Disposals and contracts for disposal of surplus property through contract realty brokers, where authorized by GSA, shall be made in the manner followed in similar commercial transactions. Realty brokers retained under contracts shall be required to give wide public notice of availability of the property for disposal.

§ 101-47.304-11 Documenting determinations to negotiate.

The disposal agency shall document the factors leading to and the determination justifying disposal by negotiation of any surplus property under §§ 101-47.304-9 and 101-47.304-10, and shall retain such documentation in the files of the agency.

§ 101-47.304-12 Explanatory statements.

(a) Subject to the exception stated in § 101-47.304-12(b), the disposal agency shall prepare an explanatory statement, as required by section 203(e)(6) of the Act, of the circumstances of each of the following proposed disposals by negotiation:

(1) Any real property that has an estimated fair market value in excess of $100,000, except that any real property disposed of by lease or exchange shall only be subject to paragraphs (a)(2) through (4) of this section;

(2) Any real property disposed of by lease for a term of 5 years or less; if the estimated fair annual rent is in excess of $100,000 for any of such years;

(3) Any real property disposed of by lease for a term of more than 5 years,

if the total estimated rent over the term of the lease is in excess of $100,000; or

(4) Any real property or real and related personal property disposed of by exchange, regardless of value, or any property any part of the consideration for which is real property.

(b) No explanatory statement need be prepared for a disposal of property authorized to be disposed of without advertising by any provision of law other than section 203(e) of the Act.

(c) An outline for the preparation of the explanatory statement is shown in § 101-47.4911. A copy of the statement shall be preserved in the files of the disposal agency.

(d) Each explanatory statement when prepared shall be submitted to the Administrator of General Services for review and transmittal by the Administrator of General Services by letters to the Committees on Government Operations and any other appropriate committees of the Senate and House of Representatives. The submission to the Administrator of General Services shall include such supporting data as may be relevant and necessary for evaluating the proposed action.

(e) Copies of the Administrator of General Services' transmittal letters to the committees of the Congress, § 101-47.304-12(d), will be furnished to the disposal agency.

(f) In the absence of adverse comment by an appropriate committee or subcommittee of the Congress on the proposed negotiated disposal, the disposal agency may consummate the sale on or after 35 days from the date of the Administrator of General Services letters transmitting the explanatory statement to the committees.

[29 FR 16126, Dec. 3, 1964, as amended at 41 FR 22354, June 3, 1976; 54 FR 12198, Mar. 24, 1989]

§ 101-47.304-13 Provisions relating to asbestos.

Where the existence of asbestos on the property has been brought to the attention of the disposal agency by the Standard Form 118 information provided in accordance with § 101-47.202-2(b)(9), the disposal agency shall incorporate such information (less any cost or time estimates to remove the asbestos-containing materials) in any Invitation for Bids/Offers to Purchase and include the following:

NOTICE OF THE PRESENCE OF ASBESTOS—WARNING!

(a) The Purchaser is warned that the property offered for sale contains asbestos-containing materials. Unprotected or unregulated exposures to asbestos in product manufacturing, shipyard, and building construction workplaces have been associated with asbestos-related diseases. Both the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) regulate asbestos because of the potential hazards associated with exposure to airborne asbestos fibers. Both OSHA and EPA have determined that such exposure increases the risk of asbestos-related diseases, which include certain cancers and which can result in disability or death.

(b) Bidders (Offerors) are invited, urged and cautioned to inspect the property to be sold prior to submitting a bid (offer). More particularly, bidders (offerors) are invited, urged and cautioned to inspect the property as to its asbestos content and condition and any hazardous or environmental conditions relating thereto. The disposal agency will assist bidders (offerors) in obtaining any authorization(s) which may be required in order to carry out any such inspection(s). Bidders (Offerors) shall be deemed to have relied solely on their own judgment in assessing the overall condition of all or any portion of the property including, without limitation, any asbestos hazards or concerns.

(c) No warranties either express or implied are given with regard to the condition of the property including, without limitation, whether the property does or does not contain asbestos or is or is not safe for a particular purpose. The failure of any bidder (offeror) to inspect, or to be fully informed as to the condition of all or any portion of the property offered, will not constitute grounds for any claim or demand for adjustment or withdrawal of a bid or offer after its opening or tender.

(d) The description of the property set forth in the Invitation for Bids (Offer to Purchase) and any other information provided therein with respect to said property is based on the best information available to the disposal agency and is believed to be correct, but an error or omission, including but not limited to the omission of any information available to the agency having custody over the property and/or any other Federal agency, shall not constitute grounds or reason for nonperformance of the contract of sale, or any claim by the Purchaser

against the Government including, without limitation, any claim for allowance, refund, or deduction from the purchase price.

(e) The Government assumes no liability for damages for personal injury, illness, disability or death, to the Purchaser, or to the Purchaser's successors, assigns, employees, invitees, or any other person subject to Purchaser's control or direction, or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity causing or leading to contact of any kind whatsoever with asbestos on the property which is the subject of this sale, whether the Purchaser, its successors or assigns has or have properly warned or failed properly to warn the individual(s) injured.

(f) The Purchaser further agrees that in its use and occupancy of the property it will comply with all Federal, state, and local laws relating to asbestos.

[53 FR 29894, Aug. 9, 1988]

§ 101-47.305 Acceptance of offers.

§ 101-47.305-1 General.

(a) When the head of the disposal agency or his designee determines that bid prices (either as to all or some part of the property) received after advertising therefor or received in response to the action authorized in paragraph (b) of this § 101-47.305-1, are reasonable, i.e., commensurate with the fair market value of the property, and were independently arrived at in open competition, award shall be made with reasonable promptness by notice to the bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. Any or all offers may be rejected when the head of the disposal agency or his designee determines it is in the public interest to do so.

(b) Where the advertising does not result in the receipt of a bid at a price commensurate with the fair market value of the property, the highest bidder may, at the discretion of the head of the disposal agency or his designee and upon determination of responsiveness and bidder responsibility, be afforded an opportunity to increase his offered price. The bidder shall be given a reasonable period of time, not to exceed fifteen working days, to respond. At the time the bidder is afforded an opportunity to increase his bid, all other bids shall be rejected and bid deposits returned. Any sale at a price so increased may be concluded without regard to the provisions of § 101-47.304-9 and § 101-47.304-12.

(c) The disposal agency shall allow a reasonable period of time within which the successful bidder shall consummate the transaction and shall notify the successful bidder of the period allowed.

(d) It is within the discretion of the head of the disposal agency or his designee to determine whether the procedure authorized by paragraph (b) of this § 101-47.305-1 is followed or whether the bids shall be rejected and the property reoffered for sale on a publicly advertised competitive bid basis in accordance with the provisions of § 101-47.304-7, or disposed of by negotiation pursuant to § 101-47.306-1, or offered for disposal under other applicable provisions of this Subpart 101-47.3.

[29 FR 16126, Dec. 3, 1984, as amended at 50 FR 25223, June 18, 1985]

§ 101-47.305-2 Equal offers.

"Equal offers" means two or more offers that are equal in all respects, taking into consideration the best interests of the Government. If equal acceptable offers are received for the same property, award shall be made by a drawing by lot limited to the equal acceptable offers received.

§ 101-47.305-3 Notice to unsuccessful bidders.

When an offer for surplus real property has been accepted, the disposal agency shall notify all other bidders of such acceptance and return their earnest money deposits, if any.

§ 101-47.306 Absence of acceptable offers.

§ 101-47.306-1 Negotiations.

(a) When the head of the disposal agency or his designee determines that bid prices after advertising therefor (including the action authorized by the provisions of § 101-47.305-1(b)) are not reasonable either as to all or some part of the property or were not independently arrived at in open competition and that a negotiated sale rather

than a disposal by readvertising or under other applicable provisions of this subpart would better protect the public interest, the property or such part thereof may be disposed of by negotiated sale after rejection of all bids received: *Provided*, That no negotiated disposal may be made under this § 101-47.306-1 unless:

(1) Notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head or his designee to each responsible bidder who submitted a bid pursuant to the advertising;

(2) The negotiated price is higher than the highest rejected bid price offered by any responsible bidder, as determined by the head of the agency or his designee; and

(3) The negotiated price is the highest negotiated price offered by any responsible prospective purchaser.

(b) Any such negotiated disposal shall be subject to the applicable provisions of §§ 101-47.304-9 and 101-47.304-12.

§ 101-47.306-2 Defense Industrial Reserve properties.

In the event that any disposal agency is unable to dispose of any surplus industrial plant because of the application of the conditions and restrictions of the National Security Clause imposed under the Defense Industrial Reserve Act (50 U.S.C. 453), after making every practicable effort to do so, it shall notify the Secretary of Defense, indicating such modifications in the National Security Clause, if any, which in its judgment will make possible the disposal of the plant. Upon agreement by the Secretary of Defense to any or all of such modifications, the plant shall be reoffered for disposal subject to such modifications as may have been so agreed upon; or if such modifications are not agreed to, and upon request of the Secretary of Defense, the plant shall be transferred to the custody of GSA.

[40 FR 12078, Mar. 17, 1975]

§ 101-47.307 Conveyances.

§ 101-47.307-1 Form of deed or instrument of conveyance.

Disposals of real property shall be by quitclaim deed or deed without warranty in conformity with local law and practice, unless the disposal agency finds that another form of conveyance is necessary to obtain a reasonable price for the property or to render the title marketable, and unless the use of such other form of conveyance is approved by GSA.

§ 101-47.307-2 Conditions in disposal instruments.

(a) Where a sale is made upon credit, the purchaser shall agree by appropriate provisions to be incorporated in the disposal intruments, that he will not resell or lease (unless due to its character or type the property was offered without leasing restrictions by the disposal agency) the property, or any part thereof or interest therein, without the prior written authorization of the disposal agency and such disposal instruments in appropriate cases may specifically provide for such authorization and/or future partial releases to be granted on terms which will adequately protect the Government's security for the credit extended to the purchaser.

(b) Except for exchange transactions initiated by the Federal Government for its own benefit, any disposition of land, or land and improvements located thereon, to public bodies by negotiation pursuant to § 101-47.304-9(4) shall include in the deed or other disposal instrument a covenant substantially as follows:

> The Grantee covenants for itself, its heirs, successors, and assigns and every successor in interest to the property hereby conveyed, or any part thereof, that the said Grantee and such heirs, successors, and assigns shall not discriminate upon the basis of race, color, religion, or national origin in the use, occupancy, sale, or lease of the property, or in their employment practices conducted thereon. This covenant shall not apply, however, to the lease or rental of a room or rooms within a family dwelling unit; nor shall it apply with respect to religion to premises used primarily for religious purposes. The United States of America shall be deemed a beneficiary of this covenant

without regard to whether it remains the owner of any land or interest therein in the locality of the property hereby conveyed and shall have the sole right to enforce this covenant in any court of competent jurisdiction.

(c) Any deed, lease, or other instrument executed to dispose of property under this subpart, subject to reservations, restrictions, or conditions as to the future use, maintenance, or transfer of the property shall recite all covenants, representations, and agreements pertaining thereto.

[29 FR 16126, Dec. 3, 1964, as amended at 33 FR 4408, Mar. 12, 1968]

§ 101-47.307-3 Distribution of conformed copies of conveyance instruments.

(a) Two conformed copies of any deed, lease, or other instrument containing reservations, restrictions, or conditions regulating the future use, maintenance, or transfer of the property shall be provided the agency charged with enforcement of such reservations, restrictions, or conditions.

(b) A conformed copy of the deed, lease, or other conveyance instrument shall be provided to the holding agency by the disposal agency.

§ 101-47.307-4 Disposition of title papers.

The holding agency shall, upon request, deliver to the disposal agency all title papers in its possession relating to the property reported excess. The disposal agency may transfer to the purchaser of the property, as a part of the disposal transaction, the pertinent records authorized by § 101-11.404-2, to be so transferred. If the purchaser of the property wishes to obtain additional records, copies thereof may be furnished to the purchaser at an appropriate charge, as determined by the agency having custody of the records.

[33 FR 572, Jan. 17, 1968]

§ 101-47.307-5 Title transfers from Government corporations.

In order to facilitate the administration and disposition of real property when record title to such property is not in the name of the United States of America, the holding agency, upon request of the Administrator of General Services, shall deliver to the disposal agency a quitclaim deed, or other instrument of conveyance without warranty, expressed or implied, transferring all of the right, title, and interest of the holding agency in such property to the United States of America.

§ 101-47.307-6 Proceeds from disposals.

All proceeds (except so much thereof as may be otherwise obligated, credited, or paid under authority of those provisions of law set forth in section 204(b)-(e) of the Act (40 U.S.C. 485(b)-(e)), or the Independent Offices Appropriation Act, 1963 (76 Stat. 725) or in any later appropriation act) hereafter received from any sale, lease, or other disposition of surplus real property and related personal property shall be covered into the land and water conservation fund in the Treasury of the United States.

[30 FR 754, Jan. 23, 1965]

§ 101-47.308 Special disposal provisions.

§ 101-47.308-1 Power transmission lines.

(a) Pursuant and subject to the provisions of section 13(d) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(d)), which is continued in effect by section 602(a) of the Federal Property and Administrative Services Act of 1949, any State or political subdivision thereof, or any State or Government agency or instrumentality may certify to the disposal agency that a surplus power transmission line and the right-of-way acquired for its construction is needful for or adaptable to the requirements of a public or cooperative power project. Disposal agencies shall notify such State entities and Government agencies of the availability of such property in accordance with § 101-47.303-2.

(b) Notwithstanding any other provisions of this subpart, whenever a State or political subdivision thereof, or a State or Government agency or instrumentality certifies that such property is needful for or adaptable to the requirements of a public or cooperative power project, the property may be sold for such utilization at the fair market value thereof.

(c) In the event a sale cannot be accomplished by reason of the price to be charged or otherwise and the certification is not withdrawn, the disposal agency shall report the facts involved to the Administrator of General Services, for a determination by him as to the further action to be taken to dispose of the property.

(d) Any power transmission line and right-of-way not disposed of pursuant to the provisions of this section shall be disposed of in accordance with other applicable provisions of this subpart, including, if appropriate, reclassification by the disposal agency.

§ 101-47.308-2 Property for public airports.

(a) Pursuant and subject to the provisions of section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)), which is continued in effect by section 602(a) of the Federal Property and Administrative Services Act of 1949 and amended by the Act of October 1, 1949, 63 Stat. 700, and section 1402(c) of the Federal Aviation Act of 1958, 72 Stat. 807 (50 U.S.C. App. 1622a-1622c), airport property may be conveyed or disposed of to a State, political subdivision, municipality, or tax-supported institution for a public airport. Airport property is any surplus real property including improvements and personal property located thereon as a part of the operating unit (exclusive of property the highest and best use of which is determined by the Administrator of General Services to be industrial and which shall be so classified for disposal without regard to the provisions of this section) which, in the determination of the Administrator of the Federal Aviation Administration is essential, suitable, or desirable for the development, improvement, operation, or maintenance of a public airport, as defined in the Federal Airport Act, as amended (49 U.S.C. 1101), or reasonably necessary to fulfill the immediate and foreseeable future requirements of the grantee for the development, improvement, operation, or maintenance of a public airport, including property needed to develop sources of revenue from nonaviation businesses at a public airport.

(b) The disposal agency shall notify eligible public agencies, in accordance with the provisions of § 101-47.303-2, that property which may be disposed of for use as a public airport under the Act of 1944, as amended, has been determined to be surplus. There shall be transmitted with the copy of each such notice when sent to the proper regional office of the Federal Aviation Administration, § 101-47.303-2(d), a copy of the holding agency's Report of Excess Real Property (Standard Form 118, with accompanying schedules).

(c) As promptly as possible after receipt of the copy of the notice given to eligible public agencies and the copy of Standard Form 118, the Federal Aviation Administration shall inform the disposal agency of the determination of the Administrator of the Federal Aviation Administration required by the provisions of the Act of 1944, as amended. The Federal Aviation Administration, thereafter, shall render such assistance to any eligible public agency known to have a need for the property for a public airport as may be necessary for such need to be considered in the development of a comprehensive and coordinated plan of use and procurement for the property. An application form and instructions for the preparation of an application shall be furnished to the eligible public agency by the disposal agency upon request.

(d) Whenever an eligible public agency has submitted a plan of use and application to acquire property for a public airport, in accordance with the provisions of § 101-47.303-2, the disposal agency shall transmit two copies of the plan and two copies of the application to the proper regional office of the Federal Aviation Administration. The Federal Aviation Administration shall promptly submit to the disposal agency a recommendation for disposal of the property for a public airport or shall inform the disposal agency that no such recommendation will be submitted.

(e) Upon receipt of such recommendation, the disposal agency may, with the approval of the head of the disposal agency or his designee, convey property recommended by the Federal Aviation Administration for disposal

for a public airport to the eligible public agency, subject to the provisions of the Surplus Property Act of 1944, as amended. Approval for aviation areas shall be based on established FAA guidelines, criteria, and requirements for such areas. Approval for nonaviation revenue-producing areas shall be given only for such areas as are anticipated to generate net proceeds which do not exceed expected deficits for operation of the aviation area applied for at the airport.

(f) Any airport property not recommended by the Federal Aviation Administration for disposal pursuant to the provisions of this subsection for use as a public airport shall be disposed of in accordance with other applicable provisions of this subpart. However, the holding agency shall first be notified of the inability of the disposal agency to dispose of the property for use as a public airport and shall be allowed 30 days to withdraw the property from surplus or to waive any future interest in the property for public airport use.

(g) The Administrator of the Federal Aviation Administration has the sole responsibility for enforcing compliance with the terms and conditions of disposal, and for the reformation, correction, or amendment of any disposal instrument and the granting of releases and for taking any necessary action for recapturing such property in accordance with the provisions of the Act of October 1, 1949, 63 Stat. 700, and section 1402(c) of the Federal Aviation Act of 1958, 72 Stat. 807 (50 U.S.C. App. 1622a-1622c).

(h) In the event title to any such property is revested in the United States by reason of noncompliance with the terms and conditions of disposal, or other cause, the Administrator of the Federal Aviation Administration shall have accountability for the property and shall report the property to GSA as excess property in accordance with the provisions of § 101-47.202.

(i) Section 23 of the Airport and Airway Development Act of 1970 (Airport Act of 1970) is not applicable to the transfer of airports to State and local agencies. The transfer of airports to State and local agencies may be made only under section 13(g) of the Surplus Property Act of 1944 which is continued in effect by the Act. Only property which the holding agency determines cannot be reported excess to GSA for disposition under the Act, but which, nevertheless, may be made available for use by a State or local public body for public airport purposes without being inconsistent with the Federal program of the holding agency, may be conveyed under section 23 of the Airport Act of 1970. In the latter instance, section 23 may be used for the transfer of nonexcess land for airport development purposes providing that such real property does not constitute an entire airport. An entire, existing and established airport can only be disposed of to a State or eligible local government under section 13(g) of the Surplus Property Act of 1944.

[29 FR 16126, Dec. 3, 1964, as amended at 42 FR 46305, Sept. 15, 1977; 48 FR 1301, Jan. 12, 1983]

§ 101-47.308-3 Property for use as historic monuments.

(a) Under section 203(k)(3) of the act, the disposal agency may, in its discretion, convey, without monetary consideration, to any State, political subdivision, instrumentalities thereof, or municipality, surplus real and related personal property for use as a historic monument for the benefit of the public provided the Secretary of the Interior has determined that the property is suitable and desirable for such use. No property shall be determined to be suitable or desirable for use as a historic monument except in conformity with the recommendation of the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments. In addition, the disposal agency may authorize the use of property conveyed under subsection 203(k)(3) of the act or the Surplus Property Act of 1944, as amended, for revenue-producing activities if the Secretary of the Interior:

(1) Determines that such activities, as described in the applicant's proposed program of utilization, are com-

patible with the use of the property for historic monument purposes;

(2) Approves the grantee's plan for repair, rehabilitation, restoration, and maintenance of the property;

(3) Approves the grantee's plan for financing the repair, rehabilitation, restoration, and maintenance of the property. The plan shall not be approved unless it provides that all incomes in excess of costs of repair, rehabilitation, restoration, maintenance and a specified reasonable profit or payment that may accrue to a lessor, sublessor, or developer in connection with the management, operation, or development of the property for revenue producing activities shall be used by the grantee, lessor, sublessor, or developer, only for public historic preservation, park, or recreational purposes; and

(4) Examines and approves the grantee's accounting and financial procedures for recording and reporting on revenue-producing activities.

(b) The disposal agency shall notify State and areawide clearinghouses and eligible public agencies, in accordance with the provisions of § 101-47.303-2, that property which may be disposed of for use as a historic monument has been determined to be surplus. A copy of the holding agency's Standard Form 118, Report of Excess Real Property, with accompanying schedules shall be transmitted with the copy of each such notice when it is sent to the proper regional office of the Bureau of Outdoor Recreation as provided in § 101-47.303-2(d).

(c) Upon request, the disposal agency shall furnish eligible public agencies with an application form to acquire real property for permanent use as a historic monument and advise the potential applicant that it should consult with the appropriate Bureau of Outdoor Recreation Regional Office early in the process of developing the application.

(d) Eligible public agencies shall submit the original and two copies of the completed application to acquire real property for use as a historic monument in accordance with the provisions of § 101-47.303-2 to the appropriate Bureau of Outdoor Recreation Regional Office which will forward one copy of the application to the appropriate regional office of the disposal agency. After consultation with the National Park Service, the Bureau of Outdoor Recreation shall promptly submit to the disposal agency the determination required of the Secretary of the Interior under section 203(k)(3) of the act for disposal of the property for a historic monument and compatible revenue-producing activities or shall inform the disposal agency that no such recommendation will be submitted.

(e) Upon receipt of the determination, the disposal agency may with the approval of the head of the disposal agency or his designee convey to an eligible public agency property determined by the Secretary of the Interior to be suitable and desirable for use as a historic monument for the benefit of the public and for compatible revenue-producing activities subject to the provisions of section 203(k)(3) of the Act.

(f) The Secretary of the Interior has the responsibility for enforcing compliance with the terms and conditions of disposals; the reformation, correction, or amendment of any disposal instrument; the granting of releases; and any action necessary for recapturing such property in accordance with the provisions of section 203(k)(4) of the act. Any such action shall be subject to the disapproval of the head of the disposal agency.

(g) The Department of the Interior shall notify the appropriate GSA regional Real Property Division, Public Buildings Service, immediately by letter when title to such historic property is to be revested in the United States for noncompliance with the terms and conditions of disposal or for other cause. The notification shall cite the legal and administrative actions that the Department must take to obtain full title and possession of the property. In addition, it shall include an adequate description of the property, including any improvements constructed thereon since the original conveyance to the grantee. Upon receipt of a statement from the Department that title to the property has revested, GSA will assume custody and accountability of the property. However, the grantee shall be required to

provide protection and maintenance of the property until such time as the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance shall, at a minimum, conform to to the standards prescribed in § 101-47.4913.

[40 FR 22257, May 22, 1975, as amended at 49 FR 44472, Nov. 7, 1984]

§ 101–47.308–4 Property for educational and public health purposes.

(a) The head of the disposal agency or his designee is authorized, at his discretion: (1) To assign to the Secretary of the Department of Education (ED) for disposal under section 203(k)(1) of the Act such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary as being needed for school, classroom, or other educational use, or (2) to assign to the Secretary of Health and Human Services (HHS) for disposal under section 203(k)(1) of the Act such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary as being needed for use in the protection of public health, including research.

(b) With respect to real property and related personal property which may be made available for assignment to ED or HHS for disposal under section 203(k)(1) of the Act for educational or public health purposes, the disposal agency shall notify eligible public agencies, in accordance with the provisions of § 101-47.303-2, that such property has been determined to be surplus. Such notice to eligible public agencies shall state that any planning for an educational or public health use, involved in the development of the comprehensive and coordinated plan of use and procurement for the property, must be coordinated with ED or HHS, as appropriate, and that an application form for such use of the property and instructions for the preparation and submission of an application may be obtained from ED or HHS. The requirement for educational or public health use of the property by an eligible public agency will be contingent upon the disposal agency's approval under (i), below, of a recommendation for assignment of Federal surplus real property received from ED or HHS and any subsequent transfer shall be subject to the disapproval of the head of the disposal agency as stipulated under section 203(k)(1) (A) or (B) of the Act and referenced in paragraph (j) of this section.

(c) With respect to surplus real property and related personal property which may be made available for assignment to either Secretary for disposal under section 203(k)(1) of the Act for educational or public health purposes to nonprofit institutions which have been held exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)), ED or HHS may notify eligible nonprofit institutions, in accordance with the provisions of § 101-47.303-2(c), that such property has been determined to be surplus. Any such notice to eligible nonprofit institutions shall state that any requirement for educational or public health use of the property should be coordinated with the public agency declaring to the disposal agency an intent to develop and submit a comprehensive and coordinated plan of use and procurement for the property. The requirement for educational or public health use of the property by an eligible nonprofit institution will be contingent upon the disposal agency's approval, under paragraph (i) of this section, of an assignment recommendation received from ED or HHS and any subsequent transfer shall be subject to the disapproval of the head of the disposal agency as stipulated under section 203(k)(1) (A) or (B) of the Act and referenced in (j) below.

(d) ED and HHS shall notify the disposal agency within 20-calendar days after the date of the notice of determination of surplus if it has an eligible applicant interested in acquiring the property. Whenever ED or HHS has notified the disposal agency within the said 20-calendar day period of a potential educational or public health requirement for the property, ED or HHS shall submit to the disposal agency within 25-calendar days after the expiration of the 20-calendar day period, a recommendation for assignment of the property, or shall inform

the disposal agency, within the 25-calendar day period, that a recommendation will not be made for assignment of the property.

(e) Whenever an eligible public agency has submitted a plan of use for property for an educational or public health requirement, in accordance with the provisions of § 101-47.303-2, the disposal agency shall transmit two copies of the plan to the regional office of ED or HHS as appropriate. ED or HHS shall submit to the disposal agency, within 25-calendar days after the date the plan is transmitted, a recommendation for assignment of the property to the Secretary of ED or HHS, or shall inform the disposal agency, within the 25-calendar day period, that a recommendation will not be made for assignment of the property to ED or HHS as appropriate.

(f) Any assignment recommendation submitted to the disposal agency by ED or HHS shall set forth complete information concerning the educational or public health use, including: (1) Identification of the property, (2) the name of the applicant and the size and nature of its program, (3) the specific use planned, (4) the intended public benefit allowance, (5) the estimate of the value upon which such proposed allowance is based, and, (6) if the acreage or value of the property exceeds the standards established by the Secretary, an explanation therefor. ED or HHS shall furnish to the holding agency a copy of the recommendation, unless the holding agency is also the disposal agency.

(g) Holding agencies shall cooperate to the fullest extent possible with representatives of ED or HHS in their inspection of such property and in furnishing information relating thereto.

(h) In the absence of an assignment recommendation from ED or HHS submitted pursuant to § 101-47.308-4 (d) or (e), and received within the 25-calendar day time limit specified therein, the disposal agency shall proceed with other disposal action.

(i) If, after considering other uses for the property, the disposal agency approves the assignment recommendation from ED or HHS, it shall assign the property by letter or other document to the Secretary of ED or HHS as appropriate. If the recommendation is disapproved, the disposal agency shall likewise notify the appropriate Department. The disposal agency shall furnish to the holding agency a copy of the assignment, unless the holding agency is also the disposal agency.

(j) Subsequent to the receipt of the disposal agency's letter of assignment, ED or HHS shall furnish to the disposal agency a Notice of Proposed Transfer in accordance with section 203(k)(1) (A) or (B) of the Act. If the disposal agency has not disapproved the proposed transfer within 30-calendar days of the receipt of the Notice of Proposed Transfer, ED or HHS may proceed with the transfer.

(k) ED or HHS shall furnish the Notice of Proposed Transfer within 35-calendar days after the disposal agency's letter of assignment and shall prepare the transfer documents and take all necessary actions to accomplish the transfer within 15-calendar days after the expiration of the 30-calendar day period provided for the disposal agency to consider the notice. ED or HHS shall furnish the disposal agency two conformed copies of deeds, leases or other instruments conveying the property under section 203(k)(1) (A) or (B) of the Act and all related documents containing restrictions or conditions regulating the future use, maintenance or transfer of the property.

(l) ED or HHS, as appropriate, has the responsibility for enforcing compliance with the terms and conditions of transfer; for the reformation, correction, or amendment of any transfer instrument; for the granting of releases; and for the taking of any necessary actions for recapturing such property in accordance with the provisions of section 203(k)(4) of the Act. Any such action shall be subject to the disapproval of the head of the disposal agency. Notice to the head of the disposal agency by ED or HHS of any action proposed to be taken shall identify the property affected, set forth in detail the proposed action, and state the reasons therefor.

(m) In each case of repossession under a terminated lease or reversion of title by reason of noncompliance with the terms or conditions of sale or

other cause, ED or HHS shall, at or prior to such repossession or reversion of title, provide the appropriate GSA regional office with an accurate description of the real and related personal property involved. Standard Form 118, Report of Excess Real Property, and the appropriate schedules shall be used for this purpose. Upon receipt of advice from ED or HHS that such property has been repossessed or title has reverted, GSA will assume custody of and accountability for the property. However, the grantee shall be required to provide protection and maintenance for the property until such time as the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in § 101-47.4913.

[49 FR 3465, Jan. 27, 1984]

§ 101-47.308-5 Property for use as shrines, memorials, or for religious purposes.

(a) Surplus military chapels shall be segregated from other buildings, and shall be disposed of intact, separate and apart from the land, for use off-site as shrines, memorials, or for religious purposes, except in cases in which the chapel is located on surplus Government-owned land and the disposal agency determines that it may properly be used in place, in which cases a suitable area of land may be set aside for such purposes, and sold with the chapel.

(1) *Application.* Applications for the purchase of surplus chapels for use off-site or for use in-place shall be solicited by public advertising. All applications received in response to advertising shall be submitted to the Chief of Chaplains of the service which had jurisdiction over the property during the period of Government use thereof for military purposes and shall be disposed of in accordance with his recommendation. If no recommendation is received from the Chief of Chaplains within 30 days from the date of such submission, the disposal agency may select the purchaser on the basis of the needs of the applicants and the best interests of the community to be served. If no application is received for transfer of the property for shrine, memorial, or religious uses, the Chief of Chaplains shall be notified accordingly, and disposal of the property shall be held in abeyance for a period not to exceed 60 days thereafter to afford additional time for the filing of applications. If no such application is received during the extended period, the property may be disposed of for uses other than shrine, memorial, or religious purposes pursuant to other applicable provisions of this subpart.

(2) *Sale price.* The sale price of the chapel shall be a price equal to its appraised fair market value in the light of conditions imposed relating to its future use and the estimated cost of removal, where required. The sale price of the land shall be a price equal to the appraised fair market value of the land based upon the highest and best use of the land at the time of the disposal.

(3) *Conditions of transfer.* All chapels disposed of pursuant to the authority of this section shall be transferred subject to the condition that during the useful life thereof they be maintained and used as shrines, memorials, or for religious purposes and not for any commercial, industrial, or other secular use; and that in the event a transferee fails to maintain and use the chapel for such purposes there shall become due and payable to the Government the difference between the appraised fair market value of the chapel, as of the date of the transfer, without restrictions on its use, and the price actually paid. Where the land on which the chapel is located is sold with the chapel, no conditions or restrictions on the use of the land shall be included in the deed.

(4) *Release of restrictions.* The disposal agency may release the conditions of transfer without payment of a monetary consideration upon a determination that the property no longer serves the purpose for which it was transferred or that such release will not prevent accomplishment of the purpose for which the property was transferred. Such determination shall be in writing, shall state the facts and circumstances involved, and shall be preserved in the files of the disposal agency.

(b) Notwithstanding the provisions of this § 101-47.308-5, a chapel and underlying land that is a component unit of a larger parcel of surplus real property recommended by the Secretary of Health, Education, and Welfare as being needed for educational or public health purposes, may be included in an assignment of such property, when so recommended by the Secretary, for disposal subject to the condition that the instrument of conveyance shall require that during the useful life of the chapel it shall be maintained and used by the grantee as a shrine, memorial, or for religious purposes.

§ 101-47.308-6 Property for housing and related facilities.

(a) Under section 414(a) of the Housing and Urban Development Act of 1969, as amended (40 U.S.C. 484b), the disposal agency may, in its discretion, transfer (assign) surplus real property to the Secretary of Housing and Urban Development or to the Secretary of Agriculture acting through the Farmers Home Administration (FmHA) at the request of either, for sale or lease by the appropriate Secretary at its fair value for use in the provision of housing to be occupied predominantly by families or individuals of low or moderate income and for related public commercial or industrial facilities approved by the appropriate Secretary.

(b) Upon receipt of the notice of determination of surplus (§ 101-47.204-1(a)), HUD or FmHA may solicit applications from eligible applicants.

(c) HUD or FmHA shall notify the disposal agency within 20 calendar days after the date of the notice of determination of surplus if it is able to interest an eligible applicant in acquiring the property under section 414(a) of the 1969 HUD Act, as amended.

(d) Both holding and disposal agencies shall cooperate, to the fullest extent possible, with representatives of HUD or FmHA in their inspection of such property and in furnishing information relating thereto.

(e) HUD or FmHA shall advise the disposal agency and request transfer of the property for disposition under section 414(a) of the 1969 HUD Act, as amended, within 25 calendar days after the expiration of the 20-calendar-day period specified in § 101-47.308-6(c).

(f) Any request submitted by HUD or FmHA pursuant to § 101-47.308-6(e) shall set forth complete information concerning the intended use, including:

(1) Identification of the property; (2) a summary of the background of the proposed project, including a map or plat of the property; (3) whether the property is to be sold or leased to a public body or to an entity other than a public body which will use the land in connection with the development of housing to be occupied predominantly by families or individuals of low and moderate income, assisted under a Federal housing assistance program administered by the appropriate Secretary or under a State or local program found by the appropriate Secretary to have the same general purpose, and related public commercial or industrial facilities approved by the appropriate Secretary; (4) HUD's or FmHA's best estimate of the fair value of the property and the price at which it will be sold by HUD or FmHA; (5) how the property is to be used (i.e., single or multifamily housing units, the number of housing units proposed, types of facilities, and the estimated cost of construction); (6) an estimate as to the dates construction will be started and completed; and (7) what reversionary provisions will be included in the deed or the termination provisions that will be included in the lease. It is suggested that this information, except for the map or plat of the property, be furnished in the body of the letter transfer request signed by the Secretary of Housing and Urban Development or the Secretary of Agriculture or his designee.

The above data will be used by GSA in preparing and submitting a statement relative to the proposed transaction to the Senate Committee on Governmental Affairs and the House Committee on Government Operations prior to the transfer of the property to HUD or FmHA.

(g) In the absence of a notice under paragraph (c) of this section or a request under paragraph (e) of this sec-

tion, the disposal agency shall proceed with the appropriate disposal action.

(h) If, after considering other uses for the property, the disposal agency determines that the property should be made available to HUD or FmHA under section 414(a) of the 1969 HUD Act, as amended, it shall transfer the property to the appropriate agency upon its request.

(i) The transferee agency shall bear the costs of any out-of-pocket expenses necessary to accomplish the transfer of the property, such as surveys, fencing, security, etc., of the remaining property or otherwise. In addition, the transferee agency shall be responsible for any protection and maintenance expenses after the property is transferred to the agency.

(j) The disposal agency, if it approves the request, shall transfer the property by letter or other document to HUD or FmHA for disposal under section 414(a) of the 1969 HUD Act, as amended. If the request is disapproved, the disposal agency shall so notify the appropriate Secretary. The disposal agency shall furnish the holding agency a copy of the transfer or notice of disapproval.

(k) The transferee agency shall prepare the disposal document and take all other actions necessary to accomplish the disposition of the property under section 414(a) of the 1969 HUD Act, as amended, within 120 calendar days after the date of the transfer of the property to the agency.

(l) If any property conveyed under section 414(a) of the 1969 HUD Act, as amended, to an entity other than a public body is used for any purpose other than the purpose for which it was sold or leased within a period of 30 years of the conveyance, it shall revert to the United States (or, in the case of leased property, the lease shall terminate) unless the appropriate Secretary and the Administrator of General Services, after the expiration of the first 20 years of such period, approve the use of the property for such other purpose.

(m) The transferee agency shall furnish the disposal agency two conformed copies of deeds, leases, or other instruments conveying property under section 414(a) of the 1969 HUD Act, as amended, and related documents containing reservations, restrictions, or conditions regulating the future use, maintenance, or transfer of the property.

(n) In each case of reversion of title by reason of noncompliance with the terms and conditions of sale or other cause, HUD or FmHA shall, prior to or at the time of such reversion, provide GSA with an accurate description of the real and related personal property involved. Standard Form 118, Report of Excess Real Property, and the appropriate schedules shall be used for this purpose. Upon receipt of advice from HUD or FmHA that title has reverted, GSA will assume accountability therefor.

[47 FR 37176, Aug. 25, 1982]

§ 101-47.308-7 Property for use as public park or recreation areas.

(a) The head of the disposal agency or his designee is authorized, in his discretion, to assign to the Secretary of the Interior for disposal under section 203(k)(2) of the Act for public park or recreation purposes, such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary as being needed for use as a public park or recreation area for disposal by the Secretary to a State, political subdivision, instrumentalities thereof, or municipality.

(b) The disposal agency shall notify established State and regional or metropolitan clearinghouses and eligible public agencies, in accordance with the provisions of § 101-47.303-2, that property which may be disposed of for use as a public park or recreation area has been determined to be surplus. There shall be transmitted with the copy of each such notice, when sent to the proper field office of the Bureau of Outdoor Recreation, a copy of the holding agency's Report of Excess Real Property (Standard Form 118, with accompanying schedules).

(c) An application form to acquire property for permanent use as a public park or recreation area and instructions for the preparation of the application shall be furnished by the Department of the Interior upon request.

(d) The Department of the Interior shall notify the disposal agency within 20 calendar days after the date of the notice of determination of surplus if it has an eligible applicant interested in acquiring the property under section 203(k)(2) of the Act.

(e) Holding agencies shall cooperate to the fullest extent possible with representatives of the Department of the Interior in their inspection of such property and in furnishing information relating thereto.

(f) The Department of the Interior shall advise the disposal agency and request assignment of the property for disposition under section 203(k)(2) of the Act, as amended, within 25 calendar days after the expiration of the 20-calendar-day period specified in paragraph (d) of this section.

(g) Any recommendation submitted by the Department of the Interior pursuant to paragraph (f) of this section shall set forth complete information concerning the plans for use of the property as a public park or recreation area, including (1) identification of the property, (2) the name of the applicant, (3) the specific use planned, and (4) the intended public benefit allowance. A copy of the application together with any other pertinent documentation shall be submitted with the recommendation.

(h) In the absence of a notice under paragraph (d) of this section or a request under paragraph (f) of this section, the disposal agency shall proceed with the appropriate disposal action.

(i) If, after considering other uses for the property, the disposal agency approves the assignment recommendation from the Department of the Interior, it shall assign the property by letter or other document to the Secretary of the Interior. If the recommendation is disapproved, the disposal agency shall likewise notify the Secretary. The disposal agency shall furnish to the holding agency a copy of the assignment, unless the holding agency is also the disposal agency.

(j) Subsequent to the receipt of the disposal agency's letter of assignment, the Secretary of the Interior shall furnish to the disposal agency a Notice of Proposed Transfer, in accordance with section 203(k)(2)(A) of the Act. If the disposal agency has not disapproved the proposed transfer within 30-calendar days of the receipt of the Notice of Proposed Transfer, the Secretary may proceed with the transfer.

(k) The disposal agency may, where appropriate, make the assignment subject to the Department of the Interior requiring the applicant to bear the cost of any out-of-pocket expenses necessary to accomplish the transfer of the property, such as surveys, fencing, security of the remaining property or otherwise.

(l) In the absence of the notice of disapproval by the disposal agency upon expiration of the 30-day period, or upon earlier advice from the disposal agency of no objection to the proposed transfer, the Department of the Interior may place the applicant in possession of the property as soon as practicable in order to minimize the Government's expense of protection and maintenance of the property. As of the date of assumption of possession of the property, or the date of conveyance, whichever occurs first, the applicant shall assume responsibility for care and handling and all risks of loss or damage to the property, and shall have all obligations and liabilities of ownership.

(m) The Department of the Interior shall furnish the Notice of Proposed Transfer within 35-calendar days after the disposal agency's letter of assignment and shall take all necessary actions to accomplish the transfer within 15-calendar days after the expiration of the 30-calendar day period provided for the disposal agency to consider the notice.

(n) The deed of conveyance of any surplus real property transferred under the provision of section 202(k)(2) of the Act shall provide that all such property be used and maintained for the purpose for which it was conveyed in perpetuity, and that in the event that such property ceases to be used or maintained for such purpose during such period, all or any portion of such property shall in its then existing condition, at the option of the United States, revert to the United States and may contain such additional terms, reservations, restrictions, and conditions as may be deter-

mined by the Secretary of the Interior to be necessary to safeguard the interest of the United States.

(o) The Department of the Interior shall furnish the disposal agency two conformed copies of deeds, leases, or other instruments conveying property under section 203(k)(2) of the Act and related documents containing reservations, restrictions, or conditions regulating the future use, maintenance or transfer of the property.

(p) The Secretary of the Interior has the responsibility for enforcing compliance with the terms and conditions of transfer; the reformation, correction, or amendment of any transfer instrument; the granting of releases; and any necessary actions for recapturing such property in accordance with the provisions of section 202(k)(4) of the Act. Any such action shall be subject to the disapproval of the head of the disposal agency. Notice to the head of the disposal agency by the Secretary of any action proposed to be taken shall identify the property affected, set forth in detail the proposed action, and state the reasons therefor.

(q) The Department of the Interior shall notify the appropriate GSA regional office immediately by letter when title to property transferred for use as a public park or recreation area is to be revested in the United States for noncompliance with the terms or conditions of disposal or for other cause. The notification shall cite the legal and administrative actions that the Department must take to obtain full title and possession of the property. In addition, it shall include an adequate description of the property, including any improvements constructed thereon since the original conveyance to the grantee. Upon receipt of a statement from the Department that title to the property has revested, GSA will assume custody of and accountability for the property. However, the grantee shall be required to provide protection and maintenance for the property until such time as the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in § 101-47.4913.

[36 FR 9776, May 28, 1971, as amended at 49 FR 3467, Jan. 27, 1984]

§ 101-47.308-8 Property for displaced persons.

(a) Pursuant to section 218 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, the disposal agency is authorized to transfer surplus real property to a State agency, as hereinafter provided, for the purpose of providing replacement housing under title II of this Act for persons who are to be displaced by Federal or federally assisted projects.

(b) Upon receipt of the notice of surplus determination (§ 101-47.204-1(a)), any Federal agency having a requirement for such property for housing for displaced persons may solicit applications from eligible State agencies.

(c) Federal agencies shall notify the disposal agency within 20 calendar days after the date of the notice of determination of surplus if it is able to interest an eligible State agency in acquiring the property under section 218.

(d) Both holding and disposal agencies shall cooperate, to the fullest extent possible, with Federal and State agency representatives in their inspection of such property and in furnishing information relating thereto.

(e) The interested Federal agency shall advise the disposal agency and request transfer of the property to the selected State agency under section 218 within 25 calendar days after the expiration of the 20-calendar-day period specified in § 101-47.308-8(c).

(f) Any request submitted by a Federal agency pursuant to § 101-47.308-8(e) shall be in the form of a letter addressed to the appropriate GSA regional office and shall set forth the following information:

(1) Identification of the property by name, location, and control number; (2) a request that the property be transferred to a specific State agency including the name and address and a copy of the State agency's application or proposal; (3) a certification by the appropriate Federal agency official that the property is required for housing for displaced persons pursuant to section 218, that all other options au-

thorized under title II of the Act have been explored and replacement housing cannot be found or made available through those channels, and that the Federal or federally assisted project cannot be accomplished unless the property is made available for replacement housing; (4) any special terms and conditions that the Federal agency desires to include in conveyance instruments to insure that the property is used for the intended purpose; (5) identification by name and proposed location of the Federal or federally assisted project which is creating the requirement; (6) purpose of the project; (7) citation of enabling legislation or authorization for the project when appropriate; (8) a detailed outline of steps taken to obtain replacement housing for displaced persons as authorized under title II of the Act; and (9) arrangements that have been made to construct replacement housing on the surplus property and to insure that displaced persons will be provided housing in the development.

(g) In the absence of a notice under § 101-47.308-8(c) or a request under § 101-47.308-8(e), the disposal agency shall proceed with the appropriate disposal action.

(h) If, after considering other uses for the property, the disposal agency determines that the property should be made available for replacement housing under section 218, it shall transfer the property to the designated State agency on such terms and conditions as will protect the interest of the United States, including the payment or the agreement to pay to the United States all amounts received by the State agency from any sale, lease, or other disposition of the property for such housing. The sale, lease, or other disposition of the property by the State agency shall be at the fair market value as approved by the disposal agency, unless a compelling justification is offered for disposal of the property at less than fair market value, in which event the disposal may be made at such other value as is approved by the disposal agency.

(i) The State agency shall bear the costs of any out-of-pocket expenses necessary to accomplish the transfer of the property, such as costs of surveys, fencing, or security of the remaining property.

(j) The disposal agency, if it approves the request, shall transfer the property to the designated State agency. If the request is disapproved, the disposal agency shall notify the Federal agency requesting the transfer. The disposal agency shall furnish the holding agency a copy of the transfer or notice of disapproval, and the Federal agency requesting the transfer a copy of the transfer when appropriate.

[36 FR 11439, June 12, 1971]

§ 101-47.308-9 Property for correctional facility use.

(a) Under section 203(p)(1) of the Act, the head of the disposal agency or designee may, in his/her discretion, convey, without monetary consideration, to any State, or to those governmental bodies named therein, or to any political subdivision or instrumentality thereof, surplus real and related personal property for correctional facility use, provided the Attorney General has determined that the property is required for correctional facility use and has approved an appropriate program or project for the care or rehabilitation of criminal offenders.

(b) The disposal agency shall provide prompt notification to the Office of Justice Programs (OJP), Department of Justice (DOJ) of the availability of surplus properties. Included in the notification to OJP will be a copy of the holding agency's Standard Form 118, Report of Excess Real Property, with accompanying schedules.

(c) With respect to real property and related personal property which may be made available for disposal under section 203(p)(1) of the Act for correctional facility purposes, OJP shall convey notices of availability of properties to the appropriate State and local public agencies. Such notice shall state that any planning for correctional facility use involved in the development of a comprehensive and coordinated plan of use and procurement for the property must be coordinated and approved by the OJP and that an application form for such use of the property and instructions for the prep-

aration and submission of an application may be obtained from OJP. The requirement for correctional facility use of the property by an eligible public agency will be contingent upon the disposal agency's approval under paragraph (g) of this section of a determination by DOJ that identifies surplus property required for correctional facility use under an appropriate program or project for the care of rehabilitation of criminal offenders.

(d) OJP shall notify the disposal agency within 20 calendar days after the date of the notice of determination of surplus if there is an eligible applicant interested in acquiring the property. Whenever OJP has notified the disposal agency within the said 20 calendar-day period of a potential correctional facility requirement for the property, OJP shall submit to the disposal agency within 25 calendar days after the expiration of the 20 calendar-day period, a determination indicating a requirement for the property and approving an appropriate program or project for the care or rehabilitation of criminal offenders, or shall inform the disposal agency, within the 25 calendar-day period, that the property will not be required for correctional facility use.

(e) Any determination submitted to the disposal agency by DOJ shall set forth complete information concerning the correctional facility use, including:

(1) Identification of the property,

(2) Certification that the property is required for correctional facility use,

(3) A copy of the approved application which defines the proposed plan of use, and

(4) The environmental impact of the proposed correctional facility.

(f) Both holding and disposal agencies shall cooperate to the fullest extent possible with Federal and State agency representatives in their inspection of such property and in furnishing information relating thereto.

(g) If, after considering other uses for the property, the disposal agency approves the determination by DOJ, it shall convey the property to the appropriate grantee. If the determination is disapproved, or in the absence of a determination from DOJ submitted pursuant to § 101-47.308-9(d), and received within the 25 calendar-day time limit specified therein, the disposal agency shall proceed with other disposal action. The disposal agency shall notify OJP 10 days prior to any announcement of a determination to either approve or disapprove an application for correctional purposes and shall furnish to OJP a copy of the conveyance documents.

(h) The deed of conveyance of any surplus real property transferred under the provisions of section 203(p)(1) of the Act shall provide that all such property be used and maintained for the purpose for which it was conveyed in perpetuity and that in the event such property ceases to be used or maintained for such purpose during such period, all or any portion of such property shall in its then existing condition, at the option of the United States, revert to the United States and may contain such additional terms, reservations, restrictions, and conditions as may be determined by the Administrator of General Services to be necessary to safeguard the interest of the United States.

(i) The Administrator of General Services has the responsibility for enforcing compliance with the terms and conditions of disposals; the reformation, correction, or amendment of any disposal instrument; the granting of releases; and any action necessary for recapturing such property in accordance with the provisions of section 203(p)(3) of the Act.

(j) The OJP will notify GSA upon discovery of any information indicating a change in use and, upon request, make a redetermination of continued appropriateness of the use of a transferred property.

(k) In each case of repossession under a reversion of title by reason of noncompliance with the terms of the conveyance documents, GSA will assume custody of and accountability for the property. However, the grantee shall be required to provide protection and maintenance for the property until such time as the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance shall, at a minimum, conform to

the standards prescribed in § 101-47.4913.

[52 FR 9832, Mar. 27, 1987]

§ 101-47.309 Disposal of leases, permits, licenses, and similar instruments.

The disposal agency may, subject to such reservations, restrictions, and conditions, if any, as the disposal agency deems necessary properly to protect the interests of the United States against liability under a lease, permit, license, or similar instrument:

(a) Dispose of the lease or other instrument subject to assumption by the transferee of the obligations in the lease or other instrument unless a transfer is prohibited by the terms of the lease or other instrument; or

(b) Terminate the lease or other instrument by notice or negotiated agreement; and

(c) Dispose of any surplus Government-owned improvements located on the premises in the following order by any one or more of the following methods:

(1) By disposition of all or a portion thereof to the transferee of the lease or other instrument (not applicable when the lease or other instrument is terminated);

(2) By disposition to the owner of the premises or grantor of a sublease, as the case may be, (i) in full satisfaction of a contractual obligation of the Government to restore the premises, or (ii) in satisfaction of a contractual obligation of the Government to restore the premises plus the payment of a money consideration to the Government by the owner or grantor, as the case may be, that is fair and reasonable under the circumstances, or (iii) in satisfaction of a contractual obligation of the Government to restore the premises plus the payment by the Government to the owner or grantor, as the case may be, of a money consideration that is fair and reasonable under the circumstances; or

(3) By disposition for removal from the premises.

Provided, That any negotiated disposals shall be subject to the applicable provisions of §§ 101-47.304-9 and 101-47.30-12. The cancellation of the Government's restoration obligations in return for the conveyance of the Government-owned improvements to the lessor is considered a settlement of a contractual obligation rather than a disposal of surplus real property and, therefore, is not subject to the provisions of §§ 101-47.304-9 and 101-47.304-12.

[29 FR 16126, Dec. 3, 1964, as amended at 31 FR 16780, Dec. 31, 1966]

§ 101-47.310 Disposal of structures and improvements on Government-owned land.

In the case of Government-owned land, the disposal agency may dispose of structures and improvements with the land or separately from the land: *Provided*, That prefabricated movable structures such as Butler-type storage warehouses, and quonset huts, and housetrailers (with or without under carriages) reported to GSA with the land on which they are located, may, in the discretion of GSA, be designated for disposal as personal property for off-site use.

§ 101-47.311 Disposal of residual personal property.

(a) Any related personal property reported to GSA on Standard Form 118 which is not disposed of by GSA as related to the real property, shall be designated by GSA for disposal as personal property.

(b) Any related personal property which is not disposed of by the holding agency, pursuant to the authority contained in § 101-47.302, or authority otherwise delegated by the Administrator of General Services as related to the real property, shall be disposed of under the applicable provisions of Part 101-45.

§ 101-47.312 Non-Federal interim use of property.

(a) A lease or permit may be granted by the holding agency with the approval of the disposal agency, for non-Federal interim use of surplus property; *Provided*, That such lease or permit shall be for a period not exceeding 1 year and shall be made revocable on not to exceed 30 days' notice by the disposal agency: And provided further, That the use and occupancy

will not interfere with, delay, or retard the disposal of the property. In such cases, an immediate right of entry to such property may be granted pending execution of the formal lease or permit. The lease or permit shall be for a money consideration and shall be on such other terms and conditions as are deemed appropriate to properly protect the interest of the United States. Any negotiated lease or permit under this section shall be subject to the applicable provisions of §§ 101-47.304-9 and 101-47.304-12, except that no explanatory statement to the appropriate committees of the Congress need to be prepared with respect to a negotiated lease or permit providing for an annual net rental of $100,000 or less, and termination by either part on 30 days' notice.

(b) [Reserved]

[54 FR 41245, Oct. 6, 1989]

§ 101-47.313 Easements.

§ 101-47.313-1 Disposal of easements to owner of servient estate.

The disposal agency may dispose of an easement to the owner of the land which is subject to the easement when the continued use, occupancy, or control of the easement is not needed for the operation, production, use, or maintenance of property owned or controlled by the Government. A determination shall be made by the disposal agency as to whether the disposal shall be with or without consideration to the Government on the basis of all the circumstances and factors involved and with due regard to the acquisition cost of the easement to the Government. The extent of such consideration shall be regarded as the appraised fair market value of the easement. The disposal agency shall document the circumstances and factors leading to such determination and retain such documentation in its files.

§ 101-47.313-2 Grants of easements in or over Government property.

The disposal agency may grant easements in or over real property on appropriate terms and conditions: *Provided,* That where the disposal agency determines that the granting of such easement decreases the value of the property, the granting of the easement shall be for a consideration not less than the amount by which the fair market value of the property is decreased.

§ 101-47.314 Compliance.

§ 101-47.314-1 General.

Subject to the provisions of § 101-47.314-2(a), requiring referral of criminal matters to the Department of Justice, each disposal agency shall perform such investigatory functions as are necessary to insure compliance with the provisions of the Act and with the regulations, orders, directives, and policy statements of the Administrator of General Services.

§ 101-47.314-2 Extent of investigations.

(a) *Referral to other Government agencies.* All information indicating violations by any person of Federal criminal statutes, or violations of section 209 of the Act, including but not limited to fraud against the Government, mail fraud, bribery, attempted bribery, or criminal collusion, shall be referred immediately to the Department of Justice for further investigation and disposition. Each disposal agency shall make available to the Department of Justice, or to such other governmental investigating agency to which the matter may be referred by the Department of Justice, all pertinent information and evidence concerning the indicated violations; shall desist from further investigation of the criminal aspects of such matters except upon the request of the Department of Justice; and shall cooperate fully with the agency assuming final jurisdiction in establishing proof of criminal violations. After making the necessary referral to the Department of Justice, inquiries conducted by disposal agency compliance organizations shall be limited to obtaining information for administrative purposes. Where irregularities reported or discovered involve wrongdoing on the part of individuals holding positions in Government agencies other than the agency initiating the investigation, the case shall be reported immediately to the Administrator of General Services for an examination in the premises.

(b) *Compliance reports.* A written report shall be made of all compliance investigations conducted by each agency compliance organization. Each disposal agency shall maintain centralized files of all such reports at its respective departmental offices. Until otherwise directed by the Administrator of General Services, there shall be transmitted promptly to the Administrator of General Services one copy of any such report which contains information indicating criminality on the part of any person or indicating noncompliance with the Act or with the regulations, orders, directives and policy statements of the Administrator of General Services. In transmitting such reports to the Administrator of General Services, the agency shall set forth the action taken or contemplated by the agency to correct the improper conditions established by the investigation. Where any matter is referred to the Department of Justice, a copy of the letter of referral shall be transmitted to the Administrator of General Services.

Subpart 101-47.4—Management of Excess and Surplus Real Property

§ 101-47.400 Scope of subpart.

This subpart prescribes the policies and methods governing the physical care, handling, protection, and maintenance of excess real property and surplus real property, including related personal property, within the States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

[47 FR 4522, Feb. 1, 1982]

§ 101-47.401 General provisions of subpart.

§ 101-47.401-1 Policy.

It is the policy of the Administrator of General Services:

(a) That the management of excess real property and surplus real property, including related personal property, shall provide only those minimum services necessary to preserve the Government's interest therein, realizable value of the property considered.

(b) To place excess real property and surplus real property in productive use through interim utilization: *Provided,* That such temporary use and occupancy will not interfere with, delay, or retard its transfer to a Federal agency or disposal.

(c) That excess and surplus real property which is dangerous to the public health or safety shall be destroyed or rendered innocuous.

§ 101-47.401-2 Definitions.

As used in this subpart, the following terms shall have the meanings set forth below:

(a) *Maintenance.* The upkeep of property only to the extent necessary to offset serious deterioration; also such operation of utilities, including water supply and sewerage systems, heating, plumbing, and air-conditioning equipment, as may be necessary for fire protection, the needs of interim tenants, and personnel employed at the site, and the requirements for preserving certain types of equipment.

(b) *Repairs.* Those additions or changes that are necessary for the protection and maintenance of property to deter or prevent excessive or rapid deterioration or obsolescence, and to restore property damaged by storm, flood, fire, accident, or earthquake.

§ 101-47.401-3 Taxes and other obligations.

Payments of taxes or payments in lieu of taxes (in the event of the enactment hereafter of legislation by Congress authorizing such payments upon Government-owned property which is not legally assessable), rents, and insurance premiums and other obligations pending transfer or disposal shall be the responsibility of the holding agency.

§ 101-47.401-4 Decontamination.

The holding agency shall be responsible for all expense to the Government and for the supervision of decontamination of excess and surplus real property that has been subjected to contamination with hazardous materi-

als of any sort. Extreme care must be exercised in the decontamination, and in the management and disposal of contaminated property in order to prevent such properties becoming a hazard to the general public. The disposal agency shall be made cognizant of any and all inherent hazards involved relative to such property in order to protect the general public from hazards and to preclude the Government from any and all liability resulting from indiscriminate disposal or mishandling of contaminated property.

§ 101-47.401-5 Improvements or alterations.

Improvements or alterations which involve rehabilitation, reconditioning, conversion, completion, additions, and replacements in structures, utilities, installations, and land betterments, may be considered in those cases where disposal cannot otherwise be made, but no commitment therefor shall be entered into without prior approval of GSA.

§ 101-47.401-6 Interim use and occupancy.

When a revocable agreement to place excess real property or surplus real property in productive use has been made, the agency executing the agreement shall be responsible for the servicing thereof.

§ 101-47.402 Protection and maintenance.

[49 FR 1348, Jan. 11, 1984]

§ 101-47.402-1 Responsibility.

The holding agency shall retain custody and accountability for excess and surplus real property including related personal property and shall perform the protection and maintenance of such property pending its transfer to another Federal agency or its disposal. Guidelines for protection and maintenance of excess and surplus real property are in § 101-47.4913. The holding agency shall be responsible for complying with the requirements of the National Oil and Hazardous Substances Pollution Contingency Plan and initiating or cooperating with others in the actions prescribed for the prevention, containment, or remedy of hazardous conditions.

[49 FR 1348, Jan. 11, 1984]

§ 101-47.402-2 Expense of protection and maintenance.

(a) The holding agency shall be responsible for the expense of protection and maintenance of such property pending transfer or disposal for not more than 12 months, plus the period to the first day of the succeeding quarter of the fiscal year after the date that the property is available for immediate disposition. If the holding agency requests deferral of the disposal, continues to occupy the property beyond the excess date to the detriment of orderly disposal, or otherwise takes actions which result in a delay in the disposition, the period for which that agency is responsible for such expenses shall be extended by the period of delay. (See § 101-47.202-9.)

(b) In the event the property is not transferred to a Federal agency or disposed of during the period mentioned in paragraph (a) of this section, the expense of protection and maintenance of such property from and after the expiration date of said period shall be either paid or reimbursed to the holding agency, subject to the limitations herein, which payment or reimbursement shall be in the discretion of the disposal agency. The maximum amount of protection and maintenance to be paid or reimbursed by the disposal agency will be specified in a written agreement between the holding agency and the disposal agency, but such payment or reimbursement is subject to the appropriations by Congress to the disposal agency of funds sufficient to make such payment or reimbursement. In accordance with the written agreement, the disposal agency and the holding agency will sign an obligational document only if and when Congress actually appropriates to the disposal agency, pursuant to its request, funds sufficient to pay or reimburse the holding agency for protection and maintenance expenses, as agreed. In the absence of a written agreement, the holding agency shall be responsible for all expenses of protection and maintenance, without any

right of contribution or reimbursement from the disposal agency.

[49 FR 1348, Jan. 11, 1984]

§ 101-47.403 Assistance in disposition.

The holding agency is expected to cooperate with the disposal agency in showing the property to prospective transferees or purchasers. Unless extraordinary expenses are incurred in showing the property, the holding agency shall absorb the entire cost of such actions. (See § 101-47.304-5.)

[36 FR 3894, Mar. 2, 1971]

Subpart 101-47.5—Abandonment, Destruction, or Donation to Public Bodies

§ 101-47.500 Scope of subpart.

(a) This subpart prescribes the policies and methods governing the abandonment, destruction, or donation to the public bodies by Federal agencies of real property located within the States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

(b) The subpart does not apply to surplus property assigned for disposal to educational or public health institutions pursuant to section 203(k) of the Act.

[29 FR 16126, Dec. 3, 1964, as amended at 47 FR 4522, Feb. 1, 1982]

§ 101-47.501 General provisions of subpart.

§ 101-47.501-1 Definitions.

(a) "No commercial value" means real property, including related personal property, which has no reasonable prospect of being disposed of at a consideration.

(b) "Public body" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any political subdivision, agency, or instrumentality of the foregoing.

§ 101-47.501-2 Authority for disposal.

Subject to the restrictions in § 101-47.502 and § 101-47.503, any Federal agency having control of real property which has no commercial value or of which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale, is authorized:

(a) To abandon or destroy Government-owned improvements and related personal property located on privately owned land.

(b) To destroy Government-owned improvements and related personal property located on Government-owned land. Abandonment of such property is not authorized.

(c) To donate to public bodies any real property (land and/or improvements and related personal property), or interests therein, owned by the Government.

§ 101-47.501-3 Dangerous property.

No property which is dangerous to public health or safety shall be abandoned, destroyed, or donated to public bodies pursuant to this subpart without first rendering such property innocuous or providing adequate safeguards therefor.

§ 101-47.501-4 Findings.

(a) No property shall be abandoned, destroyed, or donated by a Federal agency under § 101-47.501-2, unless a duly authorized official of that agency finds, in writing, either that (1) such property has no commercial value, or (2) the estimated cost of its continued care and handling would exceed the estimated proceeds from its sale. Such finding shall not be made by any official directly accountable for the property covered thereby.

(b) Whenever all the property proposed to be disposed of hereunder by a Federal agency at any one location at any one time had an original cost (estimated if not known) of more than $1,000, findings made under § 101-47.501-4(a), shall be approved by a reviewing authority before any such disposal.

§ 101-47.502 Donations to public bodies.

§ 101-47.502-1 Cost limitations.

No improvements on land or related personal property having an original

cost (estimated if not known) in excess of $250,000 and no land, regardless of cost, shall be donated to public bodies without the prior concurrence of GSA. The request for such concurrence shall be made to the regional office of GSA for the region in which the property is located.

§ 101-47.502-2 Disposal costs.

Any public body receiving improvements on land or related personal property pursuant to this subpart shall pay the disposal costs incident to the donation, such as dismantling, removal, and the cleaning up of the premises.

§ 101-47.503 Abandonment and destruction.

§ 101-47.503-1 General.

(a) No improvements on land or related personal property shall be abandoned or destroyed by a Federal agency unless a duly authorized official of that agency finds, in writing, that donation of such property in accordance with the provisions of this subpart is not feasible. This finding shall be in addition to the finding prescribed in § 101-47.501-4. If at any time prior to actual abandonment or destruction the donation of the property pursuant to this subpart becomes feasible, such donation will be accomplished.

(b) No abandonment or destruction shall be made in a manner which is detrimental or dangerous to public health or safety or which will cause infringement of the rights of other persons.

(c) The concurrence of GSA shall be obtained prior to the abandonment or destruction of improvements on land or related personal property (1) which had an original cost (estimated if not known) of more than $50,000, or (2) which are of permanent type construction, or (3) where their retention would enhance the value of the underlying land, if it were to be made available for sale or lease.

§ 101-47.503-2 Notice of proposed abandonment or destruction.

Except as provided in § 101-47.503-3, improvements on land or related personal property shall not be abandoned or destroyed by a Federal agency until after public notice of such proposed abandonment or destruction. Such notice shall be given in the area in which the property is located, shall contain a general description of the property to be abandoned or destroyed, and shall include an offering of the property for sale. A copy of such notice shall be given to the regional office of GSA for the region in which the property is located.

§ 101-47.503-3 Abandonment or destruction without notice.

If (a) the property had an original cost (estimated if not known) of not more than $1,000; or (b) its value is so low or the cost of its care and handling so great that its retention in order to post public notice is clearly not economical; or (c) immediate abandonment or destruction is required by considerations of health, safety, or security; or (d) the assigned mission of the agency might be jeopardized by the delay, and a finding with respect to paragraph (a), (b), (c), or (d) of this section, is made in writing by a duly authorized official of the Federal agency and approved by a reviewing authority, abandonment or destruction may be made without public notice. Such a finding shall be in addition to the findings prescribed in §§ 101-47.501-4 and 101-47.503-1(a).

Subpart 101-47.6—Delegations

§ 101-47.600 Scope of subpart.

This subpart sets forth the special delegations of authority granted by the Administrator of General Services to other agencies for the utilization and disposal of certain real property pursuant to the Act.

§ 101-47.601 Delegation to Department of Defense.

(a) Authority is delegated to the Secretary of Defense to determine that excess real property and related personal property under the control of the Department of Defense having a total estimated fair market value, including all the component units of the property, of less than $1,000 as deter-

mined by the Department of Defense, is not required for the needs and responsibilities of Federal agencies; and thereafter to dispose of said property by means deemed advantageous to the United States.

(b) Prior to such determination and disposal, the Secretary of Defense shall take steps as may be appropriate to determine that the property is not required for the needs of any Federal agency.

(c) The authority conferred in this § 101–47.601 shall be exercised in accordance with the Act and regulations issued pursuant thereto, except that the reporting of such property to GSA under Subpart 101–47.2 shall not be required.

(d) The authority delegated in this § 101–47.601 may be redelegated to any officer or employee of the Department of Defense.

[29 FR 16126, Dec. 3, 1964, as amended at 31 FR 16780, Dec. 31, 1966]

§ 101–47.602 Delegation to the Department of Agriculture.

(a) Authority is delegated to the Secretary of Agriculture to determine that excess real property and related personal property under the control of the Department of Agriculture having a total estimated fair market value, including all the component units of the property, of less than $1,000 as determined by the Department of Agriculture, is not required for the needs and responsibilities of Federal agencies; and thereafter to dispose of said property by means deemed advantageous to the United States.

(b) Prior to such determination and disposal, the Secretary of Agriculture shall take steps as may be appropriate to determine that the property is not required for the needs of any Federal agency.

(c) The authority conferred in this § 101–47.602 shall be exercised in accordance with the Act and regulations issued pursuant thereto, except that the reporting of such property to GSA under Subpart 101–47.2 shall not be required.

(d) The authority delegated in this § 101–47.602 may be redelegated to any officer or employee of the Department of Agriculture.

[29 FR 16126, Dec. 3, 1964, as amended at 31 FR 16780, Dec. 31, 1966]

§ 101–47.603 Delegations to the Secretary of the Interior.

(a) Authority is delegated to the Secretary of the Interior to maintain custody and control of an accountability for those mineral resources which may be designated from time to time by the Administrator or his designee and which underlie Federal property currently utilized or excess or surplus to the Government's needs. Authority is also delegated to the Secretary to dispose of such mineral resources by lease and to administer any leases which are made.

(1) The Secretary may redelegate this authority to any officer, official, or employee of the Department of the Interior.

(2) Under this authority, the Secretary of the Interior, as head of the holding agency is responsible for the following: (i) Maintaining proper inventory records, and (ii) monitoring the minerals as necessary to ensure that no unauthorized mining or removal of the minerals occurs.

(3) Under this authority, the Secretary of the Interior, as head of the disposal agency, is responsible for the following: (i) Securing, in accordance with § 101–47.303–4, any appraisals deemed necessary by the Secretary; (ii) coordinating with all surface landowners, Federal or otherwise, so as not to unduly interfere with the surface use; (iii) ensuring that the lands which may be disturbed or damaged are restored after removal of the mineral deposits is completed; and (iv) notifying the Administrator when the disposal of all marketable mineral deposits has been completed.

(4) The Secretary of the Interior, as head of the disposal agency, is responsible for complying with the applicable environmental laws and regulations, including (i) the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, *et seq.*) and the implementing regulations issued by the Council on Environmental Quality (40 CFR Part 1500); (ii) Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470f); and (iii) the Coastal Zone Management Act of 1972

(16 U.S.C. 1451, *et seq.*) and the Department of Commerce implementing regulations (15 CFR Parts 923 and 930).

(5) The Secretary of the Interior will forward promptly to the Administrator copies of any agreements executed under this authority.

(6) The Secretary of the Interior will provide to the Administrator an annual accounting of the proceeds received from leases executed under this authority.

(b) Authority is delegated to the Secretary of the Interior to determine that excess real property and related personal property under his control having a total estimated fair market value, including all components of the property, of less than $1,000 as determined by the Secretary, is not required for the needs and responsibilities of Federal agencies; and thereafter to dispose of the property by means most advantageous to the United States.

(1) Prior to such determination and disposal, the Secretary of the Interior shall determine that the property is not required for the needs of any Federal agency.

(2) The authority conferred in this § 101-47.603 (b) shall be exercised in accordance with the Act and regulations issued pursuant thereto, except that the reporting of such property to GSA under Subpart 101-47.2 shall not be required.

(3) The authority delegated in this § 101-47.603(b) may be redelegated to any officer or employee of the Department of the Interior.

[48 FR 50893, Nov. 4, 1983]

§ 101-47.604 Delegation to the Department of the Interior and the Department of Health, Education, and Welfare.

(a) The Secretary of the Interior and the Secretary of Health, Education, and Welfare, are delegated authority to transfer and to retransfer to each other, upon request, any of the property of either agency which is being used and will continue to be used in the administration of any functions relating to the Indians. The term "property," as used in this § 101-47.604, includes real property and such personal property as the Secretary making the transfer or retransfer determines to be related personal property.

(b) This authority shall be exercised only in connection with property which the Secretary transferring or retransferring such property determines:

(1) Comprises a functional unit;

(2) Is located within the United States; and

(3) Has an acquisition cost of $100,000 or less: *Provided, however,* That the transfer or retransfer shall not include property situated in any area which is recognized as an urban area or place for the purpose of the most recent decennial census.

(c) No screening of the property as required by the regulations in this Part 101-47 need be conducted, it having been determined that such screening among Federal agencies would accomplish no useful purpose since the property which is subject to transfer or retransfer hereunder will continue to be used in the administration of any functions relating to the Indians.

(d) Any such transfer or retransfer of a specific property shall be without reimbursement except:

(1) Where funds programmed and appropriated for acquisition of the property are available to the Secretary requesting the transfer or retransfer; or

(2) Whenever reimbursement at fair value is required by Subpart 101-47.2.

(e) Where funds were not programed and appropriated for acquisition of the property, the Secretary requesting the transfer or retransfer shall so certify. Any determination necessary to carry out the authority contained in this § 101-47.604 which otherwise would be required under this part to be made by GSA shall be made by the Secretary transferring or retransferring the property.

(f) The authority conferred in this § 101-47.604 shall be exercised in accordance with such other provisions of the regulations of GSA issued pursuant to the Act as may be applicable.

(g) The Secretary of the Interior and the Secretary of Health, Education, and Welfare, are authorized to redelegate any of the authority con-

tained in this § 101-47.604 to any officers or employees of their respective departments.

Subpart 101-47.7—Conditional Gifts of Real Property To Further the Defense Effort

§ 101-47.700 Scope of subpart.

This subpart provides for acceptance or rejection on behalf of the United States of any gift of real property offered on condition that it be used for a particular defense purpose and for subsequent disposition of such property (Act of July 27, 1954, (50 U.S.C. 1151-1156)).

[40 FR 12079, Mar. 17, 1975]

§ 101-47.701 Offers and acceptance of conditional gifts.

(a) Any agency receiving an offer of a conditional gift of real property for a particular defense purpose within the purview of the Act of July 27, 1954, shall notify the appropriate regional office of GSA and shall submit a recommendation as to acceptance or rejection of the gift.

(b) Prior to such notification, the receiving agency shall acknowledge receipt of the offer and advise the donor of its referral to the GSA regional office, but should not indicate acceptance or rejection of the gift on behalf of the United States. A copy of the acknowledgment shall accompany the notification and recommendation to the regional office.

(c) When the gift is determined to be acceptable and it can be accepted and used in the form in which offered, it will be transferred without reimbursement to an agency designated by GSA for use for the particular purpose for which it was donated.

(d) If the gift is one which GSA determines may and should be converted to money, the funds, after conversion, will be deposited with the Treasury Department for transfer to an appropriate account which will best effectuate the intent of the donor, in accordance with Treasury Department procedures.

§ 101-47.702 Consultation with agencies.

Such conditional gifts of real property will be accepted or rejected on behalf of the United States or transferred to an agency by GSA, only after consultation with the interested agencies.

§ 101-47.703 Advice of disposition.

GSA will advise the donor and the agencies concerned of the action taken with respect to acceptance or rejection of the conditional gift and of its final disposition.

§ 101-47.704 Acceptance of gifts under other laws.

Nothing in this Subpart 101-47.7 shall be construed as applicable to the acceptance of gifts under the provisions of other laws.

Subpart 101-47.8—Identification of Unneeded Federal Real Property

§ 101-47.800 Scope of subpart.

This subpart is designed to implement, in part, section 2 of Executive Order 12512, which provides, in part, that the Administrator of General Services shall provide Government-wide policy, oversight and guidance for Federal real property management. The Administrator of General Services shall issue standards, procedures, and guidelines for the conduct of surveys of real property holdings of Executive agencies on a continuing basis to identify properties which are not utilized, are underutilized, or are not being put to their optimum use; and make reports describing any property or portion thereof which has not been reported excess to the requirements of the holding agency and which, in the judgment of the Administrator, is not utilized, is underutilized, or is not being put to optimum use, and which he recommends should be reported as excess property. The provisions of this subpart are presently limited to fee-owned properties and supporting leaseholds and lesser interests located within the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands,

and the Virgin Islands. The scope of this subpart may be enlarged at a later date to include real property in additional geographical areas and other interests in real property.

[51 FR 193, Jan. 3, 1986]

§ 101–47.801 Standards.

Each executive agency shall use the following standards in identifying unneeded Federal property.

(a) *Definitions*—(1) *Not utilized.* "Not utilized" means an entire property or portion thereof, with or without improvements, not occupied for current program purposes of the accountable executive agency, or occupied in caretaker status only.

(2) *Underutilized.* "Underutilized" means an entire property or portion thereof, with or without improvements:

(i) Which is used only at irregular periods or intermittently by the accountable executive agency for current program purposes of that agency; or

(ii) Which is used for current program purposes that can be satisfied with only a portion of the property.

(3) *Not being put to optimum use.* "Not being put to optimum use" means an entire property or portion thereof, with or without improvements, which:

(i) Even though utilized for current program purposes of the accountable executive agency is of such nature or value, or is in such a location that it could be utilized for a different significantly higher and better purpose; or

(ii) The costs of occupying are substantially higher than would be applicable for other suitable properties that could be made available to the accountable executive agency through transfer, purchase, or lease with total net savings to the Government after consideration of property values as well as costs of moving, occupancy, efficiency of operations, environmental effects, regional planning, and employee morale.

(b) *Guidelines.* The following general guidelines shall be considered by each executive agency in its annual review (see § 101–47.802):

(1) Is the property being put to its highest and best use?

(i) Consider such aspects as surrounding neighborhood, zoning, and other environmental factors;

(ii) Is present use compatible with State, regional, or local development plans and programs?

(iii) Consider whether Federal use of the property would be justified if rental charge equivalent to commercial rates were added to the program costs for the function it is serving.

(2) Are operating and maintenance costs excessive compared with those of other similar facilities?

(3) Will contemplated program changes alter property requirements?

(4) Is all of the property essential for program requirements?

(5) Will local zoning provide sufficient protection for necessary buffer zones if a portion of the property is released?

(6) Are buffer zones kept to a minimum?

(7) Is the present property inadequate for approved future programs?

(8) Can net savings to the Nation be realized through relocation considering property prices or rentals, costs of moving, occupancy, and increase in efficiency of operations?

(9) Have developments on adjoining nonfederally owned land or public access or road rights-of-way granted across the Government-owned land rendered the property or any portion thereof unsuitable or unnecessary for program requirements?

(10) If Federal employees are housed in Government-owned residential property, is the local market willing to acquire Government-owned housing or can it provide the necessary housing and other related services that will permit the Government-owned housing area to be released? (Provide statistical data on cost and availability of housing on the local market.)

(11) Can the land be disposed of and program requirements satisfied through reserving rights and interests to the Government in the property if it is released?

(12) Is a portion of any property being retained primarily because the present boundaries are marked by the existence of fences, hedges, roads, and utility systems?

(13) Is any land being retained merely because it is considered undesirable property due to topographical features or to encumbrances for rights-of-way or because it is believed to be not disposable?

(14) Is land being retained merely because it is landlocked?

(15) Is there land or space in Government-owned buildings that can be made available for utilization by others within or outside Government on a temporary basis?

[35 FR 5261, Mar. 28, 1970, as amended at 37 FR 5030, Mar. 9, 1972; 40 FR 12079, Mar. 17, 1975]

§ 101-47.802 Procedures.

(a) *Executive agency annual review.* Each executive agency shall make an annual review of its property holdings.

(1) In making such annual reviews, each executive agency shall use the standards set forth in § 101-47.801 in identifying property that is not utilized, is underutilized, or is not being put to its optimum use.

(2) A written record of the review of each individual facility shall be prepared. The written review record shall contain comments relative to each of the above guidelines and an overall map of the facility showing property boundaries, major land uses, improvements, safety zones, proposed uses, and regulations or other authorizations that sanction the requirement for and usage made of or proposed for individual parcels of the property. A copy of the review record shall be made available to GSA upon request or to the GSA survey representative at the time of the survey of each individual facility.

(3) Each executive agency shall, as a result of its annual review, determine, in its opinion, whether any portion of its property is not utilized, is underutilized, or is not being put to optimum use. With regard to each property, the following actions shall be taken:

(i) When the property or a portion thereof is determined to be not utilized, the executive agency shall:

(A) Initiate action to release the property; or

(B) Hold for a foreseeable future program use upon determination by the head of the executive agency. Such determination shall be fully and completely documented and the determination and documentation kept available for GSA review (see § 101-47.802(b)(3)(ii)(B)). If property of this type which is being held for future use can be made available for temporary use by others, the executive agency shall notify the appropriate regional office of GSA before any permit or license for use is issued to another Federal agency or before any out-lease is granted by the executive agency. GSA will advise the executive agency whether the property should be permitted to another Federal agency for temporary use and will advise the executive agency the name of the Federal agency to whom the permit shall be granted.

(ii) When the property is determined to be underutilized, the executive agency shall:

(A) Limit the existing program to a reduced area and initiate action to release the remainder; or

(B) Shift present use imposed on the property to another property so that release action may be initiated for the property under review.

(iii) When, based on an indepth study and evaluation, it is determined that the property is not being put to its optimum use, the executive agency shall relocate the current program whenever a suitable alternate site, necessary funding, and legislative authority are available to accomplish that purpose. When the site, funding, or legislative authority are not available, a special report shall be made to the appropriate regional office of GSA for its consideration in obtaining possible assistance in accomplishing relocation.

(b) *GSA Survey.* Pursuant to section 2 of Executive Order 12512, GSA will conduct, on a continuing basis, surveys of real property holdings of all Executive agencies to identify properties which, in the judgment of the Administrator of General Services, are not utilized, are underutilized, or are not being put to their optimum use.

(1) GSA surveys of the real property holdings of executive agencies will be conducted by officials of the GSA Central Office and/or regional offices of GSA for the property within the geographical area of each region.

(i) The head of the field office of the agency having accountability for the facility will be notified in advance of a scheduled GSA survey and furnished at that time with copies of these regulations.

(ii) The head of that field office shall arrange for an appropriate official of the executive agency having necessary authority, and who is sufficiently knowledgeable concerning the property and current and future program uses of the property, to be available to assist the GSA representative in his survey.

(2) [Reserved]

(3) To facilitate the GSA survey, executive agencies shall:

(i) Cooperate fully with GSA in its conduct of the surveys; and

(ii) Make available to the GSA survey representative records and information pertinent to the description and to the current and proposed use of the property such as:

(A) Brief description of facilities (number of acres, buildings, and supporting facilities);

(B) The most recent utilization report or analysis made of the property including the written record of the annual review made by the agency, pursuant to § 101-47.802(a), together with any supporting documents;

(C) Detail maps which show property boundaries, major land uses, improvements, safety zones, proposed uses, and regulations or other authorizations that sanction the usage made or proposed for individual parcels or the entire property; drawings; and layout plans.

(4) Upon receipt of notification of the pending GSA survey, the executive agency shall initiate action immediately to provide the GSA representative with an escort into classified or sensitive areas or to inform that representative of steps that must be taken to obtain necessary special security clearances or both.

(5) Upon completion of the field work for the survey:

(i) The GSA representative will so inform the executive agency designated pursuant to 101-47.802(b)(1). To avoid any possibility of misunderstanding or premature publicity, conclusions and recommendations will not be discussed with this official. However, survey teams should discuss the facts they have obtained with local officials at the end of the survey to ensure that all information necessary to conduct a complete survey is obtained. The GSA representative will evaluate and incorporate the results of the field work into a survey report and forward the survey report to the GSA Central Office.

(ii) The GSA Central Office will notify the head of the Executive agency or his designee, in writing, of the survey findings and/or recommendations. A copy of the survey report will be enclosed when a recommendation is made that some or all of the real property should be reported excess, and the comments of the Executive agency will be requested thereon. The Executive agency will be afforded 45 calendar days from the date of the notice in which to submit such comments. If the case is resolved, GSA Central Office will notify the head of the Executive agency or his designee, in writing, of the resolution, and the case will be completed at such time as the agency completes all resolved excess and/or disposal actions. The agency will be afforded a period of 90 calendar days from the date of the notice to complete such actions.

(iii)-(iv) [Reserved]

(v) If the case is not resolved, the GSA Central Office will request assistance of the Executive Office of the President to obtain resolution.

[35 FR 5261, Mar. 28, 1970, as amended at 36 FR 7215, Apr. 16, 1971; 37 FR 5030, Mar. 9, 1972; 42 FR 40698, Aug. 11, 1977; 48 FR 25200, June 6, 1983; 51 FR 194, Jan. 3, 1986]

Subparts 101-47.9—101-47.48 [Reserved]

Subpart 101-47.49—Illustrations

§ 101-47.4900 Scope of subpart.

This subpart sets forth certain forms and illustrations referred to previously in this part. Agency field offices should obtain the GSA forms prescribed in this subpart by submitting their future requirements to their Washington headquarters office which will forward consolidated annual re-

quirements to the General Services Administration (BRAF), Washington, DC 20405. Standard forms should be obtained from the nearest GSA supply distribution facility.

[40 FR 12080, Mar. 17, 1975]

§ 101-47.4901 [Reserved]

§ 101-47.4902 Standard Form 118, Report of Excess Real Property.

§ 101-47.4902-1 Standard Form 118a, Buildings, Structures, Utilities, and Miscellaneous Facilities.

§ 101-47.4902-2 Standard Form 118b, Land.

§ 101-47.4902-3 Standard Form 118c, Related Personal Property.

§ 101-47.4902-4 Instructions for the preparation of Standard Form 118, and Attachments, Standard Forms 118a, 118b, and 118c.

[33 FR 12003, Aug. 23, 1968, as amended at 36 FR 9022, May 18, 1971]

§ 101-47.4904 GSA Form 1334, Request for Transfer of Excess Real and Related Personal Property.

NOTE: The illustrations in § 101-47.4904 are filed as part of the original document and do not appear in the FEDERAL REGISTER or the Code of Federal Regulations.

[42 FR 40698, Aug. 11, 1977]

§ 101-47.4904-1 Instructions for preparation of GSA Form 1334, Request for Transfer of Excess Real and Related Personal Property.

NOTE: The illustrations in § 101-47.4904-1 are filed as part of the original document and do not appear in the FEDERAL REGISTER or the Code of Federal Regulations.

[42 FR 40698, Aug. 11, 1977]

§ 101-47.4905 Extract of statutes authorizing disposal of surplus real property to public agencies.

[See footnote at end of table]

Statute	Type of property[1]	Eligible public agency
40 U.S.C. 484(k)(1)(A). Disposals for school, classroom, or other educational purposes.	Any surplus real property, including buildings, fixtures, and equipment situated thereon, exclusive of (1) minerals having a commercial value separate and apart from the surface, and (2) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	States and their political subdivisions and instrumentalities, and tax-supported educational institutions; District of Columbia; Commonwealth of Puerto Rico; and the Virgin Islands.
40 U.S.C. 484(k)(1)(B). Disposals for public health purposes including research.	Any surplus real property, including buildings, fixtures, and equipment situated thereon, exclusive of (1) minerals having a commercial value separate and apart from the surface, and (2) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	States and their political subdivisions and instrumentalities, and tax-supported medical institutions; District of Columbia; Commonwealth of Puerto Rico; and the Virgin Islands.
40 U.S.C. 484(k)(2). Disposals for public park or recreation areas.	Any surplus real property recommended by the Secretary of the Interior as being needed for use as a public park or recreation area, including buildings, fixtures, and equipment situated thereon; exclusive of (1) minerals; (2) improvements without land; (3) military chapels subject to disposal as a shrine, memorial, or for religious purposes under the provisions of § 101-47.308-5; and (4) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	Any State, political subdivision and instrumentalities thereof, or municipality; District of Columbia; Commonwealth of Puerto Rico; and the Virgin Islands.

(See footnote at end of table)

Statute	Type of property[1]	Eligible public agency
40 U.S.C. 484(k)(3). Disposals for historic monuments.	Any surplus real and related personal property, exclusive of (1) minerals; (2) improvements without land; (3) military chapels subject to disposal as a shrine, memorial, or for religious purposes under the provisions of § 101-47.308-5; and (4) property for which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act. Before property may be conveyed under this statute, the Secretary of the Interior must determine that the property is suitable and desirable for use as a historic monument for the benefit of the public. No property shall be determined to be suitable or desirable for use as a historic monument except in conformity with the recommendation of the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments established by section 3 of the act entitled "An Act for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes," approved Aug. 21, 1935 (49 Stat. 666), and only so much of any such property shall be so determined to be suitable or desirable for such use as is necessary for the preservation and proper observation of its historic features. The Administrator of General Services may authorize the use of the property conveyed under this subsection for revenue-producing activities if the Secretary of the Interior (1) determines that such activities are compatible with use of the property for historic monument purposes, (2) approves the grantee's plan for repair, rehabilitation, restoration, and maintenance of the property, (3) approves grantee's plan for financing repairs, rehabilitation, restoration, and maintenance of the property which must provide that incomes in excess of the costs of such items shall be used by the grantee only for public historic preservation, park, or recreational purposes, and (4) approves the grantee's accounting and financial procedures for recording and reporting on revenue-producing activities	Any State, political subdivision, instrumentalities thereof, or municipality; District of Columbia; Commonwealth of Puerto Rico; and the territories and possessions of the United States.
50 U.S.C. app. 1622(g). Disposals for public airport purposes.	Any surplus real or personal property, exclusive of (1) military chapels subject to disposal as a shrine, memorial or for religious purposes under the provisions of § 101-47.308-5; (2) property subject to disposal as a historic monument site under the provisions of § 101-47.308-3; (3) property the highest and the best use of which is determined by the disposal agency to be industrial and which shall be so classified for disposal, and (4) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	Any State, political subdivision, municipality, or tax-supported institution; Commonwealth of Puerto Rico; and the Virgin Islands.
16 U.S.C. 667b-d. Disposals for wildlife conservation purposes.	Any surplus real property (with or without improvements) that can be utilized for wildlife conservation purposes other than migratory birds, exclusive of (1) oil, gas, and mineral rights, and (2) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	The agency of the State exercising the administration of the wildlife resources of the State.
23 U.S.C. 107 and 317. Disposals for Federal aid and other highways.	Any real property or interests therein determined by the Secretary of Transportation to be reasonably necessary for the right-of-way of a Federal aid or other highway (including control of access thereto from adjoining lands) or as a source of material for the construction or maintenance of any such highway adjacent to such real property or interest therein, exclusive of (1) minerals having a commercial value separate and apart from the surface, and (2) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	State wherein the property is situated (or such political subdivision of the State as its law may provide), including the District of Columbia and Commonwealth of Puerto Rico.

[See footnote at end of table]

Statute	Type of property[1]	Eligible public agency
40 U.S.C. 345c. Disposals for authorized widening of public highways, streets, or alleys.	Such interest in surplus real property as the head of the disposal agency determines will not be adverse to the interests of the United States, exclusive of (1) minerals having a commercial value separate and apart from the surface, (2) property subject to disposal for Federal aid and other highways under the provisions of 23 U.S.C. 107 and 317, and (3) property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	State or political subdivision of a State.
50 U.S.C. app. 1622(d). Disposals of power transmission lines needful for or adaptable to the requirements of a public power project.	Any surplus power transmission line and the right-of-way acquired for its construction.	Any State or political subdivision thereof or any State agency or instrumentality.
40 U.S.C. 484(c)(3)(H). Disposals by negotiations.	Any surplus real property including related personal property.	Any State, political subdivision thereof, or tax-supported agency therein; Commonwealth of Puerto Rico; and the Virgin Islands.
40 U.S.C. 122. Transfer to the District of Columbia of jurisdiction over properties within the District for administration and maintenance under conditions to be agreed upon.	Any surplus real property, except property which the holding agency has requested reimbursement of the net proceeds of disposition pursuant to section 204(c) of the act.	District of Columbia.

Footnote:
[1] The Commissioner, Public Buildings Service, General Services Administration, Washington, DC 20405, in appropriate instances, may waive any exclusion listed in this column, except for those required by law.

[40 FR 22258, May 22, 1975]

§ 101–47.4906 Sample notice to public agencies of surplus determination.

NOTICE OF SURPLUS DETERMINATION—GOVERNMENT PROPERTY

_____

(Date)

_____

(Name of property)

_____

(Location)

Notice is hereby given that the

_____

(Name of property),

_____

(Location), has been determined to be surplus Government property. The property consists of _____ acres of fee land more or less and a _____ easement, together with _____.

This property is surplus property available for disposal under the provisions of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 *et seq.*) and applicable regulations. The applicable regulations provide that public agencies (non-Federal) shall be allowed a reasonable period of time to submit a formal application for surplus real property in which they may be interested. Disposal of this property, or portions thereof, may be made to public agencies for the public uses stated below whenever the Government determines that the property is available for such uses and that disposal thereof is authorized by the statutes cited and applicable regulations: [1]

Statute	Type of disposal
23 U.S.C. 107 and 317	Federal aid and certain other highways.
40 U.S.C. 484(e)(3)(H)	Negotiated sales to public bodies for use for public purposes generally.[1]
40 U.S.C. 484(k)(1)(A)	School, classroom, or other educational purposes.
40 U.S.C. 484(k)(1)(B)	Protection of public health, including research.
40 U.S.C. 484(k)(2)	Public park or recreation area.
40 U.S.C. 484(k)(3)	Historic monument.

[1] List only the statutes (showing type of disposal) applicable to disposal to public bodies of the property determined to be surplus.

Statute	Type of disposal
50 U.S.C. app. 1622(g)	Public airport

[1] List only for properties having an estimated value of $10,000 or more.

If any public agency desires to acquire the property under the cited statutes, notice thereof in writing must be filed with

---

(Name of disposal agency),

(Address, before)

(Date).[2] Such notice shall:

(a) Disclose the contemplated use of the property;

(b) Contain a citation of the applicable statute or statutes under which the public agency desires to procure the property;

(c) Disclose the nature of the interest if an interest less than fee title to the property is contemplated;

(d) State the length of time required to develop and submit a formal application for the property (Where a payment to the Government is required under the statute, include a statement as to whether funds are available and, if not, the period required to obtain funds); and

(e) Give the reason for the time required to develop and submit a formal application.

Any planning for a public health use of property sought to be acquired subject to a public benefit allowance must be coordinated with the Department of Health and Human Services

---

(Address of appropriate office)

An application form to acquire property for a public health requirement and instructions for the preparation and submission of an application may be obtained from that office.[3]

Any planning for an educational use of property sought to be acquired subject to a public benefit allowance must be coordinated with the Department of Education.

(Address of appropriate office)

An application form to acquire property for an educational use and instructions for the preparation and submission of an application may be obtained from that office.[4]

Any planning for a public park or recreation area of property sought to be acquired subject to a public benefit allowance must be coordinated with the Department of the Interior.

(Address of appropriate office)

An application form to acquire property for a public park or recreation area requirement and instructions for the preparation and submission of an application may be obtained from that office.[5]

Application forms or instructions to acquire property for all other public use requirements may be obtained from

---

(Name of disposal agency),

(Address).

Upon receipt of such written notices, the public agency shall be promptly informed concerning the period of time that will be allowed for submission of a formal application. In the absence of such written notice, or in the event a public use proposal is not approved, the regulations issued pursuant to authority contained in the Federal Property and Administrative Services Act of 1949 provide for offering the property for sale.

[52 FR 9830, Mar. 27, 1987]

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[2] This date shall be 20 calendar days after the date of this notice.

[3] Delete this paragraph wherever property is not available for transfer for a public health use.

[4] Delete this paragraph wherever property is not available for transfer for an educational use.

[5] Delete this paragraph wherever property is not available for transfer for a public park or recreation area.

§ 101-47.4906a Attachment to notice sent to zoning authority.

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, AS AMENDED

TITLE VIII—URBAN LAND UTILIZATION

DISPOSAL OF URBAN LANDS

SEC. 803

(a) Whenever the Administrator contemplates the disposal for or on behalf of any Federal agency of any real property situated within an urban area, he shall, prior to offering such land for sale, give reasonable notice to the head of the governing body of the unit of general local government having jurisdiction over zoning and land-use regulation in the geographical area within which the land or lands are located in order to afford the government the opportunity of zoning for the use of such land in accordance with local comprehensive planning.

(b) The Administrator, to the greatest practicable extent, shall furnish to all prospective purchasers of such real property, full and complete information concerning:

(1) Current zoning regulations and prospective zoning requirements and objectives for such property when it is unzoned: and

(2) Current availability to such property of streets, sidewalks, sewers, water, street lights, and other service facilities and prospective availability of such services if such property is included in comprehensive planning.

[34 FR 11210, July 3, 1969]

§ 101-47.4906b Paragraph to be added to letter sent to zoning authority.

As the head of the governing body of the unit of general local government having jurisdiction over zoning and land-use regulations in the geographical area within which this surplus property is located, you also may be interested in section 803 of the Federal Property and Administrative Services Act of 1949, as amended, 82 Stat. 1105, a copy of which is attached for ready reference. It is requested that the information contemplated by section 803(b) be forwarded this office within the same 20-calendar-day period prescribed in the attached notice of surplus determination for the advising of a desire to acquire the property. If the property is unzoned and you desire the opportunity to accomplish such zoning in accordance with local comprehensive planning pursuant to section 803(a), please so advise us in writing within the same time frame and let us know the time you will require for the promulgation of such zoning regulations. We will not delay sale of the property pending such zoning for more than 50 days from the date of this notice. However, if you will not be able to accomplish the desired zoning before the property is placed on sale, we will advise prospective purchasers of the pending zoning in process.

[34 FR 11210, July 3, 1969]

§ 101-47.4906-1 Sample letter for transmission of notice of surplus determination.

_____

(Date)

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

_____

_____

_____

(Addressee)

Dear _____:

The former _____(Name of property), _____(Location) has been determined to be surplus Government property and available for disposal.

Included in the attached notice are a description of the property and procedural instructions to be followed if any public agency desires to submit an application for the property. Please note particularly the name and address given for filing written notice if any public agency desires to submit such an application, the time limitation within which written notice must be filed, and the required content of such notice. Additional instructions are provided for the submission of comments regarding any incompatibility of the disposal with any public agency's development plans and programs.

In order to ensure that all interested parties are informed of the availability of this property, please post the additional copies of the attached notice in appropriate conspicuous places.[1]

A notice of surplus determination also is being mailed to _____ (Other addressees).

Sincerely,

Attachment

[1] Attach as many copies of the notice as may be anticipated will be required for adequate posting.

[34 FR 11211, July 3, 1969, as amended at 35 FR 8487, June 2, 1970]

§ 101–47.4906–2 Sample letter to a state single point of contact.

_____

(Date)

_____

_____

_____

(Addressee)

Dear:_____

On July 14, 1982, the President issued Executive Order 12372, "Intergovernmental Review of Federal Programs." This Executive order provides for State and local government coordination and review of certain proposed Federal programs and activities, including real property disposal actions of the General Services Administration.

Enclosed is a notice of surplus determination that has been sent to appropriate public bodies advising them of the availability of the described real property for public purposes. Surplus Federal real property which is not acquired for State or local governmental public purposes is generally offered for sale to the general public by competitive bidding procedures.

No final disposal action will be taken for 60 calendar days from the date of this letter to allow for the receipt of any comments from your office.

[52 FR 9831, Mar. 27, 1987]

§ 101–47.4907 List of Federal real property holding agencies.

NOTE: The illustrations in § 101–47.4907 are filed as part of the original document and do not appear in the FEDERAL REGISTER or the Code of Federal Regulations.

[40 FR 12080, Mar. 17, 1975]

§ 101–47.4908 Excess profits covenant.

EXCESS PROFITS COVENANT FOR NEGOTIATED SALES TO PUBLIC BODIES

(a) This covenant shall run with the land for a period of 3 years from the date of conveyance. With respect to the property described in this deed, if at any time within a 3-year period from the date of transfer of title by the Grantor, the Grantee, or its successors or assigns, shall sell or enter into agreements to sell the property, either in a single transaction or in a series of transactions, it is covenanted and agreed that all proceeds received or to be received in excess of the Grantee's or a subsequent seller's actual allowable costs will be remitted to the Grantor. In the event of a sale of less than the entire property, actual allowable costs will be apportioned to the property based on a fair and reasonable determination by the Grantor.

(b) For purposes of this covenant, the Grantee's or a subsequent seller's allowable costs shall include the following:

(1) The purchase price of the real property;

(2) The direct costs actually incurred and paid for improvements which serve only the property, including road construction, storm and sanitary sewer construction, other public facilities or utility construction, building rehabilitation and demolition, landscaping, grading, and other site or public improvements;

(3) The direct costs actually incurred and paid for design and engineering services with respect to the improvements described in (b)(2) of this section; and

(4) The finance charges actually incurred and paid in conjunction with loans obtained to meet any of the allowable costs enumerated above.

(c) None of the allowable costs described in paragraph (b) of this section will be deductible if defrayed by Federal grants or if used as matching funds to secure Federal grants.

(d) In order to verify compliance with the terms and conditions of this covenant, the Grantee, or its successors or assigns, shall submit an annual report for each of the subsequent 3 years to the Grantor on the anniversary date of this deed. Each report will identify the property involved in this transaction and will contain such of the following items of information as are applicable at the time of submission:

(1) A description of each portion of the property that has been resold;

(2) The sale price of each such resold portion;

(3) The identity of each purchaser;

(4) The proposed land use; and

(5) An enumeration of any allowable costs incurred and paid that would offset any realized profit.

If no resale has been made, the report shall so state.

(e) The Grantor may monitor the property and inspect records related thereto to ensure compliance with the terms and conditions of this covenant and may take any actions which it deems reasonable and prudent to recover any excess profits realized through the resale of the property.

[51 FR 23760, July 1, 1986]

§ 101–47.4909 Highest and best use.

(a) Highest and best use is the most likely use to which a property can be put, so as to produce the highest monetary return from the property, promote its maximum value, or serve a public or institutional purpose. The highest and best use determination must be based on the property's economic potential, qualitative values (social and environmental) inherent in the property itself, and other utilization factors controlling or directly affecting land use (e.g. zoning, physical characteristics, private and public uses in the vicinity, neighboring improvements, utility services, access, roads, location, and environmental and historical considerations). Projected highest and best use should not be remote, speculative, or conjectural.

(b) An analysis and determination of highest and best use is based on information compiled from the property inspection and environmental assessment. Major considerations include:

(1) Present zoning category (check one or more as appropriate).

Industrial ..... —
Single family residential ..... —
Multiple family residential ..... —
Commercial/retail ..... —
Warehouse ..... —
Agriculture ..... —
Institutional or public use ..... —

Other (specify) _____

_____

_____

Not zoned ..... —
Zoning proceeding pending Federal disposal ..... —

Category proposed _____

(2) Physical characteristics. (Describe land and improvements and comment on property's physical characteristics including utility services, access, environmental and historical aspects, and other significant factors)

_____

_____

(3) Area/neighborhood uses (check one or more as appropriate).

Single family residential ..... —
Multiple family residential ..... —
Industrial ..... —
Office ..... —
Retail or commercial ..... —
Farmland ..... —
Recreational/park area ..... —

Other (specify) _____

_____

_____

(4) Existing neighboring improvements (check one or more as appropriate).

Deteriorating ..... —
Stable ..... —
Some recent development ..... —
Significant recent development ..... —

Vicinity improvements:
——Dense ——Moderate ——Sparse ——None

(5) Environmental factors/constraints adversely affecting the marketability of the property (check one or more as appropriate).

Severe slope or soil instability ..... —
Road access ..... —
Access to sanitary sewers or storm sewers ..... —
Access to water supply ..... —
Location within or near floodplain ..... —
Wetlands ..... —
Tidelands ..... —
Irregular shape ..... —
Present lease agreement or other possessory non-Federal interest ..... —
Historic, archeological or cultural ..... —
Contamination or other hazards ..... —

Other (specify) _____

_____

_____

Comments on adverse conditions _____

_____

_____

(6) Former Government uses (check one or more as appropriate).

Office ..... —
Industrial ..... —
Warehouse or storage ..... —
Residential ..... —
Retail/commercial ..... —
Agricultural ..... —

quire an on-the-site firefighting force adequate to hold fires in check until outside assistance can be obtained.

(b) Facilities of high market value which can obtain no outside assistance and require an on-the-site firefighting force adequate to extinguish fires.

(c) Facilities of high market value at which the patrolling of large areas is necessary.

(d) Facilities of high market value not fenced and containing large quantities of personal property of a nature inviting pilferage.

(e) Facilities of high market value at which several gates must be kept open for operating purposes.

5. *Standards for All Protected Properties.*

(a) All facilities within the range of municipal or other public protection, but outside the geographic limits of such public body, should be covered by advance arrangements with appropriate authorities for police and fire protection service, at a monthly or other service fee if necessary.

(b) Patrolling of all facilities with large areas to be protected should be accomplished by use of automotive vehicles.

(c) At fenced facilities, a minimum number of gates should be kept open.

6. *Firefighter-Guards.* Firefighters and guards are the normal means for carrying out the fire protection and security programs at excess and surplus real properties where both such programs are required. The duties of firefighters and guards should be combined to the maximum extent possible in the interest of both economy and efficiency. Such personnel would also be available in many cases for other miscellaneous services, such as, removing grass and weeds or other fire hazards, servicing fire extinguishers, and other activities related to general protection of property.

7. *Operating Requirements of Protection Units.* Firefighter-guards or guards, should be required to make periodic rounds of facilities requiring protection. The frequency of these rounds would be based upon a number of factors; such as, location and size of the facility, type of structures and physical barriers, and the amount and type of activity at the facility. There may be instances where some form of central station supervision, such as American District Telegraph Company, will effect reduction in costs by reducing the number of firefighter-guards, or guards, required to adequately protect the premises.

8. *Watchman's Clock.* To insure adequate coverage of the entire property by the guards, or firefighter-guards, an approved watchman's clock should be provided, with key stations strategically located so that, in passing from one to the other, the guards will cover all portions of the property.

9. *Protection Alarm Equipment.* Automatic fire detection devices and allied equipment and services may materially assist in minimizing protection costs. However, use of devices of this type, like guards, are purely secondary fire protection and are primarily a means of obtaining fire and police protection facilities at the property in an emergency. There are various types of devices, each of which can be considered separately or in combination as supplementing guard patrols, which may assist in reduction of costs and, in some instances, it may be possible to eliminate all guards.

10. *Sentry Dogs.* Frequently there are facilities of high market value, or which cover large areas, or are so isolated that they invite intrusion by curiosity seekers, hunters, vagrants, etc., which require extra or special protection measures. This has usually been taken care of by staffing with additional guards so that the "buddy system" of patrolling may be used. In such cases, the use of sentry dogs should be considered in arriving at the appropriate method of offsetting the need for additional guards, as well as possible reductions in personnel. If it is determined to be in the Government's interest to use this type of protection, advice should be obtained as to acquisition (lease, purchase, or donation), training, use, and care, from the nearest police department using sentry dogs. When sentry dogs are used, the property should be clearly posted "Warning—This Government Property Patrolled by Sentry Dogs."

C. *Maintenance Standards.* The following standards or criteria are furnished as a guide in connection with the upkeep of excess and surplus real properties:

1. *Temporary Type Buildings and Structures.* Temporary buildings housing personal property which cannot be readily removed to permanent type storage should be maintained only to the extent necessary to protect the personal property. Vacant temporary structures should not be maintained except in unusual circumstances.

2. *Permanent Type Buildings and Structures.* (a) No interior painting should be done. Where exterior wood or metal surfaces require treatment to prevent serious deterioration, spot painting only should be done when practicable.

(b) Carpentry and glazing should be limited to: work necessary to close openings against weather and pilferage; making necessary repairs to floors, roofs, and sidewalls as a protection against further damage; shoring and bracing of structures to preclude structural failures; and similar operations.

(c) Any necessary roofing and sheet metal repairs should, as a rule, be on a patch basis.

(d) Masonry repairs, including brick, tile, and concrete construction, should be under-

taken only to prevent leakage or disintegration, or to protect against imminent structural failure.

(e) No buildings should be heated for maintenance purposes except in unusual circumstances.

3. *Mechanical and Electrical Installations.* These include plumbing, heating, ventilating, air conditioning, sprinkler systems, fire alarm systems, electrical equipment, elevators, and similar items.

(a) At facilities in inactive status, maintenance of mechanical and electrical installations should be limited to that which is necessary to prevent or arrest serious deterioration. In most cases, personnel should not be employed for this work except on a temporary basis at periodic intervals when it is determined by inspections that the work is necessary. Wherever possible electrical systems should be deenergized, water drained from all fixtures, heat turned off, and buildings secured against unauthorized entry. Sprinkler systems should be drained during freezing weather and reactivated when danger of freezing has passed.

(b) At facilities in active status, such as multiple-tenancy operations, equipment should be kept in reasonable operating condition. Operation of equipment to furnish services to private tenants, as well as the procurement of utility services for distribution to tenants, should be carried on only to the extent necessary to comply with lease or permit conditions, or in cases where it is impracticable for tenants to obtain such services directly from utility companies or other sources.

(c) At facilities where elevators and/or high-pressure boilers and related equipment are in operation, arrangements should be made for periodic inspections by qualified and licensed inspectors to insure that injury to personnel, loss of life, or damage to property does not occur.

(d) Individual heaters should be used, when practicable, in lieu of operating heating plants.

4. *Grounds, Roads, Railroads, and Fencing.* (a) Maintenance of grounds should be confined largely to removal of vegetation where necessary to avoid fire hazards and to control poisonous and noxious plant growth in accordance with local and State laws and regulations; plowing of fire lanes where needed; and removal of snow from roads and other areas only to the extent necessary to provide access for maintenance, fire protection, and similar activities. Wherever practicable, hay crops should be sold to the highest bidders with the purchaser performing all labor in connection with cutting and removal. Also, agricultural and/or grazing leases may be resorted to, if practicable, as other means of reducing the cost of grounds maintenance. Any such leases shall be subject to the provisions of § 101–47.203–9 or § 101–47.312.

(b) Only that portion of the road network necessary for firetruck and other minimum traffic should be maintained. The degree to which such roads are to be maintained should be only that necessary to permit safe passage at a reasonable speed.

(c) Railroads should not be maintained except as might be required for protection and maintenance operations, or as required under the provisions of a lease or permit.

(d) Ditches and other drainage facilities should be kept sufficiently clear to permit surface water to run off.

(e) Fencing, or other physical barrier, should be kept in repair sufficiently to afford protection against unauthorized entry.

5. *Utilities.* (a) At inactive properties, water systems, sewage disposal systems, electrical distribution systems, etc., should be maintained only to the extent necessary to provide the minimum services required. Buildings or areas not requiring electrical service or water should be deenergized electrically and the water valved off. Utilities not in use, or which are serving dismantled or abandoned structures, should not be maintained.

(b) At active properties, water supply, electrical power, and sewage disposal facilities frequently must be operated at rates much below designed capacities. Engineering studies should determine the structural and operating changes necessary for maximum economy. Where leakage is found in water distribution lines, such lines may be valved off rather than repaired, unless necessary for fire protection or other purposes.

(c) Where utilities are purchased by contract, such contracts should be reviewed to determine if costs can be reduced by revision of the contracts.

6. *Properties to be Disposed of as Salvage.* No funds should be expended for maintenance on properties where the highest and best use has been determined to be salvage.

D. *Repairs.* Repairs should be limited to those additions or changes that are necessary for the preservation and maintenance of the property to deter or prevent excessive, rapid, or dangerous deterioration or obsolescence and to restore property damaged by storm, flood, fire, accident, or earthquake only where it has been determined that restoration is required.

E. *Improvements.* No costs should be incurred to increase the sales value of a property, and no costs should be incurred to make a property disposable without the prior approval of GSA. (See § 101–47.401–5.)

[29 FR 16126, Dec. 3, 1964, as amended at 30 FR 11261, Aug. 2, 1965]

NOTE: The illustrations in § 101-47.4914 are filed as part of the original document and do not appear in this volume.

[50 FR 194, Jan. 3, 1986]

PART 101-48—UTILIZATION, DONATION, OR DISPOSAL OF ABANDONED AND FORFEITED PERSONAL PROPERTY

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 42 FR 55813, Oct. 19, 1977, unless otherwise noted.

§ 101-48.000 Scope of part.

This part prescribes the policies and methods governing the utilization, donation, and disposal of abandoned and forfeited personal property under the custody or control of any Federal agency in the United States, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

§ 101-48.001 Definitions.

For the purposes of this Part 101-48, the following terms shall have the meanings set forth in this section.

§ 101-48.001-1 Abandoned or other unclaimed property.

"Abandoned or other unclaimed property" means personal property that is found on premises owned or leased by the Government and which is subject to the filing of a claim therefor by the former owner(s) within 3 years from the vesting of title in the United States.

GSA REAL PROPERTY DISPOSAL PROGRAM

MISSION

The General Services Administration (GSA) is responsible for promoting the optimum utilization and disposal of Federal real property in the most timely, economical, and efficient manner. Primary responsibilities include the development of Federal Government policies and regulations; the identification of properties not utilized, underutilized, or not being put to optimum use; arranging transfer of excess property from one Federal agency to another; and the disposal of surplus property by sale, lease, (including leases for the homeless), exchange and donation for public purposes. Donations include conveyances for prisons, parks, education, health, wildlife, historic monument, airports, and roadway purposes.

Property is excess when it is no longer needed by a particular Government agency and surplus when it is no longer needed by the entire Federal Government.

BASIC STATUTORY AUTHORITY

The Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq.)

Section 202: Governs the Transfer of Excess Real Property
Section 203: Governs the Disposal of Surplus Real Property
Section 204: Governs the Use and Disposition of Proceeds from Sale

Executive Order 12512 (dated April 28, 1985)
Emphasizes the importance of Executive agencies effectively and efficiently managing Federal Government assets.

Federal Property Management Regulations (FPMR) 101-47
Implements regulations for the identification, utilization and disposal of excess and surplus real property.

See Appendix A for a listing of the relevant laws governing the utilization and disposal of property and Appendix B for relevant Executive Orders.

PROPERTY DISPOSAL TYPES

There are three basic categories of property disposals:
1) **Public Lands** - The Department of the Interior is responsible for public domain and national park lands. The Department of Agriculture is responsible for national forest lands. GSA does not dispose of public domain lands, national forest lands, or national park lands.

2) **Reimbursable Disposal Activities** - Under the Economy Act (31 U.S.C. 1535), GSA disposes of properties on a reimbursable

basis for agencies having their own authorities. For example, the Department of Justice has its own authority to dispose of seized and forfeited properties. There are at least 16 agencies with various types of management and disposal authorities (i.e., Resolution Trust Corporation, U.S. Postal Service, Housing and Urban Development, and the Small Business Administration).

3) **Acquired Lands** - GSA disposes of lands acquired by a Federal Agency but that have been determined to be no longer needed for furtherance of the agency's mission. These disposals are conducted under the authorities granted in the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq.). Under the base closure legislation, GSA delegated disposal authority to the Department of Defense.

DISPOSAL PROCESS

When excess property is reported to GSA, the property is screened with other Federal agencies to determine whether any other Federal requirements exits. If such requirements exist, GSA arranges transfer from the agency reporting the property to the agency requesting transfer. Unless waived by the Office of Management and Budget, receiving agencies must pay the fair market value for the property.

If there are no Federal requirements, GSA determines the property surplus to the requirements of the entire Federal Government and makes it available, depending on the highest and best use, to State and local governmental units and eligible nonprofit institutions (public bodies). A wide range of public uses are served including homelessness, prisons, park and recreation, health and education, historic monument, wildlife conservation, airports, and highways. GSA is also authorized to negotiate the sale of property to State and local governmental units and entities thereof. Property not conveyed to public bodies for public purposes is offered for sale to the general public on a competitive bid basis.

Since the enactment of legislation in 1987, implementation of the Stewart B. McKinney Homeless Assistance Act has become a major focus for GSA. GSA works with the Departments of Housing and Urban Development (HUD) and Health and Human Services (HHS) to develop policies and procedures implementing this Act. All properties reported to GSA for further Federal utilization or disposal are routinely referred to HUD for homeless suitability review. If determined suitable, GSA makes the properties available to homeless providers on a priority of consideration basis.

Oversight of the GSA real property disposal program is provided by the House Committee on Government Operations and the Senate Committee on Government Affairs. Appendix C contains a diagram depicting the disposal process.

APPENDIX A - GENERAL SERVICES ADMINISTRATION AUTHORITY

The Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq.), contains the basic law governing the utilization and disposal of excess and surplus Federal real property. Referenced below are pertinent subsections of sections 202 (utilization of excess) and 203 (disposal of surplus) of this law (40 U.S.C. 483 and 484), and citations for related laws, which contain the principal authorities in this process:

Transfer of excess real property among Federal agencies.	40 U.S.C. 483(a)(1)
Transfer of certain excess real property to the Secretary of the Interior to be held in trust for use and benefit of Indian tribes.	40 U.S.C. 483(a)(2)
Disposal of surplus real property by competitive and negotiated sale.	40 U.S.C. 484(c) and (e)
Disposal by negotiation to private parties.	40 U.S.C. 484(e)(3)(G)
Disposal by negotiation to public agencies.	40 U.S.C. 484(e)(3)(H)
Disposal for school, classroom, or other educational purposes.	40 U.S.C. 484(k)(1)(A)
Disposal for public health purposes including homeless use and research.	40 U.S.C. 484(k)(1)(B)
Disposal for public park or recreation area.	40 U.S.C. 484(k)(2)
Disposal for historic monument.	40 U.S.C. 484(k)(3)
Disposal for correctional facility use.	40 U.S.C. 484(p)
Disposal of urban lands.	40 U.S.C. 532
Disposal of power transmission lines needful for or adaptable to the requirements of a public power project.	50 U.S.C. App. 1622(d)
Disposal for public airport purposes.	50 U.S.C. App. 1622(g)

Disposal for wildlife conservation purposes.	16 U.S.C. 667b-d
Disposal of Federal aid and other highways.	23 U.S.C. 107 and 317
Disposal for authorized widening of public highways, streets, or alleys.	40 U.S.C. 345c
Transfer to a State agency for replacement housing in certain limited situations mainly involving public land acquisitions.	42 U.S.C. 4638
Transfer of jurisdiction over property within the District of Columbia for administration and maintenance under conditions to be agreed upon.	40 U.S.C. 122
Grant of easements in, over, or upon excess or surplus real property.	40 U.S.C. 319-319(e)
Lease of Federal real property for use as facilities to assist the homeless (Title V-Stewart B. McKinney Homeless Assistance Act).	42 U.S.C. 11411

OTHER LAWS AND REGULATIONS

The following is a listing of pertinent laws and executive orders which may effect the disposal of real property:

National Environmental Policy Act of 1969, as amended	40 U.S.C. 4321 et seq.
National Historic Preservation Act of 1966	16 U.S.C. 470 et seq.
Farmlands Protection Policy Act of 1981	7 U.S.C. 4201 et seq.
Archeological and Historic Preservation Act of 1974 which amends the Reservoir Salvage Act of 1960	16 U.S.C. 469 et seq.
Flood Disaster Protection Act of 1973	42 U.S.C. 40001 et seq.
Coastal Zone Management Act of 1972	16 U.S.C. 1451 et seq.

Endangered Species Act of 1973	16 U.S.C. 1531 et seq.
Resources Conservation and Recovery Act	42 U.S.C. 6901 et seq.
Toxic Substances Control Act	15 U.S.C. 2601 et seq.
Wild and Scenic Rivers Act	16 U.S.C. 1271 et seq.
Federal Water Pollution Control Act	42 U.S.C. 7401 et seq.
Clean Air Act	42 U.S.C. 7401 et seq.
Solid Waste Disposal Act	42 U.S.C. 6901 et seq.
Comprehensive Environmental Response, Compensation, and Liability Act of 1980	42 U.S.C. 9601 et seq.
Superfund Amendments and Reauthorization Act of 1986	Public Law 99-499; 100 Stat. 1613
Antiturst Laws:	
Act of July 2, 1890;	26 Stat. 209
Act of August 27, 1894;	28 Stat. 570
Act of October 15, 1914;	38 Stat. 730
Federal Trade Commission Act	38 Stat. 717
Protection and Enhancement of Environmental Quality	E. O. 11514 of March 5, 1970, as amended by E.O. 11991 of May 24, 1977
Protection and Enhancement of the Cultural Environment	E. O. 11593 of May 13, 1971
Floodplain Management	E. O. 11988 of May 24, 1977
Protection of Wetlands	E. O. 11990 of May 24, 1977
Intergovernmental Review of Federal Programs	E. O. 12372 of July 14, 1982

Executive Order 12512 of April 20, 1985

Federal Real Property Management

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 486(a) of title 40 of the United States Code, and in order to ensure that Federal real property resources are treated in accordance with their value as national assets and in the best interests of the Nation's taxpayers, it is hereby ordered as follows:

Section 1. *General Requirements.* To ensure the effective and economical use of America's real property and public land assets, establish a focal point for the enunciation of clear and consistent Federal policies regarding the acquisition, management, and disposal of properties, and assure management accountability for implementing Federal real property management reforms, all Executive departments and agencies shall take immediate action to recognize the importance of such resources through increased management attention, establishment of clear goals and objectives, improved policies and levels of accountability, and other appropriate actions. Specifically:

(a) The Domestic Policy Council shall serve as the forum for approving government-wide real property management policies;

(b) All Executive departments and agencies shall establish internal policies and systems of accountability that ensure effective use of real property in support of mission-related activities, consistent with Federal policies regarding the acquisition, management, and disposal of such assets. All such agencies shall periodically review their real property holdings and conduct surveys of such property in accordance with standards and procedures determined by the Administrator of General Services. All such agencies shall also develop annual real property management improvement plans that include clear and concise goals and objectives related to all aspects of real property management, and identify sales, work space management, productivity, and excess property targets;

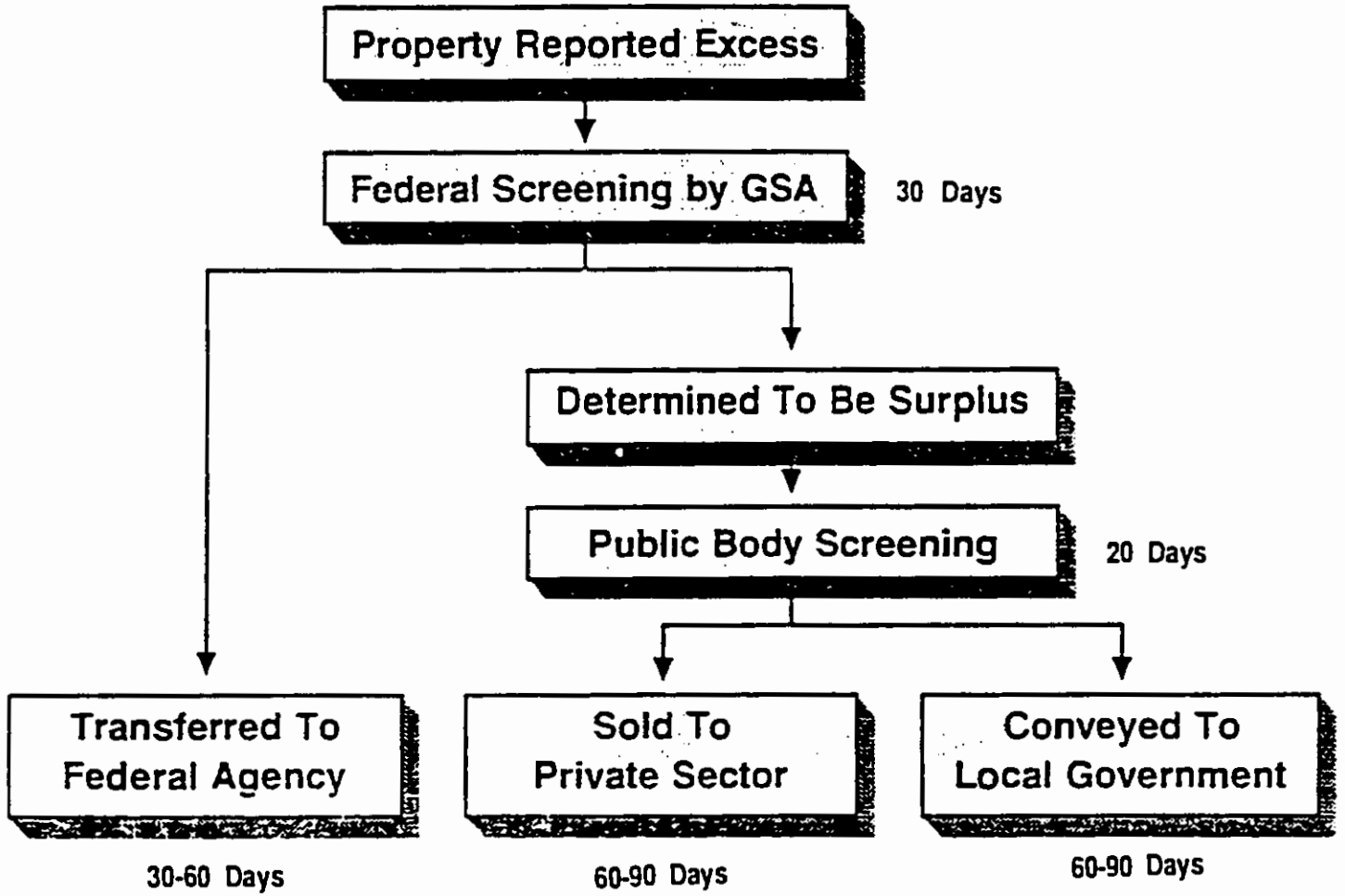
(c) The Director of the Office of Management and Budget shall review, through the management and budget review processes, the efforts of departments and agencies toward achieving the government-wide property management policies established pursuant to this Order. Savings achieved as a result of improved management shall be applied to reduce Federal spending and to support program delivery;

(d) The Office of Management and Budget and the General Services Administration shall, in consultation with the land managing agencies, develop legislative initiatives that seek to improve Federal real property management through the adoption of appropriate private sector management techniques; the elimination of duplication of effort among agencies; and the establishment of managerial accountability for implementing effective and efficient real property management practices; and

(e) The President's Council on Management Improvement, subject to the policy direction of the Domestic Policy Council, shall conduct such additional studies as are necessary to improve Federal real property management by appropriate agencies and groups.

Sec. 2. *Real Property.* The Administrator of General Services shall, to the extent permitted by law, provide government-wide policy oversight and guidance for Federal real property management; manage selected properties for

Disposal Process



agencies; conduct surveys; delegate operational responsibility to agencies where feasible and economical; and provide leadership in the development and maintenance of needed property management information systems.

Sec. 3. *Public Lands.* In order to ensure that Federally owned lands, other than the real property covered by Section 2 of this Order, are managed in the most effective and economic manner, the Departments of Agriculture and the Interior shall take such steps as are appropriate to improve their management of public lands and National Forest System lands and shall develop appropriate legislative proposals necessary to facilitate that result.

Sec. 4. Executive Order No. 12348 of February 25, 1982, is hereby revoked.

Ronald Reagan

THE WHITE HOUSE,
April 29, 1985.

federal register

Monday
March 13, 1989

Part VI

Environmental Protection Agency

40 CFR Part 300

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities; Notice of Policy Statement

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3636-2]

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities

AGENCY: Environmental Protection Agency.

ACTION: Notice of policy statement.

SUMMARY: The Environmental Protection Agency ("EPA") is announcing a policy relating to the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list.

This notice describes a policy for placing on the NPL sites located on Federally-owned or -operated facilities that meet the NPL eligibility criteria set out in the NCP, even if the Federal facility is also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). EPA had requested public comment on this policy on May 13, 1987 (52 FR 17991); comments received are contained in the Headquarters Superfund Public Docket. Elsewhere in today's Federal Register is a rule adding Federal facility sites to the NPL in conformance with this policy.

EFFECTIVE DATE: This policy is effective immediately.

ADDRESSES: The Headquarters Superfund Public Docket is located at the U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. It is available for viewing "by appointment only" from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Telephone 202/382-3046.

FOR FURTHER INFORMATION CONTACT: Joseph Kruger, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (OS-230), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, or the Superfund Hotline, phone (800) 424-9346 (or 382-3000 in the Washington, DC, metropolitan area.)

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601–9657 (CERCLA or "the Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases and threatened releases of hazardous substances, pollutants, or contaminants. In response to SARA, EPA proposed revisions to the NCP on December 21, 1988 (53 FR 51394).

Section 105(a)(8)(A) of CERCLA, as amended by SARA, requires that the NCP include criteria for "determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)). Criteria for determining priorities for possible remedial actions under CERCLA are included in the Hazard Ranking System ("HRS"), which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982).[1]

Section 105(a)(8)(B) of CERCLA, as amended by SARA, requires that the statutory criteria provided by the HRS be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). Section 105(a)(8)(B) also requires that the NPL be revised at least annually.

A site can undergo CERCLA-financed remedial action only after it is placed on the final NPL as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a). Although Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2), section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of Superfund monies at Federally-owned facilities. Federal facility sites also are subject to the requirements of CERCLA section 120, added by SARA.

This notice announces the Agency's policy of including on the NPL Federal facility sites that meet the eligibility requirements (e.g., an HRS score of 28.50), even if such facilities are also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901–6991(i). Elsewhere in today's Federal Register EPA is adding Federal facility sites to the NPL in conformance with this policy.

II. Development of the Policy for Listing Federal Facility Sites

CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases.

When the initial NPL was promulgated (48 FR 40662, September 8, 1983), the Agency announced certain listing policies relating to sites that might qualify for the NPL. One of these policies was that RCRA land disposal units that received hazardous waste after July 26, 1982 (the effective date of the RCRA land disposal regulations)

[1] EPA proposed major revisions to the HRS on December 21, 1988 (53 FR 51962); however, the current HRS applies to the listing of sites on the NPL until the revised HRS is finalized and takes effect. CERCLA section 105(c)(1).

would generally not be included on the NPL. On April 10, 1986 (50 FR 14117), the Agency announced that it was considering revisions to that policy based upon new authorities of the Hazardous and Solid Waste Amendments of 1984 ("HSWA") that allow the Agency to require corrective action at solid waste management units of RCRA facilities in addition to regulated hazardous waste management units.

On June 10, 1986 (51 FR 21057), EPA announced several components of a final policy for placing RCRA-regulated sites on the NPL, but made clear that the policy applied only to non-Federal sites. The Policy stated that the listing of non-Federal sites with releases that can be addressed under the expanded RCRA Subtitle C corrective action authorities generally would be deferred. However, certain RCRA sites at which Subtitle C corrective action authorities are available would generally be listed if they had an HRS score of 28.50 or greater and met at least one of the following criteria:

- Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws.
- Facilities that have lost authorization to operate, and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action.
- Sites, analyzed on a case-by-case basis, whose owners or operators have a clear history of unwillingness to undertake corrective action.[8]

On June 10, 1986 (51 FR 21059), EPA stated that it would consider at a later date whether this revised policy for deferring non-Federal RCRA-regulated sites from the NPL should apply to Federal facilities.

On October 17, 1986, SARA took effect, adding a new section 120 to CERCLA devoted exclusively to Federal facilities. Section 120 explains the applicability of CERCLA to the Federal Government, and generally sets out a scheme under which contaminated Federal facility sites should be included in a special docket, evaluated, placed on the NPL (if HRS scores so warrant), and addressed pursuant to an Interagency Agreement with EPA.

As part of its deliberations on a Federal facilities listing policy, EPA considered pertinent sections of SARA and the proposed policy concerning RCRA corrective action at Federal facilities with RCRA-regulated hazardous waste management units (51 FR 7722, March 5, 1986). Specifically, that policy stated that:

- RCRA section 3004(u) subjects Federal facilities to corrective action requirements to the same extent as privately-owned or -operated facilities.
- The definition of a Federal facility boundary is equivalent to the property-wide definition of facility at privately-owned or -operated facilities.

The Agency determined that the great majority of Federal facility sites that could be placed on the NPL have RCRA-regulated hazardous waste management units within the Federal facility property boundaries, subjecting them to RCRA corrective action authorities. Therefore, application to Federal facilities of the March 5, 1986 boundary policy and the June 10, 1986 RCRA deferral policy would result in placing very few Federal facility sites on the NPL. However, CERCLA and its legislative history indicate that Congress clearly intended that Federal facility sites generally be placed on the NPL and addressed under the process set out in CERCLA section 120(e). Thus, EPA concluded that the RCRA deferral policy applicable to private sites might not be appropriate for Federal facilities. On May 13, 1987 (52 FR 17991), the Agency announced that it was considering adopting a policy for listing Federal facility sites that are eligible for the NPL, even if they are also subject to the corrective action authorities of Subtitle C of RCRA; public comment was specifically requested on this approach.

Congress' intent that Federal facility sites should be on the NPL, even if RCRA corrective action authorities apply, is evidenced by the nature of the comprehensive system of site identification and evaluation set up by CERCLA section 120, added by SARA. First, in section 120(c), EPA is required to establish a "Federal Agency Hazardous Waste Compliance Docket," based on information submitted under sections 103 and 120(b) of CERCLA, *and* sections 3016, 3005, and 3010 of RCRA.[9] Thus, the docket is based heavily on information provided by Federal facilities that are subject to RCRA. If Congress had intended that Federal facilities subject to RCRA authorities should not also be examined under the Federal facility provisions of CERCLA, then the legislators would not have directed EPA to develop a docket of facilities (for evaluation *under CERCLA*) composed largely of Federal facilities subject to RCRA.

Second, the Agency is also directed, in CERCLA section 120(d), to "take steps to assure that a preliminary assessment is conducted *for each facility on the docket*," and where appropriate, to include such facilities on the NPL if the facility meets "the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases." (EPA does apply the CERCLA section 105 criteria—the Hazard Ranking System (HRS)—to Federal, as well as private, sites.) Here again, if Congress had intended that Federal facilities subject to RCRA authorities not be placed on the NPL, then the legislators would not have required EPA to evaluate for the NPL all Federal facilities in the docket—the large majority of which are subject to RCRA authorities.

Third, Congress set up the Interagency Agreement (IAG) process (CERCLA section 120(e) (2)–(4)) to evaluate the need for cleanups of Federal facility sites. If all Federal facility sites subject to RCRA Subtitle C were deferred from listing and attention under CERCLA, few Federal sites would come within the IAG process, contrary to Congressional intent.

Rather, Congress intended that EPA list, and evaluate in the IAG process, all Federal facility sites that are eligible for the NPL, including those facilities subject to RCRA Subtitle C authorities. As Senator Robert T. Stafford stated during the floor debate on section 120 of SARA (subsequently section 120 of CERCLA:

> [T]he amendments require a comprehensive nationwide effort to identify and assess *all* Federal hazardous waste sites that warrant attention. 132 Cong. Rec. S 14902 (daily ed., October 3, 1986) (emphasis added).

EPA has long expressed the view that placing Federal facility sites on the NPL serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems (50 FR 47931, November 20, 1985).

[8] On August 6, 1986 (51 FR 28702/28705), EPA published additional information on Agency policy concerning criteria to determine if an owner or operator is unwilling or unable to undertake corrective action.

[9] Section 3016 of RCRA provides for the inventory of Federal sites where RCRA hazardous waste "is stored, treated, or disposed of or has been disposed of at any time"; section 3005 of RCRA requires the filing of information necessary for the issuance of permits (or the obtaining of interim status) to treat, store, or dispose of hazardous waste under RCRA; and RCRA section 3010 requires notifications that a RCRA hazardous waste is being generated, transported, treated, stored, or disposed of.

EPA believes that today's decision not to apply the June 1988 NPL/RCRA policy (for non-Federal sites) to Federal facilities is consistent with section 120(a)(2) of CERCLA, which provides that "all guidelines, rules, regulations and criteria which are applicable to * * * inclusion on the National Priorities List, or applicable to remedial actions * * * shall also be applicable to [Federal facilities]." Given Congressional intent that Federal facility sites should be included on the NPL, EPA interprets section 120(a)(2) to mean that the criteria to list sites should not be more exclusionary than the criteria to list non-Federal sites on the NPL. As discussed in the May 13, 1987, notice on the policy (52 FR 17993-3), most Federal facilities include RCRA-regulated hazardous waste management units and thus, almost all waste contamination areas within facility boundaries are subject to RCRA corrective action authorities; in addition, key exclusions in the non-Federal RCRA deferral policy are not applicable to Federal facilities. Thus, if the non-Federal RCRA deferral policy were applied to Federal sites, very few Federal sites would be listed.

The Agency believes that although section 120(a)(2) evidences Congress' intent that the Federal agencies comply with the same baseline of requirements applicable to private sites, the section does not require that all policies and requirements applicable to private and Federal facility sites be identical. Indeed, Congress specifically set out a series of requirements which apply to Federal facilities in a manner different from, or in addition to, those applicable to private sites, e.g., the preparation of a separate Federal Agency Hazardous Waste Compliance Docket (section 120(c)); the notification required before Federal agencies may transfer property (section 120(h)); and the entire process for signing Interagency Agreements at Federal facility sites (section 120(e)(2)-(4)).

Just as Congress recognized that there are unique aspects of Federal facilities requiring additional or special attention in the contexts just named, special attention is also required in deciding what listing/deferral policy should apply to Federal versus private sites. EPA's opinion is that significant differences inherent in the rules to which Federal facility sites and private sites are subject under CERCLA and the NPL dictate that different listing and deferral policies should be crafted for each class of facilities.

For private sites, the only legal significance of NPL listing is that the site becomes eligible for *Fund-financed* remedial action, as provided in the NCP at 40 CFR 300.68(e)(2) and 300.68(a)(1) (removal actions and enforcement actions can be taken at private sites regardless of NPL status). Indeed, EPA recently suggested in the preamble to proposed revisions to the NCP (53 FR 51418, December 21, 1988) that it may be appropriate to view the non-Federal NPL "as a list for informing the public of hazardous waste sites that appear to warrant * * * remedial action through CERCLA funding alone." This relationship between the NPL and the availability of Fund monies (at private sites) is a central factor behind EPA's deferral policies. EPA has concluded that by deferring to other statutes like RCRA, "a maximum number of potentially hazardous waste sites can be addressed and EPA can direct its CERCLA efforts (and Fund monies, if necessary) to those sites where remedial action cannot be achieved by other means" (53 FR 51418, December 21, 1988). However, this goal of maximizing the use of limited Fund monies does not apply to Federal facility sites.

Federal facility sites on the NPL are not eligible for *Fund-financed* remedial actions (except in the very limited cases described in CERCLA section 111(e)(3)), pursuant to the NCP at 40 CFR 300.68(e)(2). Thus, the deferral of Federal facility sites from the NPL would not result in significant economies to the Fund, although it could do harm to the informational and management goals of including Federal facility sites on the NPL, as well as Congressional intent. Although the Agency might have decided to defer Federal facility sites subject to RCRA based on a desire to avoid duplication in remedial actions (another of the purposes behind RCRA deferral for private sites), EPA has concluded that this goal may be accomplished satisfactorily for Federal facilities through the process, set out in CERCLA section 120 (e)(2)-(e)(4), of developing comprehensive IACs. As discussed in detail below, EPA will attempt to use the IAG process to achieve efficient, comprehensive solutions to site problems, and where appropriate, to divide responsibilities for cleanup among the various applicable authorities.

Finally, the deferral of Federal facility sites to RCRA-authorized States, in lieu of evaluation under the IAG process, may be inconsistent with the intent of CERCLA section 120(g), which provides that "no authority vested in the [EPA] Administrator under this section [120] may be transferred" to any person. 42 U.S.C. 9620(g).

III. Coordination of Response Authorities at Federal Facility Sites on the NPL

EPA recognizes that when it takes action under CERCLA to address a facility that is also subject to RCRA authorities, there is some risk of overlap or even conflict. Such conflict situations are not a problem where EPA is responsible for carrying out the requirements of both RCRA and CERCLA (since any jurisdictional overlaps can be managed within EPA). However, an overlap of authority may yield disagreements as to how a site should be cleaned up where a State has been authorized to carry out all or part of the RCRA program.[4]

However, this potential overlap between RCRA and CERCLA cleanup authorities is the result of Congressional design, not site listings. EPA neither intends nor believes that site listings themselves create a conflict between CERCLA and RCRA (or State law); rather, any conflict stems from the overlap of the corrective action authorities of the two statutes. The overlap exists whenever EPA takes CERCLA action at a site that has regulated hazardous waste management units subject to a State's RCRA program or other State law. EPA can take such CERCLA actions at sites *not* on the NPL as well as at sites on the NPL.[5] (Such conflicts may also occur at private sites as well as at Federal facility sites.) There may also be cases where the applicability of both RCRA and CERCLA authorities at NPL sites does *not* create a conflict—for example, where the RCRA hazardous waste management units are not included within the area to be addressed under CERCLA, or where the release is exempt from action under RCRA. Thus, conflict between RCRA and CERCLA corrective actions can occur at virtually any point in the process or not at all.

How RCRA authorities are affected (if at all) when CERCLA also applies to a site is a matter that varies greatly, depending upon the facts of the site. In some cases, the NPL site is physically distinct from the RCRA-regulated

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[4] EPA recognizes that many States have hazardous waste laws independent of that upon which the State's authorized RCRA program may be based. Although this policy statement focuses primarily on the mechanism for applying RCRA (by EPA or authorized States) to Federal facilities on the NPL, the same analysis would apply to non-RCRA State laws that potentially overlap with CERCLA response authorities.

[5] Removal actions, as well as remedial actions ordered under section 106 of CERCLA, may be taken at non-NPL sites. *See* 40 CFR 300.68(c)(2) and 300.68(a)(1).

hazardous waste management units, and corrective action or closure at the regulated units may proceed under RCRA, while at the same time a cleanup action is proceeding at another area of the property under CERCLA, without the risk of inconsistency or duplication of response action. In other cases, the releases or contaminant plumes may overlap, such that a comprehensive solution under one statute may be the most efficient and desirable solution. The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are often implementation issues, to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

EPA's belief is that in most situations, it is appropriate to address sites comprehensively under CERCLA, pursuant to an enforceable agreement (i.e., an IAG under CERCLA section 120), signed by the Federal facility, EPA, *and*, where possible, the State. In some circumstances, it may be appropriate under an IAG to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities. Alternatively, the IAG can prescribe divisions of responsibility, such as stating that CERCLA will address ground water contamination while RCRA will address the closure of regulated hazardous waste management units. Any disagreements in the implementation of the IAG would be resolved by the signatory parties under the dispute resolution terms of the IAG.

Of course, there may be cases where a RCRA-authorized State declines to join the IAG process, or agreement on the terms of an IAG cannot be achieved. For instance, State officials may decide that the proper closure of a landfill should be accomplished through excavation, while CERCLA officials may determine that the same area should be managed differently as part of a comprehensive CERCLA action at the site. Although EPA will try to resolve any such conflicts and achieve agreement with the State in the IAG process, there may be cases where the conflicting views of EPA and the State concerning corrective action cannot be resolved.

CERCLA section 122(e)(6), entitled "Inconsistent response actions," gives specific guidance on this point:

> INCONSISTENT RESPONSE ACTION.—When 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.

As the Conference Report on SARA noted, section 122(e)(6) was included in the bill "to clarify that no potentially responsible party [PRP] may undertake any remedial action at a facility unless such remedial action has been authorized by the President" (or his delegate, EPA)[6]. *See* H.R. Rep. 962, 99th Cong., 1st Sess. at 284 (1986). *See also* 132 Cong. Rec. S14919 (daily ed., October 3, 1986) ("This is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem.")[7] This authorization requirement applies to any remedial actions taken by a PRP, including those actions ordered by a State, as both types of action could be said to present a potential conflict with a CERCLA-authorized action.[8]

CERCLA section 122(e)(6) does not constitute a prohibition on RCRA corrective action at CERCLA sites; rather, it provides a mechanism by which the Agency must approve of remedial actions commenced at sites after an RI/FS has been initiated under CERCLA. Such an approach would help to avoid duplicative and wasteful cleanup actions. This authorization mechanism would not affect normal hazardous waste management requirements under RCRA, such as complying with manifest, 90-day storage, and labeling requirements; any RCRA-regulated hazardous waste management units operating at a CERCLA site must continue to comply with RCRA hazardous waste management requirements, even if a CERCLA response action is underway. The Agency also intends to authorize many State RCRA actions to continue, e.g., where the RCRA action addresses a unit distinct from the CERCLA contamination, and where the RCRA action will not disrupt CERCLA activities.

Even where EPA decides that it is not appropriate to authorize a RCRA or other State action to continue under CERCLA section 122(e)(6) in order to avoid disruption or duplicative actions, CERCLA section 120(f) specifically provides that participation by State officials in remedy selection "shall be provided in accordance with section 121," and CERCLA section 121(*d*) specifically provides a process for taking account of "applicable or relevant and appropriate requirements" (ARARs) of RCRA (as well as other State and Federal statutes) when a remedy is selected. If any State requirements are waived pursuant to CERCLA section 121(*d*)(4), the affected State may obtain judicial review of such waiver, and even if unsuccessful, may ensure that those requirements are met by providing the necessary additional funding pursuant to CERCLA section 121(f)(3)(B). As the Agency has noted repeatedly in the past, "it is EPA's expectation that remedies selected and implemented under CERCLA will generally satisfy the RCRA corrective action requirements, and vice versa" (52 FR 17993, May 13, 1987, and 52 FR 27645, July 22, 1987).[9]

The discretion under CERCLA section 122(e)(6) not to authorize a PRP to go forward with a remedial action at a site

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[6] The authority under section 122(e)(6) to authorize a remedial action to continue after the initiation of an RI/FS at an NPL site has been delegated to the EPA Administrator. *See* Executive Order 12580, section 4(d)(1) (52 FR 2923, January 29, 1987). For most non-NPL sites, the general authority for carrying out the requirements of CERCLA section 122 has been delegated to the Federal agencies for sites under their jurisdiction or control; however, the ability of the Federal agencies to authorize sites under section 122(e)(6) is limited by the provisions of section 120(a)(4), as discussed below.

[7] Congress' intent that CERCLA actions should proceed without potential conflict with other remedial action is also suggested by the language in section 7002(b)(2)(B) of RCRA, which states that RCRA citizen suits alleging an imminent and substantial endangerment may not be brought if EPA: has commenced an action under CERCLA section 106 (or RCRA 7003); is engaging in a removal action under CERCLA section 104 or has incurred costs to begin an RI/FS under CERCLA and is diligently proceeding with remedial action; or has obtained a court order (including a consent decree) or issued an administrative order under CERCLA section 106 or RCRA section 7003, and a responsible party is diligently conducting a removal, an RI/FS, or proceeding with remedial action pursuant to that order. Similarly, RCRA section 1006(b) directs the Administrator to "integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication to the maximum extent practicable," with appropriate provisions of laws (such as CERCLA) granting regulatory authority to EPA.

[8] "Remedial action" is very broadly defined in section 101(24) of CERCLA as actions consistent with a permanent remedy at a site, including confinement of a release of hazardous substances, cleanup of hazardous substances, etc. EPA believes that remedial actions within the meaning of the term may include those taken under statutes other than CERCLA, including corrective action under RCRA.

[9] To the extent that this policy may be read as inconsistent with the district court's opinion in *State of Colorado v. U.S. Department of the Army*, C.A. No. 88-C-2520 (D. Colo., February 24, 1989), EPA disagrees with that opinion.

after a CERCLA remedial investigation/feasibility study (RI/FS) has begun—even if that action has been ordered by a State—is generally available at both private and Federal facility sites. However, CERCLA section 120(a)(4) provides that State laws shall apply to remedial actions—including those under CERCLA—at *Federal facility* sites that are *not* on the NPL, thus, acting as a general limitation on the more general section 122(e)(6).[10] Of course, no such limitation applies to Federal facility sites once they are placed on the NPL.

The plain language of section 122(e)(6) makes it clear that it is the RI/FS—not the listing itself—that triggers section 122(e)(6). Indeed, an RI/FS may be commenced prior to, as well as after, NPL listing.[11] This is especially true for Federal facility sites, as the President has delegated his authority to take CERCLA section 104 response actions (including RI/FSs) to the Federal agencies for most non-NPL sites (Executive Order 12580, at section 2(e)(1)).[12] Thus, when a Federal facility is placed on the NPL, an RI/FS will often have been commenced (or completed).

In order to invoke the authorization mechanism of CERCLA section 122(e)(6), EPA must make a threshold determination of whether or not an RI/FS "under this Act [CERCLA]" has been initiated; studies conducted by Federal facilities before a site has been placed on the NPL may or may not constitute an appropriate RI/FS in EPA's opinion.[13] As a matter of policy, the Agency will generally interpret CERCLA-quality RI/FSs to be those that are provided for, or adopted by reference, in an IAG. The Agency believes that such a policy is consistent with CERCLA section 120(e)(1), which directs Federal facilities, "in consultation with EPA," to commence an RI/FS within six months of the facility's listing on the NPL. In addition, the policy will promote consistency in RI/FS's, and will help to ensure that all appropriate information has been collected during the RI/FS, so that EPA may properly evaluate remedial alternatives at Federal facility sites as required under CERCLA section 120(e)(4). Further, by encouraging the development of IAGs at the early RI/FS stage, this policy may help to promote coordination among the parties, and avoid inconsistent actions.

Thus, the IAG will generally commit the Federal facility to complete both an RI/FS and any subsequent remedial action determined by EPA to be necessary.

Once an RI/FS has been commenced under (or incorporated into) an IAG, EPA must decide whether or not to authorize PRPs to continue with any non-CERCLA remedial actions (both voluntary and State-ordered) at the site. This decision will be made on a case-by-case basis, taking into account the status of CERCLA activities at the site, and the potential for disruption of or conflict with that work if the PRP action were authorized.

IV. Response to Public Comments

On May 13, 1987 (52 FR 17991), EPA solicited public comment on the Agency's intention to adopt a policy for including eligible Federal facility sites on the NPL, even if they are also subject to RCRA corrective action authorities; the Agency received six comments on the policy. EPA considered the comments raised, and responds to them as follows.

Two of the six commenters concur with the policy to include eligible Federal facility sites on the NPL and have no suggested revisions or additional comments.

One commenter "generally supports" the policy, but believes that the criteria used to list Federal facility sites are unclear. The commenter states that "as written, the proposed policy could be interpreted to mean that Federal hazardous facilities would be placed on the NPL regardless of their status under [RCRA] or their degree of actual hazard."

In response, the commenter is correct in concluding that under the policy, Federal facility sites would be placed on the NPL regardless of the facility's status under RCRA. As discussed above, this is consistent with Congressional intent that Federal facility sites should be on the NPL, and that listing criteria should not be applied to Federal sites in a manner that is more exclusionary than for private sites. However, the commenter is incorrect in suggesting that Federal facility sites will be listed regardless of the degree of hazard they present. The Agency intends to use the HRS, the same method used for non-Federal sites, to determine whether a Federal facility site poses an actual or potential threat to health or the environment and, therefore, qualifies for the NPL. (Currently, a site is generally eligible for the NPL if the HRS score is 28.50 or greater.) The application of the HRS to Federal facility sites is consistent with CERCLA section 120(d), which requires EPA to use the HRS in evaluating for the NPL the facilities on the Federal Agency Hazardous Waste Compliance Docket.

One commenter did not comment on the policy, but rather is concerned that no Superfund monies be spent at Federal facilities. The commenter believes that neither pre-remedial work (preliminary assessments and site inspections) nor remedial work should be financed by the Trust Fund.

In response, Executive Order 12580 (52 FR 2923, January 29, 1987), at section 2(e), delegates the responsibility for conducting most pre-remedial work to the Federal agencies. Therefore, the Federal agencies, rather than the Trust Fund, finance these activities, with EPA providing oversight. In addition, section 111(e)(3) of CERCLA, as amended by SARA, strictly limits the use of the Fund for remedial actions at Federally-owned facilities. Although the Administrator does have the discretion to use funds from the Hazardous Substances Superfund to pay for emergency removal actions for releases or threatened releases from Federal facilities, the concerned Executive Agency or department must reimburse the Fund for such costs. Executive Order 12580, section 9(i). The Department of Defense and the Department of Energy also have response authority for emergency removals (Executive Order, section 2(d)).

Another commenter opposes the policy of placing RCRA-regulated Federal facilities on the NPL, arguing that public notification is adequately addressed by other provisions of CERCLA (sections 120 (b), (c), and (d)), and that the policy is inconsistent with section 120(a), which requires that

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[10] Section 120(a)(4) states as follows: State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. (Emphasis added.)

Nothing in this section prevents Federal facilities from arguing that the doctrines of laches, estoppel or implied preemption limit the effect of section 120(a)(4).

[11] *See SCA Services of Indiana, Inc. v. Thomas*, 634 F.Supp. 1288, 1291 (W.D. Ind. 1986) ("CERCLA clearly makes the conduct of an RI/FS a removal, not remedial, action, so that the restriction that remedial actions be taken only when the site is on the NPL is simply irrelevant to a RI/FS"); 52 FR 27622 (July 22, 1987) ("an RI/FS can be performed at proposed [NPL] sites pursuant to the Agency's removal authority under CERCLA").

[12] Section 104 authorities were delegated to the Departments of Defense and Energy more generally, although such functions must still be exercised consistent with the requirements of section 120 of CERCLA. Executive Order 12580, section 2(d).

[13] "RI/FS" is a term of art under CERCLA, and applies to a special site study and evaluation pursuant to section 300.68(d) of the NCP. EPA, as the agency entrusted with the development and implementation of the NCP, is the recognized expert on what constitutes an acceptable RI/FS under CERCLA.

Federal facilities comply with CERCLA in the same manner as any nongovernmental entity. The commenter believes that the adoption of the proposed policy is inconsistent with EPA's policy regarding non-Federal facilities.

In response, CERCLA sections 120 (b), (c), and (d) refer to the establishment of the Federal Agency Hazardous Waste Compliance Docket and to the evaluation of facilities on the docket for the NPL.[9] The Agency agrees that this docket will provide the public with some information regarding hazardous waste activities at Federal facilities, as well as information concerning contamination of contiguous or adjacent property. The Agency believes, however, that evaluating sites using the HRS, and placing on the NPL those sites that pose the most serious problems, will serve to inform the public of the relative hazard of these sites. The listing process also affords the public the opportunity to examine HRS documents and references for a particular site, and to comment on a proposed listing. In addition, the NPL provides response categories and cleanup status codes for sites, and deletes sites when no further response is required, adding to the informational benefits of using the NPL. Therefore, EPA believes that listing Federal facility sites will advise the public of the status of Federal government cleanup efforts, as well as help Federal agencies set priorities and focus cleanup efforts on those sites that present the most serious problems, consistent with the NCP (50 FR 47931, November 20, 1985).

As to the comment concerning CERCLA section 120(a), EPA agrees that the section provides that Federally-owned facilities are subject to and must comply with CERCLA to the same extent as any nongovernmental entity. Further, sections 120(a)(2) and 120(d) provide that EPA should use the same rules and criteria to evaluate Federal sites for the NPL as are applied to private sites. However, today's policy is not inconsistent with those sections. As a threshold matter, it is uncontroverted that an HRS score of 28.50 or greater is an eligibility requirement for both Federal and private sites. The question is, should NPL-eligible Federal sites be deferred from listing as a matter of policy. As explained above, the Agency does not believe that CERCLA section 120(a)(2) can be read to require identical treatment of Federal and private sites in all circumstances; the fact that Congress legislated a number of requirements in addition to, or instead of, those applicable to private facilities (e.g., sections 120 (c), (e)(2), (h)), demonstrates the legislators' recognition of the need to address certain unique aspects of Federal facilities differently than for private sites. Rather, EPA interprets CERCLA section 120(a) to mean that the criteria to list Federal facility sites should not be more exclusionary than the criteria to list non-Federal sites. In this case, it is clear that if EPA were to apply the non-Federal RCRA deferral listing policy to Federal facilities, very few Federal sites would be considered for the NPL, counter to the spirit and intent of section 120 (c) and (d) of CERCLA and the statute's legislative history. Moreover, one of the key factors in EPA's decision to adopt a RCRA deferral policy for private sites—the need to manage and conserve Fund resources—does not apply to Federal facilities because the remedies are not Fund-financed. EPA believes that it is appropriate, and consistent with Congressional intent, to take these differences into account, as long as the result is not to treat Federal agencies in a more exclusionary manner than private facilities.

Two commenters expressed concern that listing Federal facility sites might interfere with enforcement activities under RCRA. One commenter stated that the policy is inconsistent with CERCLA section 120(i), which requires that Federal facilities comply with all RCRA requirements.

In response, the Agency's view is that today's policy will facilitate enforcement activities at Federal facility sites, not interfere with them. In effect, by encouraging the drafting of comprehensive IAGs for Federal facilities, this policy will advance the goal of site remediation. In addition, the IAG process allows EPA to take steps to avoid duplication and conflict; the IAG may define areas of a Federal facility that may efficiently be addressed under RCRA (e.g., units that are distinct from, and do not disrupt, CERCLA activities). In addition, States will be encouraged to become signatory parties to IAGs, reducing the likelihood of intergovernmental conflict over jurisdiction and the selection of remedy.

In any event, it is not the act of placing a site on the NPL that creates a potential conflict between CERCLA and RCRA; rather, the corrective action authorities of the two statutes overlap, pursuant to statutory design. Indeed, the alleged interference with RCRA corrective actions by CERCLA cleanups can occur at any point in the process, depending upon the specific facts of the case. In those cases where the relevant statutes do overlap, EPA believes that one of the statutes must sometimes be chosen for practical reasons, and Congress has set out a procedure for resolving such conflicts in CERCLA section 122(e)(6).[10] However, the goal of today's policy is to minimize any such conflicts through the IAG process.

The Agency acknowledges that in the case of Federal facilities, listing does have a significance not present for private sites. For instance, CERCLA section 120(e)(2) provides that for Federal facility sites *on the NPL*, EPA will play a role in selecting remedies, while CERCLA section 120(a)(4) provides that State laws concerning removal and remedial actions shall apply to Federal facilities when such facilities are not on the NPL (the section does not discuss how State laws apply at Federal sites that are on the NPL). However, any difference in EPA or State roles at NPL versus non-NPL Federal facility sites results from the statutory scheme reflected in CERCLA sections 120(a)(4) and 121(d), and not from the act of listing itself. CERCLA directs EPA to list Federal sites on the NPL and then specifies certain statutory consequences.

Further, merely alleging that there may be some effect on State enforcement actions as a result of a policy of including Federal facilities on the NPL is not grounds for rejecting today's policy. The Agency has reviewed both sides of the question, and has determined that it is in the best interest of the public and environmental protection to place Federal facility sites on the NPL and thus to make CERCLA authorities available to achieve comprehensive remedies for contamination at such sites (when appropriate). In addition, the IAG process, as discussed in this policy, will serve to minimize duplication and inconsistency with potential State orders.

[9] Pursuant to section 120(c) of CERCLA, EPA published the Federal Agency Hazardous Waste Compliance Docket on February 12, 1988 (53 FR 4280). The docket was established based on information submitted by Federal agencies to EPA under sections 3005, 3010, and 3016 of RCRA and under section 103 of CERCLA. The docket serves to identify Federal facilities that must be evaluated in accordance with CERCLA section 120(d) to determine if they pose a risk to public health and the environment. Section 120(d) requires EPA to evaluate facilities on the docket using the HRS for possible inclusion on the NPL.

[10] It is important to note that the section 122(e)(6) authorization requirement at Federal facilities is not triggered automatically by NPL listing, but rather takes effect where an RI/FS has been initiated at a listed Federal site; as a matter of policy, this start-up point for the RI/FS will not be recognized in most cases until an enforceable IAG has been signed, which may be well after a site is listed.

EPA also disagrees with the commenter's suggestion that today's policy is inconsistent with CERCLA section 120(l), which provides that "nothing in this section [120] shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [RCRA] (including corrective action requirements)." EPA interprets that section simply to mean that section 120 does not impair otherwise applicable RCRA requirements; this mandate is met even if an action is conducted under CERCLA, as CERCLA section 121(d)(2) specifically provides that ARARs of RCRA and State law must be achieved with regard to any on-site remedy. Even if a RCRA or State requirement that is an ARAR is waived by EPA (section 121(d)(4)), the State may obtain judicial review of such a waiver, and even if unsuccessful, may require that the remedial action conform to the requirement in question by paying the additional costs of meeting such standard (CERCLA section 121(f)(3)); thus, the intent of section 120(l) is satisfied.

This interpretation of section 120(l) follows directly from the language of the provision itself, which states that "nothing in this section"—as compared to "nothing in this Act"—shall affect RCRA obligations. This leaves in place limitations contained in *other* sections of the statute, such as the permit waiver provision (section 121(e)); the process for selecting and waiving ARARs (sections 121 (d)(2) and (d)(4)); and the ban on remedial actions not approved by the President (section 122(e)(6)).

For all these reasons, the Agency believes that today's Federal facilities listing policy is appropriate, that it reflects Congressional intent, and that it is consistent with CERCLA.

Pursuant to the policy described in this notice, the Agency will place eligible Federal facility sites on the NPL even if the site is also subject to the corrective action authorities of Subtitle C of RCRA.

Date: March 8, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 89-5883 Filed 3-10-89; 8:45 am]

BILLING CODE 6560-50-M

STATEMENT OF JAMES M. STROCK
CALIFORNIA SECRETARY FOR ENVIRONMENTAL PROTECTION
REPRESENTING THE NATIONAL
GOVERNORS' ASSOCIATION BEFORE THE
DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE
July 17, 1991

Mr. Chairman, fellow members of the Task Force, it is a privilege and an honor for me to be a member of this Task Force, representing the interests and viewpoints of the National Governors' Association.

Our task here is to make recommendations on ways to improve interagency coordination and to streamline procedures for the purposes of expediting environmental response actions at military installations that are being closed or scheduled to be closed.

The National Governors' Association, founded in 1908, is the instrument through which the nation's Governors collectively influence the development and implementation of national policy and apply creative leadership to state issues. The Association works closely with the Administration and Congress on state and federal policy issues. The Association serves as a vehicle for sharing knowledge of innovative programs among the states and provides technical assistance and consultant services to Governors on a wide range of management and policy issues.

States have inherited a pollution problem of staggering proportion from the federal government. While aggressive federal and state regulations have greatly improved environmental management and cleanup within the private sector over the last two decades, they have not done as well to ensure sound environmental practices at military bases. As a result, virtually every state is host to environmentally contaminated military bases.

State involvement in cleanup of military bases slated for closure is motivated by several factors. First, states have a legal responsibility to ensure that state environmental cleanup and management laws are obeyed. Second, states have a sovereign duty to ensure that cleanup plans and actions will result in safe sites and will not produce additional hazards that could threaten the health and safety of their citizens. Finally, states have an economic incentive to ensure that appropriate cleanup actions are promptly taken. Many of these bases slated for closure will eventually be transferred for civilian uses. Therefore, it is important that states oversee cleanup and compliance actions at the bases so that states and their local communities do not inherit contaminated property. To minimize economic dislocation in communities, it is also important for the clean-up to take place in a timely manner.

We believe that both the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA) provide opportunities for states to

establish strong roles in overseeing cleanup activities at the closing bases. Pursuant to CERCLA Section 120, some states have entered into the Federal Facility Agreements with the U.S. EPA and the Department of Defense (DOD) for the cleanup of military bases which are on the National Priorities List. These Federal Facility Agreements provide an effective mechanism to ensure cooperation among the DOD facilities, U.S. EPA, and state and local regulatory agencies. We are hopeful that states will be working closely and productively with these agencies to expedite the cleanup activities at these closing bases.

I. Redevelopment and Reuse of Military Bases

Redevelopment and reuse of military bases involves issues that are vital to the environment and the economy of the states. States will have to balance their mission to protect public health and the environment with the economic needs of the states and local communities. We must not be a stumbling block to base closure and reutilization of base property. We support rapid redevelopment and reuse of military bases, as long as all environmental laws are complied with before, during and after closure, and as long as ultimate remediation of environmental contamination at the bases is not adversely affected. We believe that such redevelopment can be undertaken rapidly, consistent with CERCLA Section 120 (h), if US EPA interprets that provision in a common sense way, working with states on a case-by-case basis.

Interim civilian land use on a closing base may be allowed if such land use will not interfere with the ongoing cleanup activities, if the state and the public are adequately notified, and if DOD agrees to indemnify, hold harmless and waive claims against the state for any cause of action arising out of the use of the base property.

States may consider parceling out the clean or cleaned portions of the base property for sale if, in addition to the above-mentioned three conditions, DOD agrees to retain the responsibility for any long-term operation and maintenance of the remedial action and for any necessary removal or remedial work identified in the future. Furthermore, sufficient protective provisions should be written into deeds and other legal documents effectuating parcel transfer, which will provide for right of entry or access by regulatory agencies for monitoring purposes. Land use restrictions should also be imposed on parcels which cannot be fully remediated because it is either technologically infeasible or prohibitively expensive to do so.

In determining the cleanup standards, schedules, and priorities for the closing bases, there has to be a wise balancing between the environmental concerns and the economic considerations.

Where a base closure is required by law to occur before the scheduled final cleanup previously agreed to in the Federal Facility Agreement, states may consider on a case-by-case basis whether it is appropriate or feasible to renegotiate the terms and schedules in the Federal Facility Agreement. If the resources are simply not available for the state to perform its oversight responsibility on an expedited time schedule, the state may have to seek increased oversight funding from the federal government in order to help meet the closure date required by law.

In order to ensure that the proposed reuse of base property does not interfere with the ongoing cleanup work, local redevelopment agencies need to be brought into this federal-state coordinated cleanup effort at the earliest stage possible. Redevelopment agencies need to be immediately informed of the process and requirements of the cleanup work at the base. At the last meeting, we heard about the situation at Norton Air Force Base in California from the Air Force's perspective. We would like to take a couple of minutes to talk about the Norton situation from a different perspective.

The Air Force leased a portion of the Norton Air Force Base to the Inland Valley Development Agency, which subleased a large hangar to Lockheed Corporation for commercial aircraft maintenance operation. The hangar was above a potential

source of hazardous substance contamination. Lockheed contracted to have the concrete floor in the hangar removed and repoured. The U.S. EPA Region 9 and California state regulatory agencies found out about Lockheed's activity two days before the work was to begin. In this case, the Inland Valley Development Agency and Lockheed should have been informed of the existence of the Federal Facility Agreement among the Air Force, U.S. EPA and California. They should have become familiar with the terms and conditions of the Federal Facility Agreement to know that there is a potential source of hazardous substance contamination beneath the hangar. This situation exemplifies the need for enhanced communication among the DOD branch, the base, the federal and state regulators, the local redevelopment agencies and the public.

II. Communication and Coordination with Federal, State and Local Agencies, and the Public.

States recognize that there is an interest, both within the DOD branches and within the local communities, to promptly make land and facilities on closing bases available to private sector for interim use and post-closure use. States need to make sure that activities associated with base reuse do not conflict with or impede the cleanup work as required by the Federal Facility Agreement, and federal and state environmental laws.

Therefore, it is essential that the DOD branch notify and involve the states as soon as possible regarding any proposed base reuse or changes in its cleanup policies or priorities. The communications among all parties concerned need to be improved. States need to know, at the earliest stage possible, what the proposed reuse schedules are for the closing bases. This information does not appear to be forthcoming. Most states will have to hire additional staff for the expedited cleanup effort, and will need to know in advance when to hire the new staff and how many to hire.

It would be helpful to have a joint-services regional environmental office in each state which would coordinate with the state on behalf of all the DOD branches regarding broad policy issues. This way, the state will not have to deal separately with each branch which may have different practices, policies or procedures regarding the required cleanup of its bases.

Furthermore, there are even policy differences within the same service branch. In California, we have one base which has fifty environmental staff with the authority to make on-site decisions; and less than 150 miles away, we have another base which has two environmental staff who defer all the decisions to the east coast, causing unnecessary delays in the cleanup process. This demonstrates the need for consistency in policies not only within DOD, but also within the same service

branch.

We also believe that it will help speed up the cleanup process if greater authority is given to the local base officials for on-site contracting and decision-making on technical issues. This not only will expedite decisions, but also will allow for a better relationship between the base and the state regulatory agencies.

In addition, states may consider setting up a state-level task force to address the base closure issues. In California, U.S. EPA Region 9 and Governor Wilson have jointly proposed a multi-agency task force which would include members representing the DOD branches, U.S. EPA Region 9, and the state and local regulatory agencies.

Successful transition at these closing bases also depends on how much community involvement there is in the process. Bases that are receptive and responsive to local concerns will hopefully be able to ease into the transition from military presence to civilian reuse with blessings from both regulatory agencies and local communities.

With regard to the funding for the cleanup activities at the closing bases, states applaud DOD's proposal that sale and lease proceeds from property transaction be used to fund

cleanup. However, states are concerned about the continuing funding for the cleanup and the state oversight. Currently, for those states which have entered into the Department of Defense and State Memorandum of Agreement (DSMOA) with DOD, funding for state oversight comes from the Base Closure Account which is funnelled through the Defense Environmental Restoration Account (DERA). As we understand, funding from the Base Closure Account may expire after five years. Therefore, we would like to be assured that sources of funding for state oversight and cleanup will continue, since it is obvious that most of these bases will not be fully cleaned up in five years.

III. State's Authority Under CERCLA and RCRA

It is the states' position that Congress, by enacting CERCLA Section 120(a)(4), has expressly waived federal sovereign immunity regarding removal and remedial actions at federal facilities which are not included on the National Priorities List. In other words, it is the states' position that the DOD facilities are subject to state law requirements and the state approval authority regarding removal and remedial actions at military bases which are not on the National Priorities List.

States also support the aggressive use of state enforcement

authority to make sure that base closure activities and the required cleanup are carried out in full compliance with federal and state environmental laws. Where necessary, states will seek penalties against the DOD facilities to deter future violations at the closing bases. States are hopeful that Congress or the U.S. Supreme Court will soon clarify the states' authority to assess penalties under RCRA Section 6001.

CONCLUSION

In conclusion, we would like to reiterate that the key to a successful and expeditious cleanup of the closing bases is communication and cooperation. DOD, federal and state regulatory agencies and local communities need to work together to come to a consensus on issues relating to the cleanup and reuse of the closing bases.

Mr. Chairman, fellow members of the Task Force, I thank you for your consideration of my statement. I would be pleased to answer any questions you may have, and to work with you in the coming months on these important issues.

STATEMENT OF EARL E. GJELDE

PRESIDENT AND CEO

OF

CHEM-NUCLEAR ENVIRONMENTAL SERVICES, INC.

PRESENTED TO

THE DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

July 17, 1991

Members of the Task Force, I am Earl Gjelde, President and Chief Executive Officer of Chem-Nuclear Environmental Services, Inc., and I am pleased to provide this statement to the Task Force regarding environmental response actions at closing military installations.

Chem-Nuclear Environmental Services, Inc. (CNES) is a member of the Waste Management,Inc - Chemical Waste Management, Inc. group of companies, which together form the world's largest and most experienced environmental and waste management team. CNES is specifically structured to focus these extensive resources, experience and capabilities on the unique and complex environmental and waste management needs of the federal government. The CNES team offers waste management systems, procedures and Quality Assurance policies that meet all applicable state environmental and EPA standards, from analytical technologies through remediation systems to final treatment, disposal and site restoration involving all streams of waste at federal and industrial facilities.

We commend the dedication of this Task Force, the Department of Defense and the U.S. Environmental Protection Agency (USEPA) to explore methods of consolidating and streamlining interagency coordination and environmental restoration. The Department of Defense has created, through this Task Force and other public fora, avenues of public expression for concerns about

environmental problems at DOD facilities and proposed solutions. Out of this atmosphere of genuine openness, creative solutions will certainly arise. In congressional hearings Deputy Assistant Secretary Tom Baca, and Christian Holmes, Deputy Assistant Administrator for USEPA, have called for greater interagency coordination and streamlining of clean-up procedures. Both DOD and USEPA have made clear that expedited environmental restoration and interagency cooperation are not mutually exclusive.

Base closures have made this point practical. With regard especially to large bases slated for closure, it is clear that if expedited remediation procedures are not established and utilized, final cleanup of the facilities might be delayed indefinitely. Additionally, if expedited restoration procedures are not considered as a first resort, instead of as a last resort, the prolonged, multi-stage, time-consuming and expensive that we have experienced in the Superfund program will be repeated at taxpayer expense at federal facilities.

DOD AND ENVIRONMENTAL ACCOUNTABILITY

We believe a successful Environmental Restoration and Waste Management Program at DOD rests on four cornerstones which are

derived from extensive environmental experience in the industry and municipal sectors:

- Involve the people who know and have experience in the commercial contract world;

- Identify clearly what the DOD wants to achieve when soliciting bids, but don't stifle creativity on how to achieve these goals;

- Hold contractors accountable for the results;

- Align contractor incentives with the Department's desired results.

Take advantage of the best America has to offer. Involving companies that know the environmental business will mean accessing the commercial skills and experience that already exist. Superfund and other corrective action programs have given the commercial sector over a dozen years experience in the technical areas of restoration and waste management. DOD should take advantage of lessons learned. Moreover, DOD should challenge industry to find new and better solutions to DOD's problems, not constrict it with specified solutions and methods.

DOD must set out clear performance standards which the contractors must satisfy. These standards also will provide a clear measurement of environmental compliance. With desired results clearly stated, the contractor can then be given authority to solve the problems for DOD in a cost-efficient and environmentally effective way.

Holding contractors accountable will mean implementing contract mechanisms that measure performance by commercial standards. Accountable contractors, who possess the proper degree of control and authority at an installation, will have a clear incentive to produce what they promised. Accountable contractors have a bias for appropriate action, which lessens repetitive, overlapping site analysis and supports more integrated clean-up methods.

Aligning contractor incentives with the desired results and performance standards will bring more environmentally effective and cost efficient work. Saving costs and reducing time for tasks demand creative technical breakthroughs and a bias for action. Incentives, in the fee structure and bonuses for cost-and-time-savings, are essential elements in encouraging the best results.

DOD AND COMMERCIAL ENVIRONMENTAL ADVANTAGES

We would like to briefly focus on three innovative practices widely used in the private sector which could, if implemented

broadly where appropriate, save funds, protect the environment and establish the Department of Defense as the federal environmental leader. These could apply equally to closed, realigned and active DOD installations. When applied to base closures, these practices could greatly speed up the transfer process, and subsequent receipt of revenues for the federal government. The economically effected communities would benefit from the clean-up earlier and the near-term impact of closure will be lessened. These are not new ideas, but simply need to be applied in new areas and more broadly to meet DOD demands: integrated or "turn-key" contracts; substantial clean-up initiatives; and a capital development partnership program.

INTEGRATED, TURN-KEY RESTORATION CONTRACTS

The DOD, especially the Air Force, has boldly stated the need to explore consolidated, turn-key clean-up contracts whereby one contractor (or contracting team) is responsible for environmental services at a site. We strongly encourage the Department and the Military Services to focus on Integrated Restoration as a <u>first</u> resort, in order to avoid entering the fragmented Superfund approach at each installation. Where appropriate, the integrated, turn-key approach should prove a time and cost saver.

Under this approach in a remediation-restoration situation, the DOD would develop a compact but dependable RI/FS, using the most efficient and accelerated study techniques approved by EPA.

Contractors would then provide bids to complete all of the phases of the remediation and restoration. DOD would collect baseline data on the volumes and types of waste at the site and provide known site characteristics. Contractors or teams of contractors would then competitively bid for the project from completion of a final site investigation through technology implementation, identifying to the greatest extent possible fixed-prices or fixed-unit prices for wastes processed.

Many critics of the pace of cleanup at DOD facilities have concluded that the complex and exacting final clean-up standards of Superfund and other statutes may tend to trigger exhaustive study and corresponding delay. USEPA has been attempting to address this issue by proposing ways to streamline the site investigation process. The central premise is that use of an initial hydrogeological analysis to focus site monitoring will reduce the number of samples needed while at the same time assuring more accurate site characterization. These new procedures can accelerate the site evaluation phase dramatically and produce more accurate, reliable results.

Our company has had considerable experience with these new procedures and can attest to their success. In fact, in most Superfund situations we find we can conduct a very thorough RI/FS for a unit in three to six months, and at a fraction of the

traditional cost. The program we utilize has been made available to EPA and DOD, and is available to anyone else.

Experienced contractors, given accurate preliminary information on site and waste characteristics, can submit bids on the cost of performing the rest of the project. For smaller projects, such as removal of an underground storage tank or a motor pool area, literally hundreds of contractors will be experienced with this kind of bid. On larger restoration projects, DOD will find a large number of competitive contractors and teams of contractors prepared to bid.

CNES has broad experience with this approach. Firm fixed contracts make up more than half of the environmental restoration work performed by CNES and its parent company, Chemical Waste Management, Inc. We have conducted single contractor remedial projects for the DOD and through CNES Geotech have found our charges to be 45 percent of the charge for identical work carried out under the fragmented contracting model too often used in the Superfund program.

The incentives under this approach are right. There is considerable pressure for prompt, accurate, efficient action because the contractor has the burden to produce the required results within a high degree of fixed pricing. Moreover, this disciplined-bid approach by its nature encourages development of

new, more effective and cost efficient technologies. It must be stressed that fixed pricing is truly effective only if the contractor is accountable for specific environmental results. Short-term costs are then balanced with long-term environmental results.

SUBSTANTIAL CLEAN-UP INITIATIVES FOR DOE

Seeking the right regulatory approach can accelerate physical clean-up of a site. By expanding the application of the Superfund Interim Remedial Action Program and using it as a model for other remedial programs, DOD could contract for cleanup for far more sites than it envisions at present.

Under this approach, the contractor would perform a substantial remedial action that eliminates a site's threats to health and the environment, but does not achieve all applicable, final cleanup standards. The contractor would analyze the site, using the most focused and timely means sanctioned by EPA, and perform such tasks as removal and disposal of the source, or containment, treatment or removal of hot spots, plume containment and site stabilization. By the end of the process, all threats to health and environment in the surrounding vicinity should be eliminated or substantially reduced and the potential for contamination migration halted. DOD would then have a substantially clean site which could then be scheduled for final restoration.

The principle here is that DOD would be able to move aggressively to solve 80 percent of the environmental problem as quickly as possible. The last 20 percent of work often is the most difficult, sometimes is the most expensive and time consuming and can be subject to the greatest impact of later technology development. In some circumstances, the best approach for the first 80 percent is not the same as for the final 20 percent of a project. This program accelerates the greatest degree of cleanup and health protection, and saves money because the migration of contaminants is halted.

CAPITAL DEVELOPMENT PARTNERSHIP PROGRAM

In addition to investigating means to accelerate cost-effective clean-up, DOD should seek out private capital development in an effort to create rigorous performance warranties for installation facilities. At closed bases, anticipating transfer to the private or state-local government sectors, and at active installations, this cost-saving method might be used. It could have the effect of saving substantial capital budget funds. The Capital Development Partnership Program concept is an expansion of DOD's present long-term contracting authority in 10 USC, Sections 2809 and 2812. The Program is patterned after commercial sector practices in capital facilities development and long-term facilities management and operation. DOD has obvious need at active and realigned installations for facilities such as those for water treatment, waste treatment, thermal treatment,

containment, and waste-to-energy. DOD might also find application in certain situations involving closed bases.

In the past, DOD possessed a few methods for developing, building and operating such capital facilities. Assuming that the need for the facility was recognized by Congress, DOD was often forced to place the full cost of the design, construction, permitting and operation of the facility in the budget. At times, the product paid for did not work properly, was not able to be permitted, or cost too much to operate. Subsequent retrofits, added to the initial costs, have at times resulted in bogus or deserved charges of economic wastefulness and missed critical deadlines.

There is an alternative option for DOD to stem this cycle of costs and lack of performance. Under the Capital Development Partnership Program concept, the proposed DOD facility (for example, a waste disposal or treatment facility or a waste-to-energy plant) would, after a rigorous competition, be fully capitalized by private company which is an expert in that field.

Under this integrated "turn-key" approach in the capital facilities area, a contractor or team of contractors would design and build a capital facility, such as a waste disposal facility or an incinerator, and fully warrant the results. More expansively, competing contractors could provide a bid to perform

all services, from site investigation through facility design, permitting and operation -- all for a firm fixed price.

The Department of Defense has the assurance that it does not pay the contractor if it does not receive the environmental performance it requires. If the contractor is to incinerate wastes to a numerical clean air standard with warranted, permitted ash disposal, or to clean waste water to numerical water quality standards, it will perform enough study to assure that the waste stream is accurately characterized. It will then move very rapidly into design and construction of the treatment facility. Remember, the contract is paid only if it achieves the performance goal set out by the Department at the beginning. Contrast this commercial sector approach with the potential cost overruns that have accrued over several years at projects built for DOD, where such contractor accountability is absent.

Construction costs and permitting costs at the DOD site or adjacent land would be borne fully by the company. The company would receive a requirements contract for all waste to be disposed of, with the payment fully "subject to annual appropriations" (thus addressing the federal budget limitations). Whatever wastes DOD (or the new state-local government or private title holder in the case of closed bases) actually produced would be sent to the facility. DOD could then decide each year how much is produced or how much is to be disposed of subject to

annual operating appropriations. Thus, DOD would not have to "score" the capital costs and would not pay for anything, except the actual processing of wastes. These unit-price payments would therefore be "subject to annual appropriations" under a long-term contract. Arrangements could be made for unexpected termination of the contract.

DOD is, of course, now authorized under Title X to contract for certain facility operations for up to 32 years. That authority should be expanded to include more environmental categories, such as waste disposal and waste-to-energy; and long-term requirement contracts, subject completely to annual appropriations, with companies which fully capitalize the needed facility and assure all permits and certifications necessary under laws and regulations.

CONTRACTOR ACCOUNTABILITY

This Task Force is conscious of the valuable discussion ensuing in the federal contractor community regarding liability and accountability. In closing, we would briefly focus the Committee and DOD on two clear principles:

1. Contractors should be held accountable for the task they contracted to carry out and the results they promised. The commercial market is driven by this principle. If a customer such as DOD contracts to build a waste treatment

system which is to be capable of meeting specific standards, the Department should not bear the costs if the company cannot deliver on its promise. This is but one performance warranty often presumed in the commercial sector that DOD has a responsibility to demand of us in the contractor community;

2. No company should be expected to bear extraordinary and uncontrollable liability, especially regarding third party effects and prior existing conditions with future impacts. The contractor for DOD cannot "bet the Company" and thereby risk its very existence in areas where it has little or no control. Accountability must be commensurate with the degree of authority and control of the site and tasks given the contractor. In addition, the DOE must recognize that increased contractor accountability must be matched by rewards that reflect the added responsibilities.

In summing up, every contractor should be accountable for its performance, within its control under the contract, and not for others. The DOD should move its environmental restoration contracting in a manner that demands this carefully-defined accountability. The commercial sector demands such accountability. The federal government should accept no less.

Adopted at the 59th Annual Conference of Mayors
June 19, 1991, in San Diego, CA

ENVIRONMENTAL MITIGATION AT CLOSING MILITARY FACILITIES

WHEREAS, currently and in future years a number of cities are facing closure of military facilities located within or near to city jurisdiction, while other cities already have closed and abandoned military facilities in their jurisdiction; and

WHEREAS, there are significant, economic, fiscal and environmental impacts related to these facility closures; and

WHEREAS, many of the facilities scheduled or proposed for closure contain environmental hazards including asbestos in buildings or facilities to be removed, active and abandoned hazardous and/or toxic waste disposal areas, and groundwater contamination; and

WHEREAS, costs for assessment and cleanup or mitigation of environmental hazards and for economic conversion will be high at many closing facilities; and

WHEREAS, financial responsibility for this necessary cleanup rightfully belongs with the United States Government, Department of Defense and the particular branches of the military services responsible for creation or control of the hazardous conditions; and

WHEREAS, the Chairman of the House Armed Services Committee's Environmental Restoration Panel has proposed legislation to require that environmental hazards at closing military facilities be cleaned up in a timely and efficient fashion to allow transfer of uncontaminated portions of such facilities for other purposes prior to complete cleanup of all contaminated portions,

NOW, THEREFORE, BE IT RESOLVED that The United States Conference of Mayors urges the Department of Defense to assume all responsibility for environmental mitigation at closing and closed military facilities to facilitate turning them over to local control for reuse; and

BE IT FURTHER RESOLVED that The United States Conference of Mayors calls upon Congress to provide necessary statutory direction and funding to meet Federal cleanup responsibilities and to allow accelerated transfer of uncontaminated portions of closing facilities in a cooperative and timely fashion; and

BE IT FURTHER RESOLVED that The U.S. Conference of Mayors calls upon Congress to ensure that these properties are transferred to local governments at a cost not to exceed one dollar ($1) once mitigation has been achieved in order that the local economy benefits from the use of the property.

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CONTRACTING ISSUES AND ENVIRONMENTAL RESTORATION ACTIVITIES AT MILITARY INSTALLATIONS SCHEDULED FOR CLOSURE

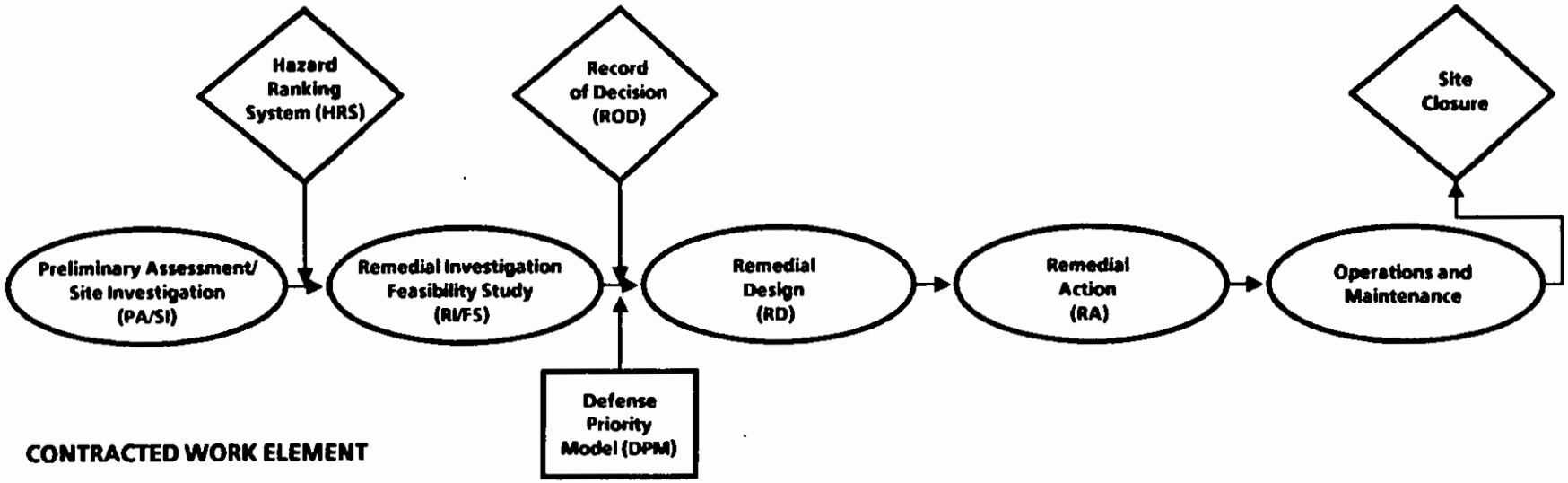
July 1991

OVERVIEW

- **Background**
  - Environmental restoration requirements
  - Construction contracting versus service contracting
  - Fixed-price contract versus cost-reimbursement contract
  - DoD environmental restoration contracting centers
- **Contractors' concerns**
- **Contracting issuess**
  - Contracting pool
  - Contracting models and methods
  - Turnkey approach
  - Contracting strategy
  - Third-party liability and construction bond
- **Summary**

ENVIRONMENTAL RESTORATION REQUIREMENTS

SUPERFUND PROCESS



CONTRACTED WORK ELEMENT

- Report preparation
- Historical record search
- Visual inspection
- Sampling/Analysis
- Geotechnical surveys
  - Electromagnetic
  - Ground probing radar
- Asbestos inventory

- Report preparation
- Monitoring well construction
- Sampling/Analysis
- Risk assessment
- Hydrogeological studies
- Pilot testing
  - Biological treatment
  - In-situ vitrofication
  - Pump and treat system
  - Soil venting
- Permit application
- Tank leak testing

- Full scale design
- Engineering performance development
- Specification/Drawings

- Emergency response
  - Removal/Disposal
  - Incineration
- Construction
  - Enclosures/Capping
  - Fences
  - Slurry walls
  - Earthwork
- Treatment
  - On-site incineration
  - In-situ vitrofication
  - Soil venting
  - Biological treatment
  - Groundwater treatment system

- Long-term monitoring
  - Sampling/Analysis
- Equipment replacement
- Engineering performance adjustment
- Technical support

CONSTRUCTION CONTRACTING VERSUS SERVICE CONTRACTING

- **The Department of Labor – the Administrator of the Wage and Hour Division – has the regulatory authority to determine which labor rate should be applied for each work element.**

  Construction contract: Contractor labor rate is administered under the Davis-Bacon Act (DBA). Contract awarded to actually alter the site conditions via clean-up actions, which include soil removal and disposal, posting fences, enclosing asbestos-containing areas, or construction of long-term remedial action.

  Service contract: Contractor labor rate is administered under the McNamara-O'Hara Service Contract Act (SCA). Contract awarded for technical expertise in engineering, chemical, social, life science, drafting, statistics, health and safety, and program/construction management or for operation of process-oriented remedial actions.

- **Contracting officer determines the classification of the contract**

- **Guideline for classifying work element (construction versus service) is unclear for new emerging technologies.**

  - Examples: bio-treatment, soil venting, in-situ vitrofication, and other process-related treatment technology.

FIXED-PRICE CONTRACT VERSUS COST-REIMBURSEMENT CONTRACT

Method	Fixed-price contract	Cost-reimbursement contract
Suboptions	Firm-fixed-price Fixed-price with economic price adjustment Fixed-price-incentive Fixed-price with redetermination	Cost-plus-award-fee Cost-plus-incentive-fee Cost-plus-fixed-fee Cost or cost-sharing
Risks	Contractor bears risk	Government bears risk
Suitability	Scope of work and reasonable prices can be defined at the time of contract award; e.g., construction, soil removal, simple service contracts, etc.	Scope of work can only be subjectively measured, but actual scope of work cannot be defined at the time of contract award; e.g., major system development, research and development tasks with clearly defined end product
Environmental restoration work	Traditional construction-type service work – removal, erecting permanent structures, capping, slurry walls, etc., where scope is clearly defined	Technical services work – PA/SI and RI/FS reports, risk assessment, pilot projects, implementation of innovative treatment technology, where scope is not clearly definable

DoD ENVIRONMENTAL RESTORATION CONTRACTING CENTERS

	Contracting center background	Primary contract method	Contractor pool	Contract limit
ARMY				
COE districts	Construction	Firm-fixed-price Cost-plus-fixed-fee	2 rapid-response contractors 7 preplaced contractors	5 years, $50 million
COE THAMA	Service	Cost-plus-award-fee	24 contractors 3 SB contractors	5 years, $15 million 2 years, $1.5 million
NAVY				
NAVFAC/NEESA (CLEAN) WEST DIV	Construction	Cost-plus-award-fee	8 regional contractors	10 years, $100 million
AIR FORCE				
Brooks AFB, TX	Service	Time-and-materials	10 preplaced contractors	5 years, $50 million
DOE Laboratories (HAZWRAP)	Service	Cost-plus-fixed-fee	8 regional contractors 2 alternatives	5 years, $ unlimited

CONTRACTORS' CONCERNS

- **Environmental restoration contractors are subject to numerous business risks**
  - **Unknown site condition/clean-up requirement**
  - **Changing regulatory standards**
  - **Application of many remedial technologies are not yet commercially proven**
  - **Strict environmental liability and nonavailability of insurance**
- **Protecting trade secrets to maintain a competitive edge**

CONTRACTING ISSUES

- Types of contracting pool
- Application of various contracting models and methods
- Application of turnkey approach
- Contracting strategy to expedite clean-up process
- Third-party liability and construction bond

CONTRACTING POOL

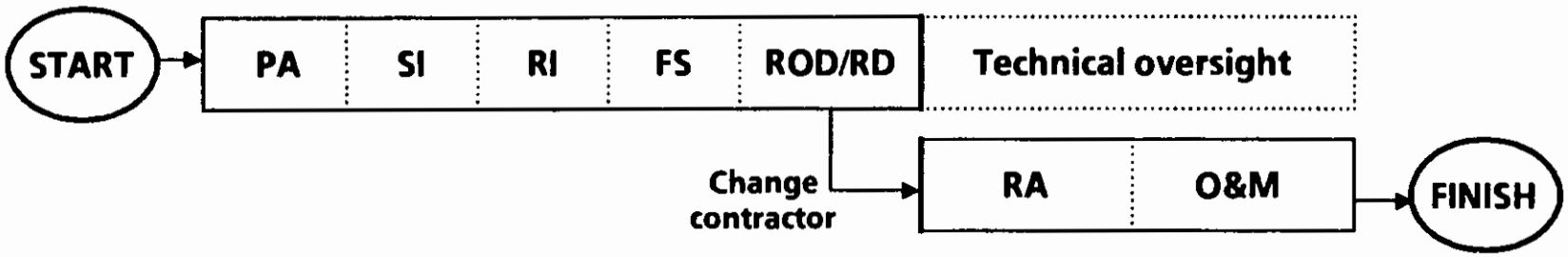
- **All environmental restoration contracting centers have established a pool of contractors based on each phase of the Superfund process**
  - **All of these contractor pools have limited capability and flexibility**
  - **Example: Brooks Air Force Base cannot perform RD/RA**
- **Services are planning to establish a pool of contractors with full-service capability and with more flexibility**
  - **Navy's CLEAN contract could be used for all phases of the Superfund process**
  - **Air Force plans to expand Brooks Air Force Base capability to perform all phases of the Superfund process**
  - **Corps of Engineers is expanding use of large indefinite delivery A-E/service contracts and preplaced remedial action contracts**

CONTRACTING POOL (Continued)

- **Creating a preplaced contracting pool of many qualified contractors is the key to ensuring competition**
  - Contracting officer must have leverage against preplaced contractors
  - Geographical monopoly within a preplaced pool of contractors should be avoided
- **There are several built-in incentives to make contractors competitive**
  - Preplaced contractors are screened through a competitive review process
  - Contract options are renewed annually
- **Having in-house ability to obtain and evaluate a second opinion is critical in minimizing fraud and abuse by contractors**
  - DoD needs highly qualified technical program managers and contracting officers to ensure a healthy competition among contractors, particularly for managing cost-reimbursement contracts

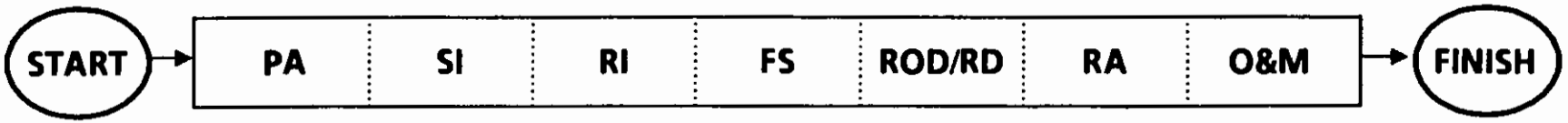
CONTRACTING MODELS

CONSTRUCTION MODEL



- The Federal Acquisition Regulation (FAR) 36.209 states design and construction works must be separated, and a contractor that performed the design work cannot bid on the follow-on construction work except with the approval of the head of the agency or an authorized representative
- ROD/RD contractor can be retained to provide technical oversight services

SERVICE MODEL



- Turnkey approach – one contractor manages a site from start to finish
- Artificial separation between design and construction is eliminated; use of this model is better suited for implementing process-oriented technology

CONTRACTING METHODS

CONTRACT OPTIONS MATRIX

Contract type	Primary contracting method: Fixed-price	Cost-reimbursement	Special use Time-and-materials*
Construction model	COE districts NAVFAC		
Service model	COE districts NAVFAC	COE THAMA DOE	COE Brooks AFB

* Time-and-materials contracting method is a special variation of cost-reimbursement contracting method.

CONTRACTING METHODS (Continued)

- **Environmental restoration activities require combinations of all contracting options outlined in the matrix**
- **DoD environmental restoration contracting centers are biased toward using a contracting option in which they have most experience**
  - **They would rather use a more familiar contracting method than explore use of a suitable alternative with which they are less familiar**
  - **This is an institutional weakness that can be corrected by improving contracting officer training on available contract methods**
- **Each contracting center must develop a capability to use various contracting methods**
  - **Training of contracting officers is critical**
  - **Services have made progress in establishing preplaced contractor pools and using innovative contracting strategies**

TURNKEY APPROACH

- The turnkey approach may prove to be a useful tool for contracting remedial actions that primarily involve process-oriented technology

- The turnkey concept can be used with prequalified pool of contractors who can perform all phases of the Superfund process or contractors selected by a separate open competition

- To explore potential uses of the turnkey approach which combines design and construction into one contract

CONTRACTING STRATEGY

- **Utilize a hybrid contract incorporating provisions covering all phases of the Superfund process**
  - **Where requirement develops, use task order contracting to quickly award a contract**
  - **Depending on scope of work, procurement time takes about 4 to 6 weeks after work is requested**
  - **Using a proper contract method for a specific requirement will significantly reduce the need for change orders.**
- **A dedicated procurement cell at each DoD environmental restoration contracting center could improve customer responsiveness**

CONTRACTING STRATEGY (Continued)

- All DoD contracting centers should have their own contracting authority to perform all phases of Superfund process provided that adequate technical oversight is available
- Consider adapting turnkey approach for awarding contracts requiring process-oriented technology
- Employ special provisions in contract to reimburse DOL-directed wage increases

THIRD-PARTY LIABILITY AND CONSTRUCTION BOND

- **DoD should explore using Public Law 85-804 (50 USC 1431) implemented in the FAR 52.250, *Indemnification of Contractors***
  - This will lessen the risk to contractors posed by strict liability standards
  - Contractors will remain responsible for their own negligence
  - Under cost-reimbursement contract method, contractor's insurance costs are directly passed on to Government
  - Indemnification allows contractors without liability insurance to compete for DoD contracts
- **Compliance with Miller Act (Performance and Payment Bonds) may lessen competition**
  - Use the authority in the Miller Act [40 USC 270(e)] to waive the requirements of the Act for cost-reimbursement contracts
  - More carefully evaluate bonding requirements for fixed-price contracts

SUMMARY

- **Having a capability to manage various contracting methods at each DoD contract center will reduce contract delays**
  - DoD acquisition managers should have some flexibility in deciding contract types
  - Expanding the present preplaced pool of contractors will give DoD remedial managers more flexibility
- **Establishing a dedicated procurement cell at each DoD contract center will expedite contracting**
  - The cell should consist of contracting officers who have expertise in both fixed-price and cost-reimbursement contracts, experienced site remediation managers, and auditors
  - In hiring contracting officers, DoD contract centers should concentrate on past familiarity and experience with cost-reimbursement contracts
- **Close coordination with DOL is important since DOL determines the wage classifications (construction versus service) of new emerging remedial technologies**

Alternative treatment technologies may be available, innovative or emerging

ALTERNATIVE TREATMENT TECHNOLOGIES FOR HAZARDOUS WASTES

Technology	Description of Process or Equipment	Example Applications	Status	Considerations	Relative Cost
Physical Treatment					
Magnetic processes	Magnetic-separation devices	Debris presort	Commercial	Limited applications	Low
Screening and classification	Standard manufactured units	Separation of oversize materials	Commercial	Reprocessing or disposal of miscellaneous material	Low
Crushing and grinding	Standard manufactured units	Size reduction of solid material for further processing	Commercial	Fugitive emissions	Low
Liquid/solid separation Sedimentation (with or without flocculation) Filtration, Centrifugation, Flotation, Belt presses, Filter presses	Standard manufactured units	Remove particles from liquids Remove excess moisture from solids or sludges	Commercial	Solid still contains some liquid	Low
Drying	Standard manufactured units	Sludge drying	Some Experimental Some Commercial	Mechanical problems air emissions	Expensive
Distillation	Multitray or packed column with heating and condensing device	Solvent purification for reuse	Commercial	Scaling and/or fouling Flammability hazard with some solvents	Medium
Evaporation	Single-stage, multistage or vapor-compression evaporators that may include crystallization step	Nuclear wastes Electroplating wastes	Commercial	Scaling and/or fouling Condensate is sometimes contaminated Disposal of concentrate	Moderately high
Stripping Steam, Air, Other gas	Multitray or packed column with gas injection	Sulfide stripping Trichloroethylene stripping	Commercial	Limited to volatile components Air emissions	Low to medium
Absorption	Multitray or packed column with appropriate solvent	Usually for emission control	Commercial	Disposal of scrubbing liquor	Low
Solvent extraction Liquid-liquid, Solid-liquid, Supercritical fluid	Standard process (Supercritical fluid under development)	Extracting contaminants from soil Extracting metals from liquid	Commercial (Supercritical fluid under development)	Contaminated solvent requires further processing for disposal	Moderately high
Adsorption Carbon, Resin (ion exchange, others); proprietary systems	Batch or continuous adsorption beds, usually with regeneration	Organic adsorption onto carbon Heavy-metal adsorption onto resins	Commercial	Limited to low concentrations Disposal of regenerate	Medium
Membrane processes Ultrafiltration, Reverse osmosis, Dialysis, Electrodialysis	Standard manufactured units with appropriate pretreatment facilities to prevent membrane fouling and/or deterioration	Removal of heavy metals or some organics from groundwater	Recently commercial	Separations are imperfect Pretreatment is complex	Medium
Freezing Crystallization, Freeze drying, Suspension freezing	Many types of units	Suspension-freezing ponds for hydrous metal hydroxides	Experimental other than drying/freezing beds	Not commercially developed	Low for drying beds, high for others
Chemical Treatment					
Neutralization	Chemical addition and mix tanks	Neutralization of acid and alkaline wastes	Commercial	Heat release in concentrated Control complex	Low
Precipitation	Chemical addition, to produce an insoluble solid	Heavy-metals removal	Commercial	Solubility laws interfering substances	Low
Electrochemical processes	D.C. power and plating apparatus	Copper removal	Some commercial Some experimental	Impurities can upset process	Medium
Oxidation Chlorine-containing reagents, Ozone, Permanganate, Peroxide, Others	Chemical addition and contacting tanks	Trace-organic destruction	Some commercial Some experimental	Side-reactions may generate other hazardous constituents	Medium to high
Reduction Dechlorination, Sulfonation, Other	Chemical addition and contacting tanks	Reduction of hexavalent chrome, Dechlorination of dioxin	Some commercial Some experimental	Side-reactions may generate hazardous constituents	Medium to high

ALTERNATIVE TREATMENT TECHNOLOGIES FOR HAZARDOUS WASTES

Technology	Description of Process or Equipment	Example Applications	Status	Considerations	Relative Cost
Photolysis Ultraviolet light Natural light	Photolamps and contacting devices	Dioxin destruction Cyanide destruction	Semi-commercial	Fouling of photo-chemical devices Kinetics	Low for natural, High for UV
Gamma irradiation	Shielded irradiator	Pesticide destruction	Experimental	Sophisticated irradiator design	High
Miscellaneous chemical treatments Catalysis, Hydrolysis Others	Chemical additions and contacting tanks	Pesticide destruction	Experimental	Side-reactions may generate other hazardous constituents	Varies
Biological Treatment					
Activated sludge lagoons: Aerated Facultative Anaerobic	Common commercial system designs	Removal of organic materials from water	Commercial	Only effective on biodegradable or bioadsorbable constituents subject to toxic inhibition	Low
Anaerobic digestion Composting, Trickling filters, Aerobic biofilters, Fermentation, Waste-stabilization ponds	Common commercial system designs	Removal or organic materials from water	Commercial	Only effective on biodegradable or bioadsorbable constituents. Subject to toxic inhibition	Low
New biotechnologies Enzyme, Cultured bacteria, Gene splicing	Biochemical addition system	—	Experimental	Field is new, so considerations are not well understood	Low to Medium
Thermal Treatment					
Established incineration processes Fluidized bed, Multiple hearth, Rotary kiln, Liquid injection, Shipboard	Standard commercially marketed units	Industrial incinerators Contract hazardous-waste incinerators	Commercial	Fuel value Destruction efficiency Disposal of ash and scrubber blowdown	Medium to high
Evolving incineration processes Molten salt, Microwave plasma, Plasma arc	Developmental unit	Dioxin destruction	Experimental	Technology not well developed	High
Codisposal incineration processes Industrial boiler, Cement kiln, Lime kiln	Standard units	Waste-solvent burning	Commercial	Fuel value Effects on emissions-control equipment	Low to medium
Pyrolysis Conventional temperature Ultra high temperature	Proprietary units	Organics destruction	Mostly experimental	Byproducts generated may be hazardous	Medium
Wet-air oxidation Autoclave, U-tube reactor, Vertical-tube reactor	Proprietary units	Organics destruction	Many commercial, but mostly in non-hazardous-waste applications	Process is only 85-95% efficient	Medium
Fixation/Encapsulation					
Sorption Flyash, Kiln dust, Lime, Limestone, Clays, Vermiculite, Zeolites, Alumina, Carbon, Imbiber beads, Proprietary agents	Stabilizing materials and contacting methods	Solidifying hazardous wastes	Commercial	Long-term effectiveness	Medium
Pozzolanic reaction Lime-flyash, Portland cement	Mechanical equipment for mixing and reaction	Solidifying hazardous wastes	Commercial	Organic agents sometimes interfere with reaction	Medium
Encapsulation Organic polymers, Asphalt, Glassification, Proprietary agents	Stabilizing materials and mechanical equipment for encapsulation	Solidifying hazardous wastes	Some experimental	Long-term effectiveness	Medium to high

Source: Ref. [8]

TYPES O
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	FIXED PRICE (GREATEST RISK ON CONTRACTOR)				COST RE (GREATEST RI	
	FIRM FIXED-PRICE (FFP)	FIXED-PRICE WITH ECONOMIC PRICE ADJ	FIXED-PRICE INCENTIVE (FPI)	FIXED-PRICE WITH REDETERMINATION (FPR)	COST-PLUS-AWARD-FEE (CPAF)	COST-PLUS-INCENTIVE-FEE (CPIF)
APPLICATION AND ESSENTIAL ELEMENTS	Reasonably definite design or performance specifications available. Fair and reasonable price can be established at outset. CONDITIONS FOR USE: Adequate competition. Prior purchase experience of the same, or similar, supplies or service under comparable conditions. Valid cost or pricing data. Realistic estimates of proposed cost. Possible uncertainties in performance can be identified and costed. Contractor willing to accept contract at a level which causes him to take all financial risks. Any other reasonable basis for pricing can be used to establish fair and reasonable price.	Uncertain market or labor conditions during the production period and contingencies which would otherwise be included in the contract price can be identified and made the subject of a separate price adjustment clause. Contingencies must be specifically defined in contract. Provides for upward adjustment (with ceiling) in contract price. May provide for downward adjustment if price of controlled element has personal of falling below the levels established in the contract. Three general types of EPAs: Adjustments based on established prices. Adjustments based on actual costs of labor or material. Adjustments based on cost indexes of labor or material. FAR Clauses: 52.216-2 52.216-3 52.216-4	Cost uncertainties exist but there is potential for cost reduction and/or performance improvement by giving contractor a degree of cost responsibility and a positive profit incentive. Profit is earned, or lost, based upon relationship that contract's final negotiated cost bears to total target cost. Contract must contain: target cost, target profit, ceiling price, and profit sharing formula. There are two forms of this contract: firm target (FPIF) and successive targets (FPIS). FIRM TARGET: firm target cost, target profit, and profit sharing formula are negotiated into initial contract; profit is adjusted upon contract completion. SUCCESSIVE TARGETS: initial cost and profit targets are negotiated into contract but final cost target (firm) cannot be negotiated until sometime during performance. Contains production point(s) at which either a firm target and final profit formula, or a firm fixed-price contract, can be negotiated. Elements which can be incentivized are: costs, performance, delivery, and quality.	There are two forms of this contract: PROSPECTIVE: used when it is possible to negotiate a fair and reasonable price for an initial period of performance but not for entire contract period. Contract is firm fixed-price at the start. At a specific time(s) during performance the contract price is redetermined either up or down. A price ceiling, if appropriate, should be negotiated into the original contract. RETROACTIVE: used when realistic fixed-price cannot be negotiated initially, or when contract amount is so small, or time so short, that any other contract type would be impractical. Additional ceiling price is negotiated into original contract and final price is negotiated after contract is completed. FAR Clauses: 52.216-5 52.216-6	Contract completion is feasible, expenses are assured but performance not susceptible to fixed measurement. Provides for SUBJECTIVE evaluation of contractor performance. Contractor is evaluated at stated time(s) during performance period. Contract must contain clear and unambiguous evaluation criteria to determine award fee. Award fee is earned for excellence in performance, quality, timeliness, ingenuity and cost effectiveness and can be earned in whole or in part. Two separate fee pools can be established in contract: A base fee not to exceed 3% of the contract's estimated cost and an award fee. The total award fee plus base fee cannot exceed the statutory limits shown in FAR 15.903: A&E—6%, production and service—10%, and R&D—15% of estimated cost. Award fee earned by contractor is determined by the contracting officer and is often based upon recommendations of an award fee evaluation board. FAR Clause: 52.216-7	Development has a high probability that it is feasible or positive profit incentives for contractor management can be negotiated. Performance incentives must be clearly spelled out and objectively measurable. Fee range should be negotiated to give the contractor an incentive over various ranges of cost performance. Fee is adjusted by a formula negotiated into the contract in accordance with the relationship that total allowable cost bears to target cost. Total fee cannot exceed the statutory limits shown in FAR 15.903: production and services 10% and R&D—15% of estimated cost. Contract must contain target cost, target fee, minimum and maximum fees, and fee adjustment formula. Fee adjustment is made upon completion of contract. FAR Clause: 52.216-7
LIMITATIONS	Price not subject to adjustment regardless of contractor performance costs. Places 100% of financial risk on contractor. Places least amount of administrative burden on contracting officer. Preferred over all other contract types. Used with advertised or negotiated procurements.	Price can be adjusted up or down upon action of an industry wide contingency which is beyond contractor's control. Reduces contractor's fixed price risk. Fixed price with EPA is preferred over any cost reimbursement type contract. If contingency materializes, the contract administration burden will increase. Used with negotiated procurements and, on rare occasions, with formal advertising when determined to be feasible.	Requires adequate contractor accounting system. Contracting officer must determine that contract type is least costly and best of any other type would be impractical. Government and contractor administrative effort is more extensive than under other fixed price contract types. Used only with negotiated procurements. Selling prices must be established for interim payments.	FOR BOTH: contracting officer must determine that a firm fixed price contract will not satisfy requirements. Contractor's accounting system must be adequate. Prospective period must be made to conform to contractor's accounting periods. Price must be redetermined promptly at time(s) specified. Redetermination must be done promptly when contract completion. Must establish ceiling price in the original contract that represents the contractor's assumption of reasonable degree of risk. Requires approval, in writing, from the head of a contracting activity. Used only with negotiated procurements.	Weighted guidelines will NOT be used to determine either base or award fee. Government's determination of amount of award fee earned by the contractor is NOT subject to disputes clause. CPAF contract cannot be used to avoid either CPIF or CPFF type if either is feasible. Should not be used if the amount of money, period of performance or expected benefits are insufficient to warrant additional administrative effort. Very costly to administer. Contractor must have an adequate accounting system. Used only with negotiated procurements. D&F required.	Difficult to negotiate range between the maximum and minimum fees so as to provide an incentive over entire range. Performance must be objective measurable. Costly to administer, contractor must have an adequate accounting system. Used only with negotiated procurements. Appropriate Government surveillance during performance is required to evaluate effective methods and encourage cost controls are used. D&F required.
SUITABILITY	Commercial products and commercial type products, military items for which reasonable prices can be established, and services.	Commercial products and commercial type products, military items for which reasonable prices can be established at time of award, and services.	Development and production.	PROSPECTIVE: quantity production or services. RETROACTIVE: research and development of $100,000 or less ONLY.	Level of effort services that can only be subjectively measured, and contracts for which work should have been accomplished under another contract type if performance objectives could have been expressed as definite minimums, targets, and goals susceptible of being artfully measured.	Major systems development or other development programs where it has been determined that this contract type is desirable or administratively practical.
FAR	16.202	16.203	16.403	16.205 (Prospective) 16.206 (Retroactive)	16.404-2	16.404-1

STATE AUTHORIZATION

- Congress envisioned that Subtitle C would be administered by the States
- States are eligible to seek authorization to implement and enforce a hazardous waste program
- Authorized State programs operate in lieu of the Federal program; EPA administers the Federal RCRA program in non-authorized States

STATE AUTHORIZATION

- Prior to HSWA, Federal rules promulgated after a State obtained base authorization did not take effect until the State adopted that requirement

- Non-HSWA rules (promulgated under pre-HSWA authorities) are effective only in non-authorized States

- Rules promulgated under 1984 HSWA authorities are immediately effective in both non-authorized and authorized States

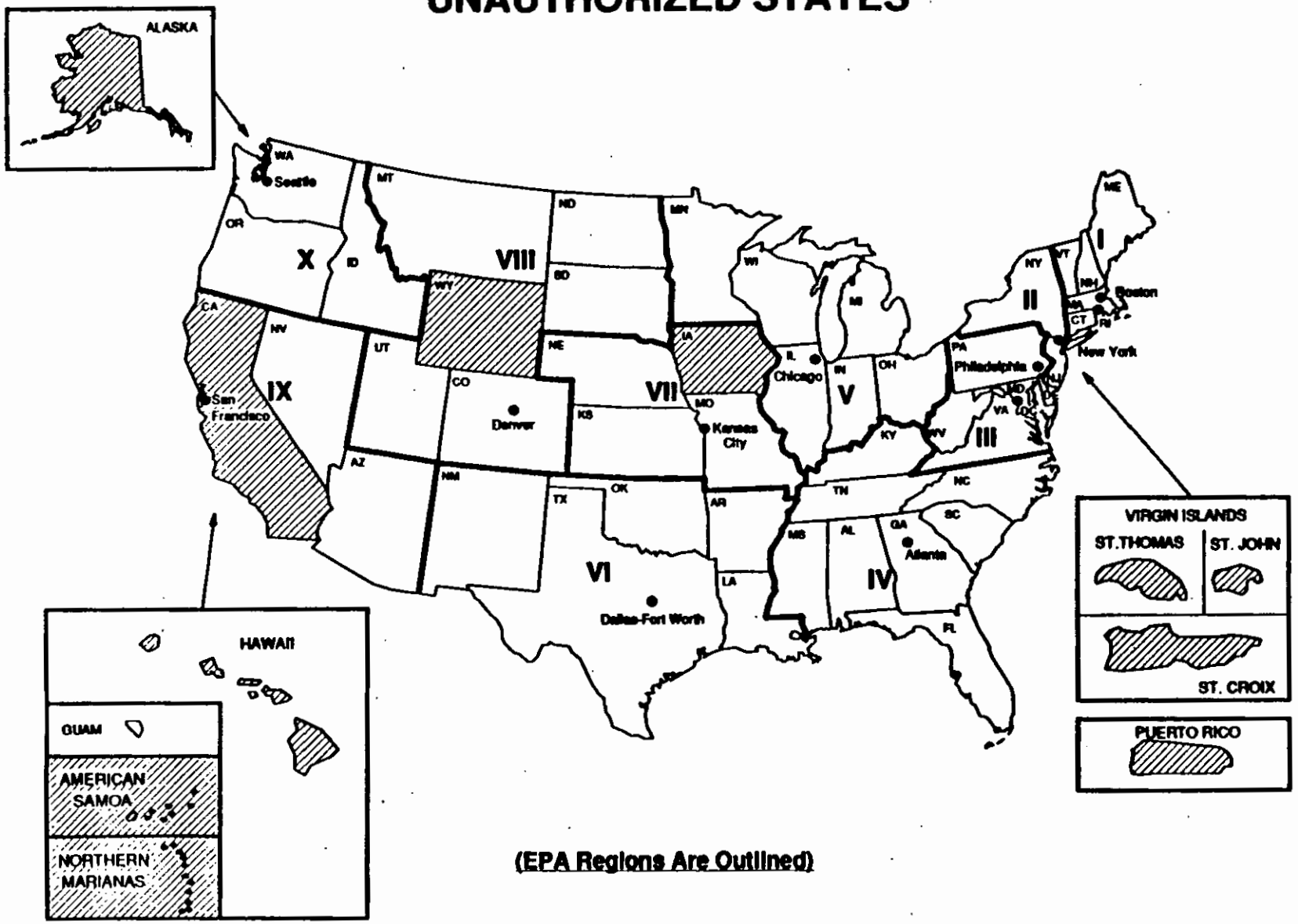
STATE AUTHORIZATION

- EPA authorizes State hazardous waste programs which are at least as stringent as the Federal RCRA program
- Authorized State programs may be more stringent than the Federal RCRA program
- EPA retains enforcement authorities and oversight responsibilities
- States receive funding from EPA through RCRA grants under Section 3011

STATE AUTHORIZATION

- Forty six States and territories have been authorized for RCRA
- Ten States and territories currently are unauthorized for RCRA (including Alaska, California, Hawaii, Iowa, and Wyoming)

UNAUTHORIZED STATES



(EPA Regions Are Outlined)

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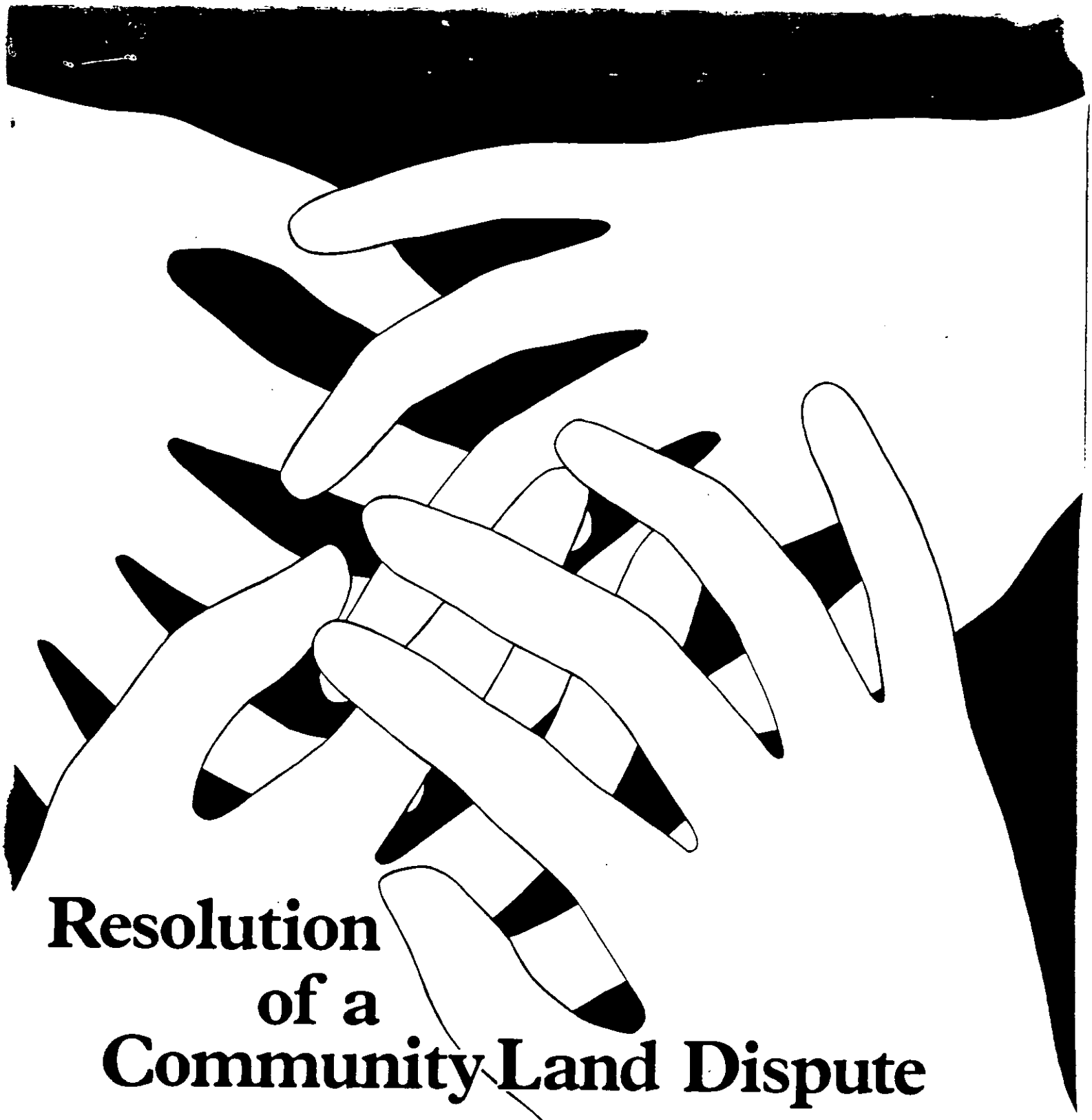


Resolution of a Community Land Dispute

A Rhode Island Case Study

President's Economic Adjustment Committee

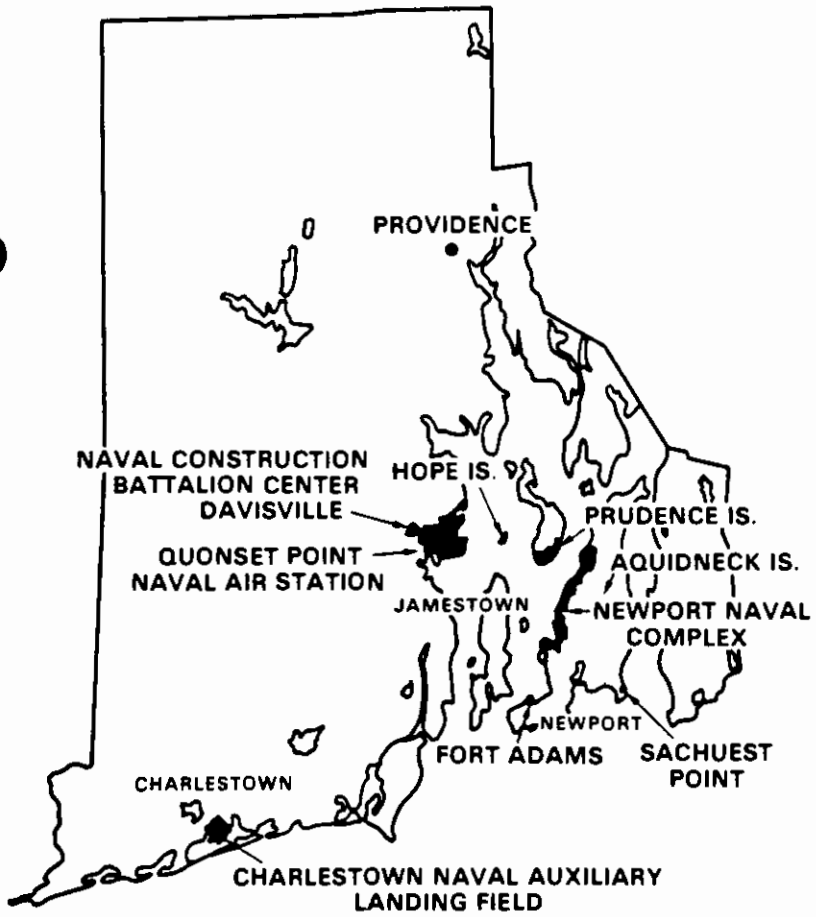
The conflicts over land use in Rhode Island which comprise this case study, arose from planning for the reuse of former Defense facilities, part of an ongoing Defense Economic Adjustment Program. Resolution of conflict was a critical factor to the success of the program.. To resolve outstanding differences impeding reuse planning and property disposal, the Rhode Island mediation effort was established.

Funding support was provided by Department of Defense (Office of Ecomic Adjustment) with the cooperation of the New England Regional Commission. This enabled the State of Rhode Island to contract with Ecofunding, the non-profit organization that designed and implemented the mediation program. Ecofunding was also supported by a grant from the Henry P. Kendal Foundation.

Persons responsible for this effort at Ecofunding include Judith Reitman, Editorial Director (Brochure Preparation), Debra Mellinkoff, Project Director (Mediation), and William R. Butler, President. Resolution would not have been possible, however, without the determined and unselfish efforts of the Rhode Island participants who were deeply concerned about the future of their state.

This community guidance manual has been prepared under the auspices of the President's Economic Adjustment Committee (EAC) in accordance with its clearinghouse function for information exchange among federal, state and local officials involved in resolving community adjustment problems. The process pursued in Rhode Island should have potential application in other situations.

RHODE ISLAND SURPLUS NAVY LANDS



Resolution of a Community Land Dispute

A Rhode Island Case Study

Community Guidance Manual VI
May 1980

Years of Conflict

In 1973, the Department of Defense (DOD) closed several naval facilities in Rhode Island, totalling approximately 4,000 acres. By law the General Services Administration (GSA) is charged with the disposal of surplus federal property. Compliance with the National Environmental Policy Act (NEPA) is required in the disposal process. To offset significant job losses from the base closures, an interim use lease was negotiated with the State for areas of Quonset/Davisville properties, so that productive, civilian use could be made of the property during the disposal process.

Between 1973-1976, the Rhode Island Port Authority, the State agency responsible for the leased property, negotiated 55 leases to various firms, many of which were oil-related industries. Prompted by this action and their concern for the environmental consequences of surplus land redevelopment, a coalition of five environmental organizations (Conservation Law Foundation of Rhode Island, Audubon Society of Rhode Island, Save the Bay, Acquidneck Island Ecology), filed suit in November 1975, against GSA, charging that the requirements of NEPA had not been met during disposal. This move was based on the environmentalists' contention that NEPA required the GSA to prepare a "cumulative" EIS for the disposition of all Navy lands in Rhode Island.

As a result of this litigation, the GSA was barred from selling the Charlestown Naval Auxiliary Landing Field to the New England Power Company for its proposed nuclear facility. An EIS had to be completed before disposal could proceed.

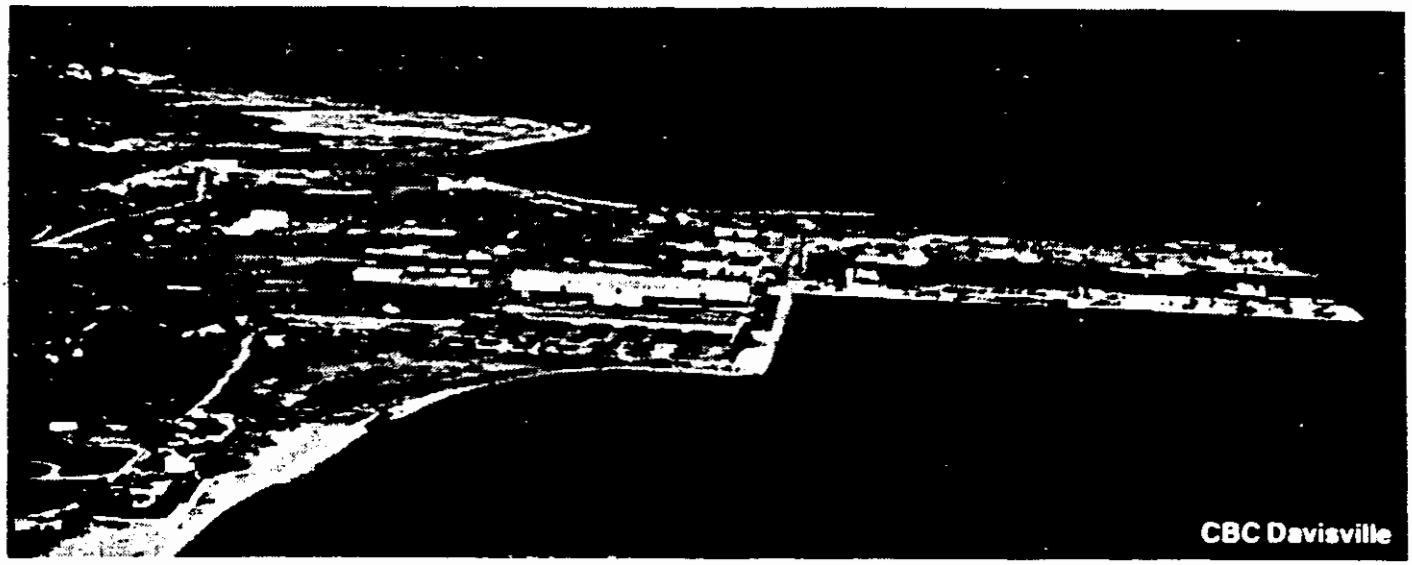
In January 1976, the environmental coalition filed a subsequent suit against the GSA to compel production of an EIS for the Quonset/Davisville and Acquidneck Island (East Bay) parcels before disposition of the properties. Since the GSA had insufficient funds to prepare the required EIS's, funds were made available by DOD, so that disposal and reuse of the property could proceed as quickly as possible. Work on the EIS's began in the Fall.

Faced with the reality of high unemployment, limited suitable industrial land,and the absence of a comprehensive land management plan, the State considered resolution of this conflict imperative. However, due to the potent economic, political, and environmental ramifications of the land development, each of these interest groups remained adamant regarding their view on optimal land use. Hostility between the actors further polarized pro-developmental and environmental positions. Extended litigation appeared inevitable.

An Alternative Through Mediation

In an effort to move toward a viable resolution of this dispute, to speed planning and disposal, DOD and the State decided to establish a forum for dispute resolution, with the assistance of a non-profit organization which helps communities with environmental problem solving. Early in 1977 this organization began to investigate environmental mediation methodologies. Final selection of the approach was made by participants and the Governor's Office.

Months were spent identifying the appropriate representatives from each interest group who would participate in a series of 4 meetings. Staff members of the firm awarded the GSA contract for preparation of the EIS for Quonset/Davisville and East Bay parcels, were also invited to attend these sessions.



When the 30-40 leaders from business, labor, environment, state and local government first met formally, the lack of communication was as extreme as the hostility nurtured by 4 years of intense conflict. Old grievances and preconceived biases were aired—vocally and emphatically. Misperceptions generated by media coverage aggravated an already volatile situation.

Despite the vociferous atmosphere of the first session, the majority of attendees expressed interest in pursuing this method of dispute resolution. During the second meeting in January 1978, which the press did not attend, each group cogently expressed its concerns. Areas of conflict were thereby identified, and those areas not inherently suitable to compromise (e.g. proposed nuclear facilities) eliminated from debate.

Environmentalists strongly endorsed the notion of a resource-oriented, comprehensive land use plan for the surplus property and demanded increased participation in the review of public and private sector development. Fearing excessive regulation of intended industrial development, business leaders distrusted the environmentalists' "obstructionist" actions. Government pressured for an immediate resolution in order to curb the devastating social and economic impact of Rhode Island's loss of $300 million in cash flow. And, labor, concerned with the loss of 6,000 jobs, sought adoption of a master land use plan which would, hopefully, result in a more stable job climate.

Due to the pervasive hostility, the mediator decided that an informal setting would be more conducive to problem resolution. At the close of the second session, participants endorsed the creation of an Executive Committee with representation from each faction. Meeting bi-weekly, this committee would seek consensus on the heated issues. Government representatives from the Department of Economic Development, Department of Environmental Management (DEM), Statewide Planning Program, and the Governor's Office provided technical support, while representatives on the Executive Committee kept their constituencies informed as to the progress of the agreement.

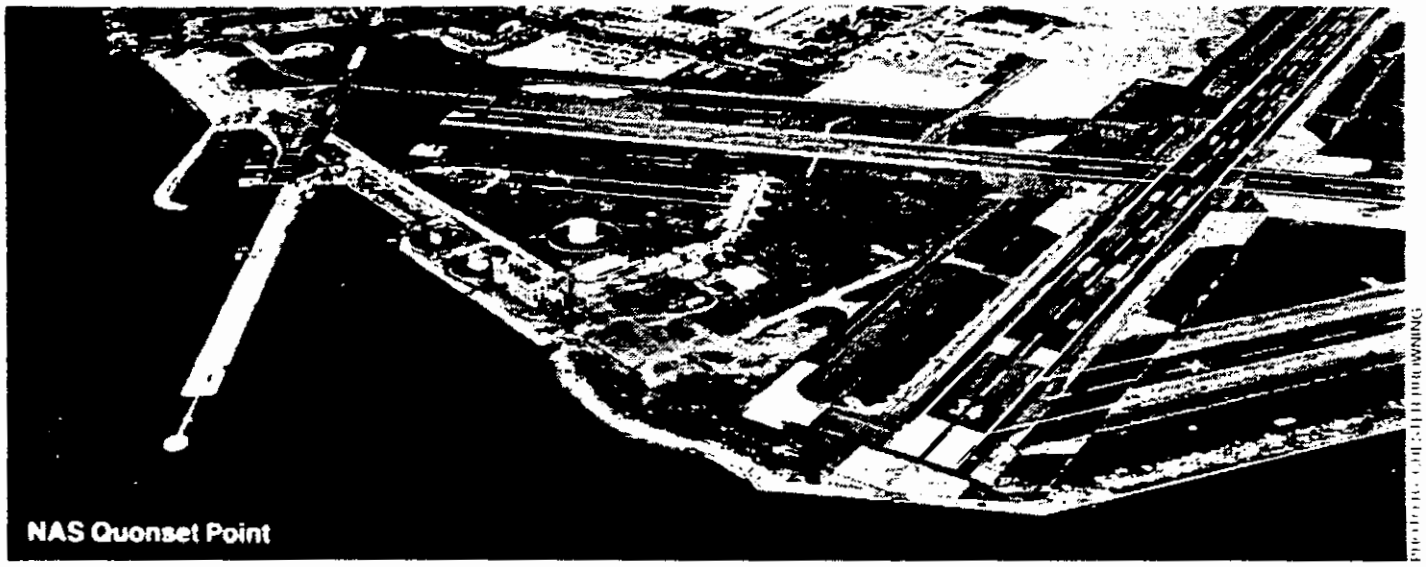
Due to unanticipated constraints on the appointed mediator's time, the mediation Project Director assumed this rigorous position which demands intensive, irregular hours and constant, personal contact with the participants at the site of the mediation, in this case Rhode Island.

The Issues: Fears and Resolutions

Coddington Cove In their 1976 court action, environmentalists agreed to excise Coddington Cove from their suit due to the Cove's tenuous surplus status. At that time, the Navy made a tacit agreement with the State and environmentalists that the latter group would be given opportunity to comment on the Candidate EIS (CEIS) for development of the Cove property.

In November, 1977, the CEIS was released. Then, in February 1978, the Navy filed a "negative declaration" stating that the proposed construction of a shipyard did not warrant a full EIS evaluation. Such a declaration clearly violated the Navy's 1976 agreement with the State and environmentalists.

In order to avoid a potential suit against the Navy, a series of mediations with Navy and environmental leaders were initiated. Negotiations produced a binding agreement which assured that proper environmental consideration would be given to the development of Coddington Cove; specifically, 1. oil and toxic wastes generated by shipyard operations would be disposed of according to applicable laws, and, 2. reports on intended disposal procedures would



NAS Quonset Point

be reviewed by the Department of Environmental Management.

Oil Development Environmentalists viewed oil development as an aggravation rather than as a solution to economic conditions in Rhode Island and warned of the toxic effects of an oil refinery on Narragansett Bay. Business, however, identified the oil industry as the only developer with a firm interest in the Davisville site and termed concerns about environmental hazards irrelevant. Labor maintained that satellite industries generated by oil development would create desperately-needed jobs.

During the mediation, the environmentalists' contentions received no support from State, business and labor representatives. Consequently, environmentalists withdrew their objection and conceded to the development of oil support facilities on the Navy lands.

Land Use Planning Although the majority of participants favored a comprehensive land use plan, the uncertainty surrounding future development precluded the formulation of such an approach. Environmentalists offered a set of evaluation criteria which would determine the economic and environmental effects of potential development. These plans were endorsed by the Executive Committee and sent to the Departments of Economic Development and Environmental Management and the Statewide Planning Program. The proposal guidelines were accepted as valid. Implementation of the criteria would encourage productive interaction between business, labor, environmentalists and government in the selection of appropriate industrial development.

Occupational Safety and Health In response to the State's request to excise a portion of the Quonset Base for construction of a new Electric Boat facility, environmentalists requested stricter enforcement of OSHA regulations governing potentially hazardous (toxic) working conditions at the original EB plant. Initially unsupportive of the environmentalists' position, business stated that the federal OSHA laws were adequate and expressed concern over further government regulation.

Labor's first reaction to the OSHA issue was one of suspicion: why the sudden charge that OSHA regulations were inadequately enforced?

Nonetheless, environmentalists insisted upon resolution of the issue before excising the EB parcel from their suit. After seven months of intense negotiations, a compromise agreement was reached between the State and environmentalists which assured that further development would meet State and Federal standards governing occupational safety and health.

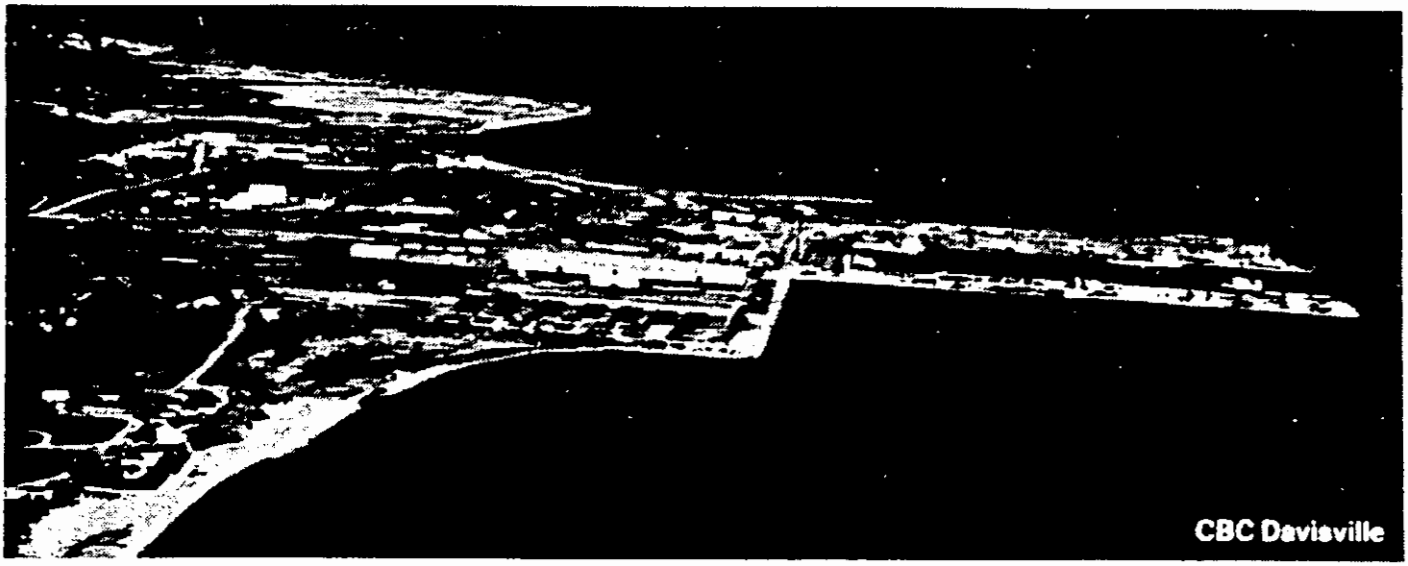
By the end of 1978, the State had concluded negotiations with the GSA for the purchase of the Electric Boat, Airstrip, and Air National Guard parcels.

The Environmental Impact Statement (EIS) When the mediation process began in Rhode Island, participants believed the EIS to be an appropriate mechanism by which to resolve the dispute. In May, 1978, when GSA released the draft EIS on the Quonset/Davisville and East Bay parcels, State officials, business and environmentalists expressed concern that the draft's failure to address critical issues increased the possibility of litigation over the final document.

The Executive Committee then developed evaluation criteria which facilitated acceptance of the final EIS, released in November, 1978.

From Skepticism to Support

The following assessment by participants in the mediation process may be useful to other communities experiencing similar conflicts. Hopefully, our suggestions will help in the de-



signing of other effective local programs for resolution of environmental disputes.

Labor Despite past experience with mediation, labor was, initially, a reluctant participant and particularly suspicious of environmentalists' motives. Noted Mr. Prentice Witherspoon, President of the Food Handler Local Union 328 AFL-CIO:

"My interest in this issue of disposition of the Navy lands is simply—jobs...My initial perception of the mediation process was less than complimentary. There were too many people representing the environmentalists to have much hope for any progress."

Upon familiarization with the nature of the dispute, labor actively and constructively participated. With the cooperation of industry representatives, labor achieved success in "selling the need for a balanced environment—physical, economic and social."

The key to the success of the process was, according to labor, "the development of mutual respect and trust by the parties involved." Mr. Witherspoon recommends that "future disputes be handled in much the same manner, with some fine tuning." That is, all interested parties should participate in the initial two meetings, then representation reduced to two persons per party. As to the use of outside resources, Mr. Witherspoon comments:

"I was most impressed with both the ability and dedication of those involved, but the process could have been speeded up considerably with better orchestration of resource people."

Mr. Prentice Witherspoon

"The key to the success of the entire process was the development of mutual respect and trust among the parties."

Business Although business shared the environmentalists' desire to maintain the unique beauty of Narragansett Bay, their primary concern was industrial development with minimal regulation. Aware of the need for accomodation, business was consistently supportive of the mediation process and proved to be highly constructive in working toward agreement. Business representative John Simas, Manager, Cranston Plant, CIBA-GEIGY Corporation, dealt with environmentalists on industrial siting concerns. He stated:

"I believe the process has merit. The process provided the opportunity for adversary groups to come together, state their concerns and, in turn, reach concensus on establishing controls for the appropriate use of Navy lands. It proved that people with different backgrounds and views can develop a focus that provides for long-term, better solutions than otherwise could have been developed."

As did Mr. Witherspoon, Mr. Simas believes that:

"Some efficiencies could be achieved by allowing the parties to have a venting session(s), but shortly thereafter to structure a representative group to identify all the concerns and start working on those issues as early as possible."

NAS Quonset Point

He also recommends that the same mediator serve throughout, without interruption, in order to expedite the process.

Mr. John Simas

"The process provided the opportunity for adversary groups to meet, state their concerns and reach consensus."

Environmentalists According to Harold Ward, Dean of the Environmental Pre-Law Program at Brown University and founding member and Director of the Conservation Law Foundation of Rhode Island, the environmentalists welcomed the initiation of an alternative process (mediation) which promised to develop land-use controls which could be implemented by state government and which, by agreement, would appropriately balance environmental protection with economic growth.

Recognizing the need for clearly enunciated positions, the environmentalists remained consistently active in developing specific land use recommendations, many of which held promise for achieving consensus. Mr. Ward suggests that in order to create a successful mediation, working groups should be kept to a minimum and an independent method be devised for representatives of the various interests to consult with their constituents. The facilitator should encourage the momentum of the sessions and remain throughout the process as a stable force. Mr. Ward further advises that the participation of public interest groups, which typically do not have paid staffs, be funded. He notes that only through the threat of injunction did environmentalists achieve equal bargaining stature:

"It may be that for environmental groups the possibility of litigation will be adequate to give credibility to their participation in the mediation process."

Mr. Harold Ward

"The mediation opened lines of communication previously blocked by many of the participants' biases."

State and Local Government At the outset, government officials, pressured by the substantial loss of cash flow, were impatient and insistent upon an immediate resolution.

Mr. Charles H. Vernon, Chief Plan-

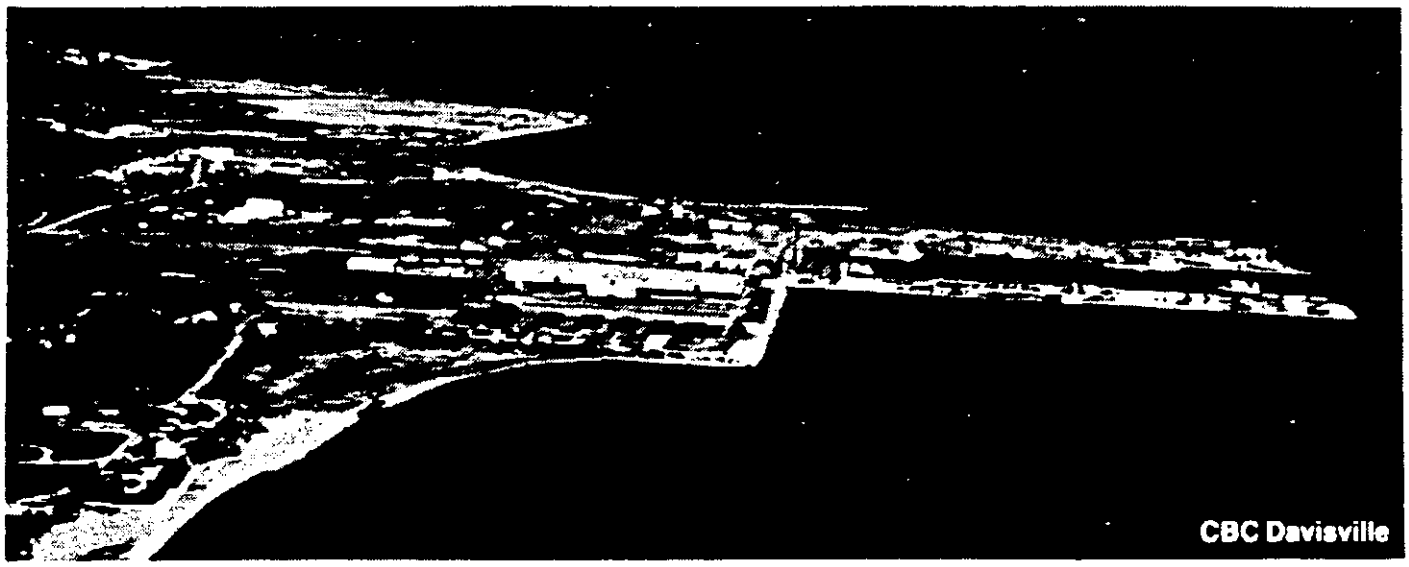


PHOTO BY CHRISTOPHER BROWN

ner for the State's Department of Economic Development commented:

"Initially I was not optimistic about the process...However, to the extent that the PAEDC would be spared additional delays through continued litigation, we all agreed to take part."

As the potential for agreement became recognizable, government representatives cooperated with the Executive Committee, became a driving force in the Planning Division, and made every effort to accommodate the private sector. Mr. Vernon acknowledged:

"The process had provided for dialogue and an ensuing mutual understanding of each group's position."

Mr. Eric R. Jankel, a participant and former Executive Assistant to Governor Garrahy, views mediation as a means by which to offset the loss of both jobs and cash from Rhode Island and the resolution of this dispute as the first step towards attracting new types of industry to the former Naval facilities. And Governor Garrahy, having chaired the Economic Renewal Council as Lt. Governor was confident that the process would clarify participant needs and open lines of communication between the parties.

Governor Garrahy

"The mediation process provided for dialogue and an ensuing mutual understanding."

Success

The process initiated in Rhode Island has since been established as a State system, and subsequent actions and review concerning the land development have been removed from the jurisdiction of Federal Court. Although the environmentalists have no involvement in the State review process, State failure to maintain this procedure furnishes grounds for environmentalists' pursuit of court action. However, recourse to litigation is not warranted if environmentalists disagree on an interpretive level with the State's decision reached through this process.

The benefits accrued to the State of Rhode Island upon resolution of this dispute are impressive. Most notably, the threat of further litigation involving the transfer of Navy lands has finally been dissipated. Firm negotiations over price have begun, unimpeded by conflicts over appropriate use.

An unprecedented, productive line of communication has opened between previously warring factions, and the genuine rapport that evolved among members of the Executive Committee continues beyond the sessions. In addition, communication among State government agencies improved greatly as staff from various departments joined forces, often for the first time.

And, while the parties recognized their similarities to be greater than their apparent differences, the taxpayers were saved an estimated $250,000 in litigation expenses. The General Services Administration (GSA) will no longer have to bear the

NAS Quonset Point

PHOTO BY PETER BROWNING

cost of maintaining an estimated $100 million worth of federal property left idle since the Navy's move in 1973.

Planning Community Mediations

Expensive, divisive court battles have traditionally been the only recourse for conflict resolution. However, legal decisions, achieved at much cost and with extended delays, often leave the disputants dissatisfied and embittered.

The non-adversarial approach, such as that employed in Rhode Island, can be highly effective in opening lines of communication between interest groups disputing environmental issues. Controversies which for years were locked in legal and political stalemate have been resolved through mediation:

- When farmers in the Snoqualmie-Snohomish River Basin clashed with environmentalists over dam construction, mediation broke the impasse; construction of the flood-control dam was approved and a planning council established to oversee that future growth would correspond to environmental standards.
- Regularly, the Western Forest Environmental Discussion Group, comprised of representatives from timber companies and environmental groups, conducts an ongoing dialogue on optimal use and preservation of the forests.
- After a year of meetings and field trips, the National Coal Policy Project saw environmentalists and industry officials agree on important issues for coal mining and burning.

The conflict over intangible values and priorities sets environmental disputes apart from those of labor or business. Shifting the focus from "quality of life" topics to a more pragmatic listing of specifics is a necessary but often grueling process, requiring the mediator to clarify participant concerns. Furthermore, not all environmental disputes are condusive to mediation due to the presence of extreme polarization of views.

Because of the sensitive nature of environmental mediation, the following points should be taken into consideration by communities planning such a process:

1. Selection of the Proper Mediator

A mediator from outside the region may be more readily accepted as an impartial, disinterested party. While all participants must approve the choice of mediator, initial approval should be sought from the interest group which has had the least experience with this process; often, the opponent of the proposed action will be most wary of outside interference with the issues.

Due to the local time-intensive demands of the process, the mediator must expect to spend extensive time at the location. The appointment of an assistant who can remain at the location throughout the mediation may offset some of this pressure.

Finally, official endorsement of the selection should be offered by the community's highest public official. Such support gives credibility to the process and encourages full participation by all concerned.

2. Selection of the Participants

Identification of all parties who have the power to effect the dispute is the mediator's first task. The selection of the participants must be accomplished in a thorough manner in order to expedite the process.

Although business, labor and government might have had prior experience with the mediation process, all participants must be educated regarding the elements of the particular dispute. An under

PHOTO BY CHESTER BROWNING

standing of the "give and take" nature of the process will assist all factions in preparing their cases and in accepting the need to compromise.

3. Clarification of Positions

Abstract, poorly articulated concepts often feed preconceived biases and foster mistrust. Hence, the intangible values which lie at the core of environmental disputes must be clarified by the mediator in more concrete terms.

Once all parties have determined their concerns, the mediator can then identify the controversial aspects and eliminate from debate those issues not condusive to the mediation forum.

4. Mediator's Low Key Role

Acting in a liason capacity, the mediator should facilitate dialogue and promote open lines of communication between parties. Such a role requires constant, daily contact with both members of the Executive Committee (core group) and general participants.

Forceful yet subtle, the mediator gives stability to the process.

5. Structure

A large public meeting initially introduces the participants to one another and provides a forum through which pent-up hostilities are purged. After a few such meetings, formation of a smaller core group is advised. The mediator should guide these sessions and periodically meet with representatives of the original, larger group, keeping them informed of the progress of the settlement.

6. A Mediable Dispute

The kinds of disputes that lend themselves to mediation are those in which there is a rough equivalence of power and the situation is not do-or-die, where there's no ground for compromise.

Such a balance of power must be present for an equal bargaining position to exist. Groups which are less established in the community may draw their power from either a track record of successful lawsuits or the implicit threat of litigation.

To be mediated, positions on dispute must be flexible and lend themselves to compromise. Complete and apparently irreversible polarity preclude mediation.

7. Timing

A sense of public urgency and broad media coverage is useful to a successful mediation. If NEPA is relevant to the dispute, commencement of the mediation process before production of an EIS is advised. Community input can then be a valuable asset in the resolution of the conflict.

If the Federal agency involved is receptive to the mediation process, the duration of the conflict may be minimized.

8. Financial Support

Federal and state government support for all participants' time is critical, as is funding from other donor institutions. Such support lends legitimacy to the process, reinforces the need for resolution, and provides participants with a data base to compare options.

9. Media Cooperation

The sensitive nature of most disputes lends itself to dramatic, emotional press coverage. Such coverage can foster public interest and concern for a speedy resolution, but can also reinforce old prejudices. Although press should be discouraged from attending the sessions, the mediator should be accessible and provide media sources with comprehensive progress reports.

Widespread coverage, well handled, can be an excellent catalyst for participant activity.

The President's Economic Adjustment Committee

*Department of Defense
*Department of Agriculture
*Department of Commerce
*Department of Energy
*Department of Health, Education & Welfare
*Department of Housing & Urban Development
*Department of the Interior
*Department of Justice
*Department of Labor
*Department of Transportation
*Council of Economic Advisors
*Office of Management & Budget
*Arms Control & Disarmament Agency
*Environmental Protection Agency
*Community Services Administration
*General Services Administration
*Small Business Administration
*Office of Personnel Management
*White-House Office of Intergovernmental Affairs

The Economic Adjustment Committee was established in March 1970 to assist in the alleviation of serious economic and social impacts that result from major Defense realignments. The role of the inter-agency Economic Adjustment Committee was strengthened by President Carter in his Executive Order 12049, dated March 27, 1978, to provide a coordinated Federal response to the Defense adjustment needs of the states and local communities. The Secretary of Defense is the Chairman of EAC and the Office of Economic Adjustment serves as the staff of the Committee.

For Further Information Contact

Director, Office of Economic Adjustment, Department of Defense
Pentagon, Room 3E772, Washington,D.C. 20301
(202) 697-9155

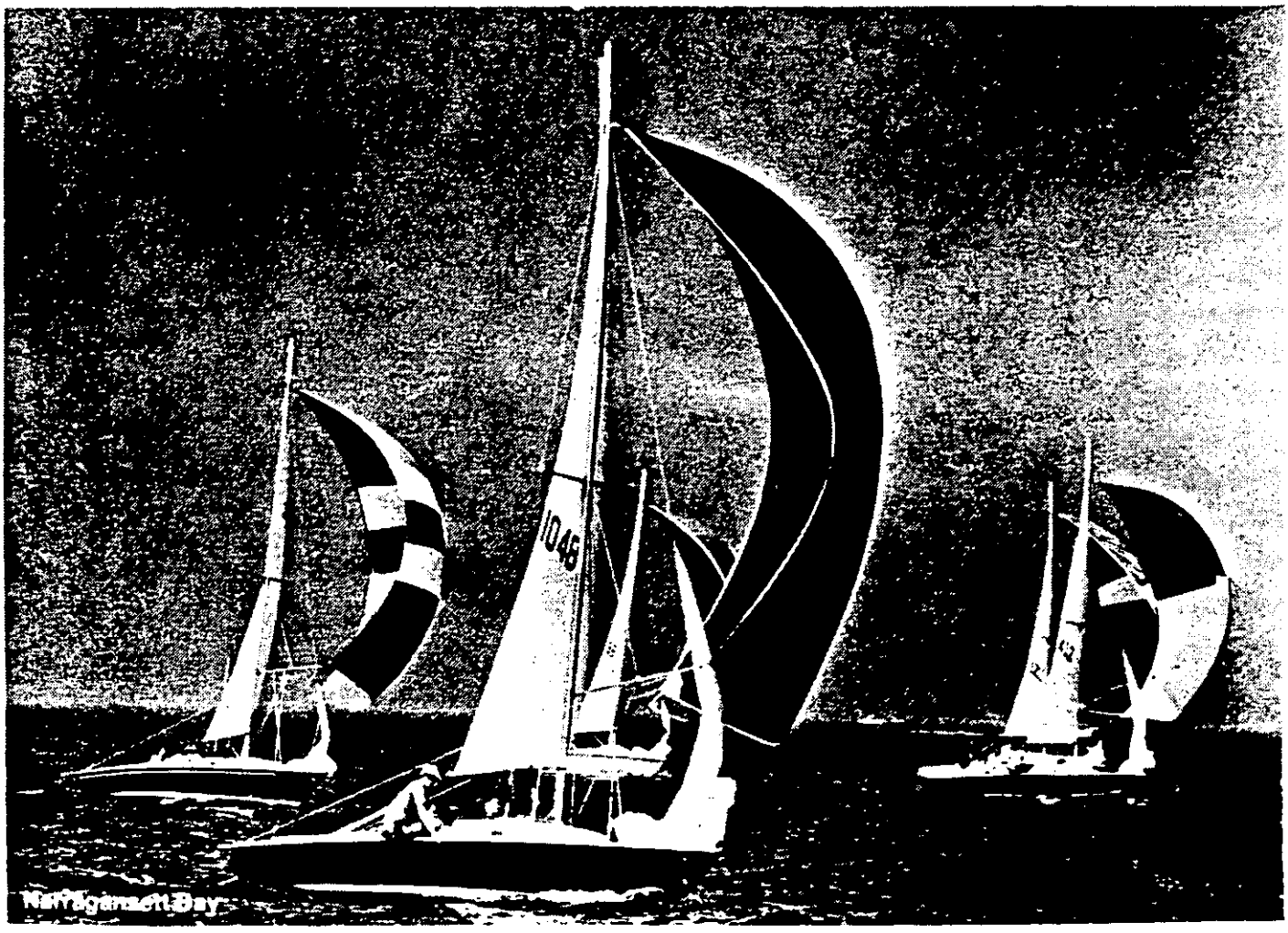


PHOTO BY CHESTER BROWNING

OFFICE OF ECONOMIC ADJUSTMENT

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE MEETING

July 17, 1991

Thank you Mr. Chairman.

I am pleased to have the opportunity to meet with you to talk about community adjustments to base closures and realignments.

I am David MacKinnon of the Office of Economic Adjustment (OEA). I am here on behalf of the Director and Deputy Director who are out of town today.

The Department of Defense has supported a program of community economic adjustment assistance since 1961. The program is voluntary and comprehensive. It is coordinated among all levels of government through the mechanism of the President's Economic Adjustment Committee. We tailor the program to help meet local needs. First, we estimate the Defense-related impact; then we scale the assistance in proportion to the needs. A local adjustment organization is designated or established as a focal point for adjustment efforts. Coordination is deliberate; local, State, and Federal officials meet in the forum provided by the program. Private sector organizations and public interest groups are also represented to help plan the community response to the impact.

The philosophy and main goal behind the program is that the private sector will, in the main, replace the lost jobs and earnings through reuse of the available facilities and the generation of new and/or expanded economic activity outside the gate. The principal objective is economic stability.

During the past 30 years we have tried to help shorten and make more effective the tasks of closure and reuse. Speedy reuse clearly benefits both communities and the DoD. New jobs are created quickly, and DoD lowers its cost for property maintenance. If there are delays in reusing the property and replacing the jobs, the losses will be deeper and longer than otherwise would be the case.

Large bases, such as airfields, depots, and the like, usually constitute significant portions of local economies. Announcement of the planned closure of such installations invariably denotes a crisis, measured in jobs lost, the decline in real estate value, tax base shrinkage, and population outmigration. Closures also place major burdens on local planning agencies and resources as they must try to integrate these surplus facilities with community development plans and ongoing economic development activities. The severity of these burdens is usually a function of community size, location, and economic structure; large urban economies can often absorb these losses without undue strain, while smaller, more rural areas have more difficulty.

In the usual case, the community or communities that constitute the impact area do not have sufficient public and private resources necessary to cover the immediate base conversion and redevelopment costs. Community economic

adjustment, therefore, becomes essentially the process of planning and sorting through possible development goals, alternative base redevelopment concepts, and differing resource requirements in an effort to decide what investment decisions will be needed to replace the economic losses.

To this end, we are working in 21 communities that are near bases on the 1988 Base Realignment Closure Act list. Base reuse planning is timed to coincide with the schedule for closing the facilities and disposal of property. Since Congressional action in April 1989, more than $1.7 million in planning funds have been provided by OEA to the communities where the local economic impacts have been most severe.

Today, plans are complete for two locations and are nearing completion at all others. The first of the 1988 Base Closure Act installations formally closed on April 1, 1991--Pease Air Force Base in New Hampshire. The Pease Development Authority, a State-chartered organization with $250 million in bonding capacity, completed, and is now implementing the base reuse plan. Implementation boils down to garnering and applying the resources needed to carry out the plan. It's the process of property acquisition, redevelopment, facility marketing, promotion, enterprise development, and financing.

Historically, implementation of a base redevelopment plan took a minimum of three or four years. This, I might add, was

before we were operating under the environmental cleanup constraints that now exist. While some of the issues at Pease appear to be resolved, initial attempts to implement the Redevelopment Plan were seriously hampered, as Mr. Cheney of the State of New Hampshire described to you at the last hearing, with any number of unexpected and expected environmentally based complications and impediments. The remaining installations on the 1989 list will close between 1993 and September 1995 and they, too, are experiencing uncertainities and delays.

Regarding the 1991 base closure list--while final Congressional action has not taken place, OEA and the Military Departments, notified the affected Members of Congress in April 1991, and presently are notifying Governors and elected officials of DoD's community economic adjustment program. To assure common understanding of the program and process, OEA will sponsor three two-day meetings in the West, Central, and East for the impacted communities at which time we will explain the economic adjustment program and process. They will also observe concrete results of successful economic adjusment projects. Participants will include senior representatives of the Military Departments, and member of the Economic Adjustment Committee such as the Environmental Protection Agency, Housing and Urban Development, Health and Human Services, the General

Services Administration, Department of Labor, and the Economic Development Administration. Considering the emphasis at the Base Closure Commission hearings, we are certain that environmental cleanup as it relates to facility reuse will be one of the principal, if not the primary, topic of concern.

Once Congress acts probably in early October, we are prepared to initiate community economic adjustment programs and make planning grants in those locations where it is appropriate to get started.

Does the program work? In the sample of 100 closings we have monitored for almost 30 years, over 80 percent of the base closure communities have replaced lost civilian jobs and incomes within several years. They then go beyond those recovery levels to attain even larger, more diversified economies as a result of further development.

For the most part, we believe that the 1988 and 1991 base closure communities should have the same strong success record as in the past. However, if Pease and Norton are the norm, it is predictable, although regrettable, that the environmental laws and regulations delaying or prohibiting interim use or disposition of the property will more than likely impede community economic recovery and make future base closures even more difficult for the Department. We fully support the efforts of the Commission to improve the process and would like to help in any way we can.

Formerly Used Defense Sites

The Secretary of the Army is the DoD Executive Agent for the implementation of DERP at Formerly Used Defense Sites (FUDS). As Executive Agent, the Army is responsible for environmental restoration activities under DERP on lands formerly owned or used by any DoD components. The U.S. Army Corps of Engineers (USACE) is responsible for executing the FUDS program. Investigation and cleanup procedures at formerly used sites are similar to those at currently owned installations. However, information concerning the origin of the contamination, land transfer information, and current ownership must be evaluated before DoD considers a site eligible for restoration.

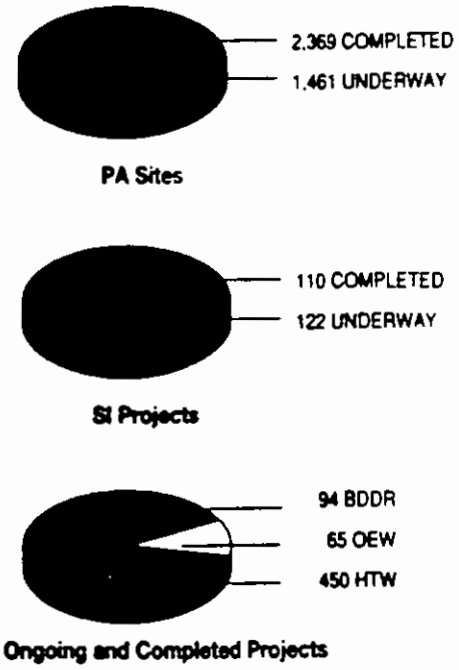
A total of 6,980 FUDS with potential for inclusion in the program have been identified through inventory efforts. By the end of FY 90, PAs had been initiated at 3,830 of the sites, of which 1,461 were underway and 2,369 were completed. Based on the completed PAs, it was determined that 1,588 sites were eligible and 781 sites were ineligible for the FUDS program. Of the eligible sites, 308 require no further action, but each of the other 1,280 sites requires one or more remedial/removal projects. SIs had been completed for 110 projects and were underway for another 122 projects as of the end of FY 90.

DoD has already funded 609 properties for further investigation and remedial action. These activities include 450 projects addressing hazardous or toxic waste (HTW) contamination from formerly used underground storage fuel tanks or landfills, and leaking polychlorinated biphenyl (PCB) transformers. Also included are 65 projects for detection and removal of ordnance and explosive waste (OEW) from former target ranges or impact areas. Prior to FY 88, 94 BDDR projects involving unsafe buildings or structures on formerly owned or used properties were completed. No BDDR projects have been conducted during the last 2 years.

USACE also represents DoD interests at NPL sites where former properties are located and where DoD may be a Potentially Responsible Party (PRP). Former properties that have passed from DoD control may have been contaminated by past DoD operations as well as by other owners, making DoD one of several PRPs. Ongoing USACE efforts will determine the allocation, if any, of DoD cleanup responsibility. USACE also cooperates with EPA, state, and other PRP representatives to facilitate the cleanup process.

At the end of FY 90, 12 FUDS were listed on the NPL. Ten of the sites are described in Appendix E. (The eleventh site, United Chrome Products, was deleted from DERP

Status of Activities at Formerly Used Properties



in early FY 91, as a result of a determination that DoD was not responsible for the contamination of the site. The twelfth site, West Virginia Ordnance Works, is an inactive site that is being remediated as an active site and is described in Appendix B.)

In FY 90, $58.6 million was spent on activities at former sites. The following are examples of work undertaken by USACE at formerly used properties in FY 90. (Appendix E provides additional details for FUDS on the NPL.)

Removal Action at Pine Grove Flats, NV

An old mine shaft in a remote part of Nevada was found to contain metal canisters of chemicals. The party that illegally dumped the canisters remains unidentified and no component of DoD ever owned the property. However, labels on the canisters indicated that they were once Army property produced prior to 1966 for deactivating chemical warfare agents. After the State of Nevada issued a Finding of Alleged Violation and Order to USACE and the Bureau of Land Management, USACE removed more than 400 canisters from the 30-foot deep mine shaft. Because of the mine shaft's instability, it was unsafe to enter and a fireman's hook had to be used to remove the canisters. The age of the canisters and the corrosive nature of the chemicals made it necessary to repackage all canisters prior to transportation and disposal. Negotiations with the State of Nevada are ongoing to determine if further response activities are required.

Tank Removal at Quonset Point, RI

During the winter of 1989-90, 113 underground fuel storage tanks were removed from the site. During the removal operation, a significant amount of soil and ground water contamination was encountered. The Rhode Island Department of Environmental Management proposed removing contaminated soil down to the water table, lining the holes with polyethylene, and backfilling with clean material.

The State of Rhode Island accepted a USACE counter proposal, which resulted in an RA consisting of backfilling the holes with the contaminated soil, performing a soil gas analysis supplemented by monitoring wells, and, as necessary, installing skimming wells to recover free product in the ground water. An RI/FS will be conducted to determine the extent of environmental contamination and the need for long-term remediation.

These negotiations were initiated by USACE, resulting in a substantial savings of $500,000 to the government, while achieving compliance with regulatory requirements and maintaining good relations with the State of Rhode Island regulatory agencies.

A total of 113 underground storage tanks were removed from Quonset Point in FY 90.

Rapid Response at Valley Forge General Hospital, PA

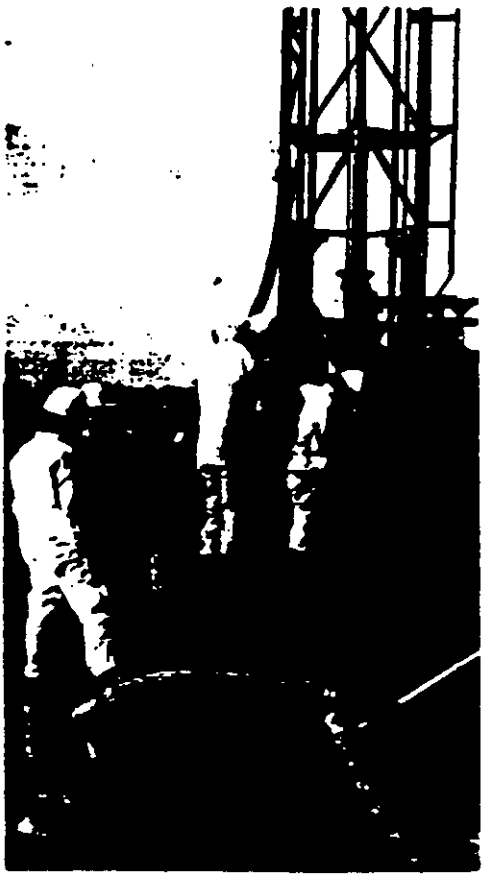
In May 1990, the presence of pesticides and herbicides was discovered by property owners in an unused part of the hospital complex. One month later, the USACE Rapid Response Team overpacked, transported, and disposed of approximately 10 drums of hazardous chemical waste. The Team was able to perform a quick removal of the chemicals. Local residents were pleased with DoD's concern for public health and the environment.

Removal Action at Port Heiden, AK

More than 8,000 drums and several large-capacity above ground and underground fuel tanks were abandoned at Port Heiden Radio Relay Site by the Army and the Air Force after World War II. The remote location of the site required large-scale mobilization using barges for equipment and living quarters before the RA began in the summer of 1990. HTW as well as other regulated materials were removed from the site and transported to approved disposal facilities in the continental United States. Unregulated wastes were recycled, to the extent practical, incinerated onsite, or buried in local approved landfills. The removal action was successfully completed before the winter season began.

ROD at Hastings East Industrial Park, NE

In September 1990, USACE achieved a major milestone when a ROD was signed to allow the official cleanup of the contaminated soil operable unit at the Hastings East Industrial Park, formerly the Blaine Naval Ammunition Depot. In 1991, USACE will prepare engineering design documents for incineration of explosives-contaminated soils.



Extensive investigations at Hastings East Industrial Park culminated in the FY 90 signing of a ROD for the cleanup of this FUDS.

FACT SHEET

July 1991

SUBJECT: Defense Environmental Restoration Program for Formerly Used Defense Sites (DERP FUDS)

1. Created through Congressional appropriation (PL98-212) in 1983, the Defense Environmental Restoration Program (DERP) consolidated and expanded separate Department of Defense (DOD) programs for environmental restoration at active and former sites, and research and development and procurement initiatives to minimize the generation of hazardous waste. DERP was later codified in permanent law as section 211 of the Superfund Amendments and Reauthorization Act (PL99-499) enacted in 1986. This fact sheet covers that portion of DERP which deals with environmental restoration at formerly used defense sites (FUDS).

2. The U.S. Army Corps of Engineers (USACE) executes DERP FUDS and is responsible for environmental restoration related to hazardous and toxic/radiologic waste (HTRW), ordnance and explosive waste (OEW), and building demolition and debris removal (BD/DR) on lands formerly owned or used by any DOD component for which DOD is responsible. No BD/DR activities were conducted under the program in FY 87-90 because funds were required by higher priority HTRW and OEW projects. However, limited funds in FY 91 and FY 92 are targeted for BD/DR.

3. Environmental restoration activities at FUDS conform to the requirements of the National Oil and Hazardous Substances Contingency Plan. There are two primary components. The inventory component consists of: site identification; determination of former use by a DOD component and eligibility for the FUDS program; determination of the category(ies) of potential remediation needed at each eligible site; and data to support prioritization of remedial activities. The remediation component consists of: studies essential to characterize the site prior to remedial design; remedial design; remedial action; and litigation, and settlement negotiations with EPA, State and other parties relative to defining and resolving DOD CERCLA liability for a particular site.

4. About 7000 formerly used properties, with potential for inclusion in the program, have been identified. Preliminary Assessments (PA) at about 2900 of those sites have been completed. The USACE plans to complete all PA's by the end of FY 94. To date about 850 properties have been determined to need remediation; 108 properties have been cleaned-up, actions are underway or planned for the remaining sites.

5. In FY 89 and FY 90, $41.3 million and $58.5 million, respectively, was spent on activities at FUDS. The FY 91 FUDS budget is $87.8 million.

6. The Corps of Engineers point of contact for the FUDS program is Mr. Thomas J. Nash, Chief, Formerly Used Defense Sites Branch, ATTN: CEMP-RF, 20 Massachusetts Ave., NW, Washington, D. C. 20314-1000, telephone number (202) 504-4705.

AGENDA
DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE MEETING
KIMBALL CONFERENCE CENTER
1616 P SREET, NW
WASHINGTON, D.C.

JULY 17, 1991, 9:00 AM - 4:00 PM

9:00-9:20 a.m.	I.	Chairman's Remarks A. Introduction of New Members B. Overview of Agenda
9:20-10:15	II.	Economic Development and Environmental Requirements - Mr. Dempsey, Office of Economic Adjustment
10:15-11:15	III.	RCRA/CERCLA Applicability A. RCRA/CERCLA Overlap - Mr. Davidson B. RCRA Delegation - Ms. Jones
11:15-12:00	IV.	Parcelling Property - Mr. Pendergrass
12:00-1:00	LUNCH	
1:00-2:00	V.	Contracting Improvements - Mr. Dienemann, Mr. Mahon, Mr. Oh
2:00-3:00	VI.	Public Witnesses
3:00-4:00	VII.	Open
4:00	RECESS	

JULY 18, 1991, 9:00 AM - 12 NOON

9:00-12:00 a.m.	I.	Outline and Discussion of Proposed Recommendations A. Staff Review B. Task Force Discussion
12:00	II.	Closing Remarks - Mr. Baca

The Installation Restoration Program

The Installation Restoration Program (IRP) conforms to the requirements of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA guidelines are applied in conducting investigation and remediation work in the program.

The initial stage, a **Preliminary Assessment** or **PA**, is an installation-wide study to determine if sites are present that may pose hazards to public health or the environment. Available information is collected on the source, nature, extent, and magnitude of actual and potential hazardous substance releases at sites on the installation. The next step, a **Site Inspection** or **SI**, consists of sampling and analysis to determine the existence of actual site contamination. The information gathered is used to evaluate the site and determine the response action needed. Uncontaminated sites do not proceed to later stages of the IRP process.

Contaminated sites are fully investigated in the **Remedial Investigation/Feasibility Study** or **RI/FS**. The RI may include a variety of site investigative, sampling, and analytical activities to determine the nature, extent, and significance of contamination. The focus of the evaluation is to determine the risk to the general population posed by the contamination. Concurrent with these investigations, the FS is conducted to evaluate remedial action alternatives for the site.

After agreement is reached with appropriate EPA and/or state regulatory authorities on how the site will be cleaned up, **Remedial Design/Remedial Action** or **RD/RA** work begins. During this phase, detailed design plans for the cleanup are prepared and implemented.

The notable exception to this sequence involves Removal Actions and Interim Remedial Actions (IRAs). These actions may be conducted at any time during the IRP to protect public health or control contaminant releases to the environment. Such measures may include providing alternate water supplies to local residents, removing concentrated sources of contaminants, or constructing structures to prevent the spread of contamination.

The National Priorities List (NPL)

EPA has established a Hazard Ranking System (HRS) for evaluating contaminated sites based on their potential hazard to public health and the environment. A Revised Hazard Ranking System (HRS2) for evaluation of future sites has been proposed by EPA. The application of the HRS, using PA/SI data, generates a score for each site evaluated. The score is computed based on factors such as the amount and toxicity of the contaminants present, their potential mobility in the environment, the availability of pathways for human exposure, and the proximity of population centers to the site.

The NPL is a compilation of the sites scoring 28.5 or higher by the HRS. Such sites are first proposed for NPL listing. Following a public comment period, proposed NPL sites may be listed final on the NPL or may be deleted from consideration.

IRP Priorities

The order in which DoD conducts IRP project activities is based on a policy assigning the highest priorities to sites that represent the greatest potential public health and environmental hazards. Top priority is assigned to:

- Removal of imminent threats from hazardous or toxic substances or unexploded ordnance (UXO)
- Interim and stabilization measures to prevent site deterioration and achieve life cycle cost savings
- RI/FSs at sites either listed or proposed for the NPL and RD/RAs necessary to comply with SARA.

Anticipating the need to refine priorities as the DERP matures and a large number of sites simultaneously reach the costly cleanup phase, DoD developed the Defense Priority Model (DPM). The DPM uses RI data to produce a score indicating the relative risk to human health and the environment presented by a site. The model considers the following site characteristics:

- Hazard – the characteristics and concentrations of contaminants
- Pathway – the potential for contaminant transport
- Receptor – the presence of potential receptors.

This risk-based approach recognizes the importance of protecting public health and the environment and helps objectively identify those sites that should receive priority for funding.

In FY 89, DoD completed development of the DPM. DoD solicited comments from EPA, the states, environmental organizations, and the public. In response to comments received, the model was refined. In addition, the model has been automated to facilitate scoring.

DoD component personnel have been trained in the use of DPM and have scored more than 250 sites where RD/RA activities could be initiated in FY 90. In this first year of implementation, scoring results were used primarily to identify scoring difficulties and gauge model performance.

In preparation for the FY 91 program scoring effort, further improvements were made to DPM. Most significantly, the methodology used to calculate toxicity of contaminants was changed to reflect more accurately actual toxicity data. Previously, surrogate values were calculated relative to the chemical benzo(a)pyrene. In addition, all information for contaminant characteristics contained in the DPM chemicals data base was updated. This update was conducted in cooperation with EPA to ensure consistency in methods. The DPM data base currently contains more than 280 chemicals, including explosives and radiologicals. Other improvements to DPM include clarification of terms and increased user friendliness of the automated version.

In the summer of 1990, scoring was accomplished for nearly 300 sites where RD/RA work could be initiated in FY 91. A quality assurance review indicated that site scores were more reliable than last year due to increased experience with the model and improved scoring guidance. Confidence is expected to increase each year the model is applied.

The Department has a continuing dialogue with EPA and states on DPM. During FY 91, DoD intends to continue to improve DPM and proceed with full implementation.

Flashing residual explosives at the West Virginia Ordnance Works NPL site. Highest priority is given to sites such as this, which represent public health and environmental hazards.

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330

OFFICE OF THE ASSISTANT SECRETARY

AUG 12 1991

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY (ENVIRONMENT)
OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
(PRODUCTION AND LOGISTICS)

SUBJECT: Experience with Environmental Response Actions and Property Transfer (Your memo, 28 June 1991) - INFORMATION MEMORANDUM

I appreciate the opportunity to respond to the issues being worked by the Environmental Response Task Force. The four attachments to this letter provide answers to the specific questions you asked related to these issues.

I have also reviewed the issue briefs forwarded as an attachment to the subject letter. While these briefs provide additional background information and list some generalized options, they do not make concrete recommendations for the two areas which the Task Force was charged to address. In an attempt to assist you in focusing on ways to improve interagency coordination and streamline the process, I suggest you refer to the testimony I gave to the Senate Armed Services Committee, Subcommittee on Readiness, Sustainability and Support on June 21, 1991. In addition, I suggest the May 20, 1991 letter that I forwarded to Mr. Jim Courter, Chairman of the Base Closure and Realignment Commission concerning these areas be considered.

Finally, in an attempt to ensure that all of the different federal committees and task forces considering issues related to the expeditious accomplishment of the environmental restoration program, I suggest the staff supporting the task force consider the recommendations being formulated by the Federal Facilities Environmental Strategy (FFES) working group. Since, the FFES working group is chartered as a joint DoD, EPA and DoE effort and is currently addressing a broad range of issues, it is an excellent source of recommendations.

I am certainly supportive of your leadership in trying to make the outcome of the Task Force reflective of the best ideas available for accelerating the cleanup at closure bases. I think the Task Force is an excellent vehicle for communicating these ideas to the Congress and the public.

I look forward to reviewing future activities of the Task Force.

Gary D. Vest
Deputy Assistant Secretary of the Air Force
(Environment, Safety and Occupational Health)

4 Attachments
1. Response to Issue 1
2. Response to Issue 2
3. Response to Issue 3
4. Response to Issue 4

Issue 1.

QUESTION

What experience have you had with out-leasing facilities when the facility is within the scope of an investigation of potential contamination by hazardous substances or an ongoing cleanup of such contamination? What barriers or complications have you identified?

With respect to excess property, or bases slated for closure, what policies, procedures or standard lease forms have been established for leasing base facilities that may be affected by an investigation or cleanup of hazardous substance contamination in the interim before the base is closed?

What policies, procedures or standard deed provisions have been established to protect the rights of the Department, and to enable it to discharge its responsibilities to clean up contaminated sites, when transferring parcels of a closing base that are within an "area of concern?"

RESPONSE

Enclosed are specific experiences we have had with Pease AFB, NH. Also enclosed are the interim lease agreements for Pease AFB, NH and Norton AFB, CA.

3 Tabs
1. Specific Experiences - Norton and Pease AFBs
2. Interim Lease Agreement - Pease
3. Interim Lease Agreement - Norton

ATTACHMENT 1

ENVIRONMENTAL RESPONSE ISSUE 1

Air Force experience with attempts to lease or convey property where remedial actions are underway or needed at closing bases is fairly limited to date. Our primary experience is based on a time-critical soil removal at Norton AFB and an environmental site assessment and proposed interim remedial action at Pease AFB to support redevelopment efforts at these two bases. Both Norton and Pease AFB are on the National Priorities List.

Time-Critical Soil Removal at Norton AFB

In July 1990, the Air Force subleased two bays of Hangar 763 to the Inland Valley Development Agency (IVDA) who in turn subleased them to Lockheed Commercial Aircraft Center, Inc. for use in performing Boeing 747 aircraft maintenance.

In November 1990, Lockheed conducted structural tests that revealed that the bay floors required replacement to support the weight of Boeing 747 aircraft and identified previously unknown trichloroethylene- (TCE-) and toluene-contaminated soil below the floor. In Dec 90, the Air Force initially gave Lockheed permission to accomplish the contaminated soil removal under the Resource Conservation and Recovery Act (RCRA) as part of the floor removal and construction but rescinded permission as the result of inputs from the other remedial project managers (RPMs). The RPMs from EPA Region IX, the California Department of Health Services (DHS), and the Regional Water Quality Control Board (RWQCB) notified the Air Force that the area beneath the hangar needed to be fully characterized under the Federal Facilities Agreement and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Further, to allow the soil removal and replacement of the floor might impede the ongoing characterization of sites at Norton AFB.

To obtain consensus and ensure adequate characterization of the excavated soil, meetings were held with EPA Region IX, DHS, and RWQCB in Dec 90 and Jan 91. Based on these meetings, a new soil sampling plan was developed. EPA Region IX, DHS, and RWQCB all reviewed and technically concurred with the sampling plan. In Mar-Apr 91, soil sampling and analysis was accomplished. TCE and toluene contamination was confirmed primarily above three feet in depth.

In close coordination with EPA Region IX, DHS, and the RWQCB, the Air Force developed an action memorandum that identified minimum action levels and outlined the actions that

would be taken to characterize and remediate the site. The Air Force and Lockheed agreed that Lockheed would be responsible for all soil removal and treatment in support of the floor replacement and that the Air Force would be responsible for the removal and treatment of any soil below that level. To accelerate the process and avoid further delays to Lockheed, the Air Force made the decision to allow Lockheed to accomplish the soil removal as a time-critical action. The regulators disagreed with this approach but agreed not to oppose it. Soil removal actually began 28 May 91 and was completed in late Jun 91.

The lease and sublease were modified to reflect Norton's status as an NPL site; hold the lessee & sublessee accountable for compliance with the Federal Facilities Agreement; to give the Air Force, federal, and state regulators greater access to the leased property for inspections; and to hold the lessee and sublessee accountable for compliance with the action memorandum and work plan during construction.

Environmental Site Assessment and Interim Removal Action at Pease AFB

In early 1990, Deutsche Airbus began negotiations with the Pease Development Authority for the possible purchase of facilities and property at Pease AFB for use as an aircraft refurbishing plant. In Feb-Mar 91, after the requirement had firmed up and as a result of its experience at Norton, the Air Force began a environmental site assessment of Hangar 227 and 52 acres of adjacent apron and taxiways, the proposed site for Deutsche Airbus operations. The purpose of the assessment was to determine what, if any, contaminants existed on the site and whether they would pose a sufficient problem to prevent a property transfer to the PDA in support of negotiations with Deutsche Airbus.

Initial sampling revealed the presence of TCE and dichlorethylene (DCE) contamination at the southeast corner of Hangar 227. As a result, a second round of sampling was conducted and completed in Jun 91. The second round confirmed the presence of TCE and DCE contamination in excess of minimum action levels and indicated a need for remedial action prior to transfer of the property.

As the result of negotiations with Ms Belaga, EPA Region I Administrator, the Air Force has developed a strategy in which it will deed only the building to PDA for conveyance to Deutsche Airbus. The 52 acres (to include the land beneath the hangar 227) will be leased to PDA and presumably subleased to

Deutsche Airbus until remedial actions are in place and a permanent transfer can be effected in compliance with CERCLA 120(h). The Air Force also made a commitment to have an interim remedial action in place and operating as quickly as possible.

Lessons Learned.

The biggest lesson learned was from Norton AFB's experience with Lockheed. At the time that the original lease and sublease were signed, neither Lockheed nor the Air Force was aware that the floor would need to be replaced and that contamination existed below the floor. This lack of knowledge concerning Lockheed's requirements and the environmental conditions at the site resulted in a six month delay to Lockheed's construction plans and could ultimately have cost the IVDA a redevelopment opportunity for the local community.

To remedy this deficiency in future situations, the Air Force has adopted a policy of conducting an environmental site assessment at industrial areas on closing bases where the RI/FS is not yet complete and the local development authority has a time sensitive business opportunity that involves an interim use lease or permanent transfer of property. The first environmental site assessment accomplished was the one at Pease AFB discussed above.

Another lesson learned was the need to keep the regulators fully involved and informed early in the process when environmental site assessments or interim remedial actions are necessary. Many of the delays at Norton can be attributed to the Air Force's initial effort to accomplish the soil removal outside the auspices of the FFA and CERCLA. Particularly at the NPL bases, the concurrence and support of the non-Air Force remedial project managers is critical to the success or failure of such an endeavor.

RETURN TO
12th BCW/BCV

LEASE FOR BASE CLOSURE PROPERTY (INTERIM BASIS) ON PEASE AIR FORCE BASE, NEW HAMPSHIRE

Table of Contents

No. _____

DEPARTMENT OF THE AIR FORCE

LEASE

OF PROPERTY ON PEASE AIR FORCE BASE, NEW HAMPSHIRE

THIS LEASE, made between the Secretary of the Air Force of the first part, and the Pease Development Authority, an authority established under New Hampshire RSA 12-G, with a place of business at 300 Gosling Road, Portsmouth, New Hampshire, of the second part, WITNESSETH:

The Secretary of the Air Force ("Government" or "Air Force"), by virtue of the authority conferred upon him by law under Title 10, United States Code, Section 2667, for the consideration set out below, hereby leases to the party of the second part ("Lessee") the premises or property described in Exhibit "A" and shown on Exhibit "B" hereto ("leased premises" or "premises"), for use on an interim basis pending its final disposal pursuant to the Base Closure and Realignment Act, P. L. 100-526.

THIS LEASE is granted subject to the following conditions:

1. Term

This Lease shall be for a term of one (1) year, beginning on _____, and ending on _____, unless sooner terminated in accordance with the provisions of this Lease.

2. Use of Leased Premises

a. The sole purpose for which the leased premises and any improvements thereon may be used, in the absence of prior written approval of the Government for any other use, is for the conduct of corporate aircraft operations and related minor preventive aircraft maintenance and other directly related activities.

b. This Lease authorizes interim use of land and facilities on Pease Air Force Base for purposes which will facilitate the local community's economic adjustment to the impacts resulting from the impending closure of the installation and not interfere with, delay, or retard final disposal of the property by the Government. The Lessee understands and acknowledges that this Lease is not and does not constitute a commitment by the Government as to the ultimate disposal of the leased premises or of Pease Air Force Base, in whole or in part, to the Lessee or any agency or instrumentality thereof, or to any sublessee.

c. The Lease may be terminated by the Government as provided in Condition 6. The Lessee understands and agrees that the Government need not state a reason for termination and waives any claims or suits against the Government arising out of any such termination.

3. Subjection to Existing and Future Easements and Rights-of-Way

This Lease is subject to all outstanding easements and rights-of-way for any purpose with respect to the leased premises. The holders of such easements and rights-of-way ("outgrants"), present or future, shall have reasonable rights of ingress and egress over the leased premises, consistent with Lessee's right to quiet enjoyment of them under this Lease, in order to carry out the purpose of the outgrant. These rights may also be exercised by workers engaged in the construction, installation, maintenance, operation, repair or replacement of facilities located on the outgrants and by any federal, state or local official engaged in the official inspection thereof.

4. Operating Agreement

The Operating Agreement attached hereto as Exhibit "C" is incorporated into this Lease by reference. In the event of any inconsistency between the provisions of the Operating Agreement, as it presently exists or may be amended, and the provisions of this Lease, the provisions of this Lease will control.

5. Rent

a. The Lessee shall pay to the United States rent as follows:

(1) For the one-year term of this Lease, facility/area rent in the amount of One Hundred Twenty-Seven Thousand Eight Hundred Dollars ($127,800). Facility/area rent shall be payable in equal quarterly installments of Thirty-One Thousand Nine Hundred Fifty Dollars ($31,950) each in advance on or before the first day of the beginning month of each such quarter-year period.

(2) For each calendar day or any portion thereof that an aircraft in support of the Lessee's operations shall occupy ramp parking during the existence of this Lease, ramp parking rent in an amount of Twenty-five Dollars ($25.00) per aircraft. Ramp parking rent shall be payable in arrears upon receipt of appropriate bills from the Government and forwarded with the facility/area rent due for the following quarter-year period.

(3) Rent payments due under Conditions 5a(1) and 5a(2) above shall be made promptly when due, without any deduction or setoff. Interest at the rate prescribed by the Secretary of the United States Treasury shall be payable on any rent payment required to be made under this Condition 5a that is not paid within fifteen (15) days after the date on which such payment is due. Interest shall accrue beginning on the day after the rent payment is due and end on the day payment is received by the Government.

b. Rent under Conditions 5a(1) and 5a(2) above shall begin on the day following the beginning date of the Lease term. If the rent under Condition 5a(1) above begins on a day other than the first day of the beginning day of such quarter-year period, that portion of the rent which is payable for the period shall be prorated.

c. The Lessee will reimburse all Air Force costs associated with granting this Lease. Such reimbursement will be in the amount of actual Air Force expenses, but not exceeding Five Thousand Dollars ($5,000). Such costs include, but are not limited to, expenses incurred in connection with the conduct of appraisals, environmental studies required by the National Environmental Policy Act (NEPA), and any environmental audit of the leased premises conducted solely for purposes of this Lease. Payment of these costs shall be made promptly upon receipt of appropriate bills from the Government. Notwithstanding the foregoing, the Lessee will not be required to reimburse the Air Force costs associated with granting this Lease if such costs are less than One Thousand Dollars ($1,000.00).

d. The Lessee shall pay to the Government on demand any sum which may have to be expended after the expiration or termination of this Lease in restoring the premises to the condition required by Condition 18.

e. Compensation in each case shall be made payable to the Treasurer of the United States and forwarded by the Lessee direct to the Commander, 509 Combat Support Group, Pease Air Force Base, New Hampshire 03803 ("Commander" or "said officer").

6. Termination

a. This Lease may be terminated by the Deputy Assistant Secretary of the Air Force (Installations) at any time upon the failure of the Lessee to comply with the terms of this Lease. No money or other consideration paid by the Lessee or which may be due up to the effective date of termination will be refunded. Prior to termination, the Lessee must be informed, in writing, by the said officer of the terms with which the Lessee is not complying and afforded a period of ten (10) business days to return to compliance with the Lease's provisions or begin the actions necessary to bring it into compliance with the Lease in accordance with a compliance schedule approved by the Government, if the time required to return to compliance exceeds the ten (10) business day period.

b. This Lease may be terminated by either the Lessee (subject to the provisions of Condition 18 below) or the Government at any time by giving the other party thirty (30) days' written notice. No money or other consideration paid by the

Lessee or which may be due up to the effective date of termination will be refunded or waived, as the case may be.

7. Assignment or Subletting

a. The Lessee shall neither transfer nor assign this Lease or any interest therein or any property on the leased premises, nor sublet the leased premises or any part thereof or any property thereon, nor grant any interest, privilege, or license whatsoever in connection with this Lease without the prior written consent of the Government. Such consent shall not be unreasonably withheld or delayed, subject to the provisions of Conditions 7b, 7c, and 7d below.

b. Any assignment or sublease granted by the Lessee shall be subject to all of the terms and conditions of this Lease and shall terminate immediately upon the expiration or any earlier termination of this Lease, without any liability on the part of the Government to the Lessee or any assignee or sublessee. Under any assignment made, with or without consent, the assignee shall be deemed to have assumed all of the obligations of the Lessee under this Lease. No assignment or sublease shall relieve the Lessee of any of its obligations hereunder.

c. The Lessee shall furnish the Government, for its prior written consent, a copy of each agreement of sublease or assignment it proposes to execute. Such consent may include the

requirement to delete, add or change provisions in the sublease instrument as the Government shall deem necessary to protect its interests. Consent to any sublease shall not be taken or construed to diminish or enlarge any of the rights or obligations of either of the parties under the Lease. Consent or rejection or any required changes shall be provided within twenty-one (21) days of receipt of the proposed agreement.

d. Any agreement of sublease or assignment must include the provisions set forth in Conditions 22 and 23 of the Lease and expressly provide that (1) the sublease is subject to all of the terms and conditions of the Lease; (2) it shall terminate with the expiration or earlier termination of the Lease; (3) the sublessee shall assume all of the Lessee's obligations and responsibilities under the Operating Agreement (Exhibit C); and (4) in case of any conflict between the Lease and the sublease, the Lease will control. A copy of the Lease and the Operating Agreement must be attached to the sublease agreement.

8. Condition of Leased Premises

a. The Lessee has inspected, knows and accepts the condition and state of repair of the leased premises. It is understood and agreed that they are leased in an "as is," "where is" condition without any representation or warranty by the Government concerning their condition and without obligation on the part of the Government to make any alterations, repairs or

additions. The Government shall not be liable for any latent or patent defects in the leased premises. The Lessee acknowledges that the Government has made no representation or warranty concerning the condition and state of repair of the leased premises nor any agreement or promise to alter, improve, adapt, or repair them which has not been fully set forth in this Lease.

b. A condition report signed by representatives of the Government and the Lessee will be attached as Exhibit "D" and made a part of this Lease no later than ten (10) business days after the beginning date of this Lease. The report sets forth the condition of the leased premises with respect to physical appearance and condition as determined from the joint inspection of them by the parties.

c. An environmental condition report signed by representatives of the Government and the Lessee will be attached as Exhibit "E" and made a part of this Lease no later than ten (10) business days after the beginning date of this Lease. The report sets forth the condition of the leased premises with respect to environmental matters as determined from the joint environmental inspection of them by the parties.

9. Maintenance of Leased Premises

The Lessee, at its own expense, shall at all times protect, preserve, and maintain the leased premises, including any

improvements located thereon, in good order and condition, and exercise due diligence in protecting the leased premises against damage or destruction by fire and other causes.

a. The Government will provide grounds maintenance to standards required for Government operations to within five (5) feet of Building No. 215. The Lessee or any sublessee will be responsible for and provide all grounds maintenance in the area within five (5) feet of the facility.

b. The Lessee or any sublessee will be responsible for and provide any snow and ice removal on streets, parking lots, and airfield pavements required in support of the Lessee's or any sublessee's operations that are not listed on Exhibit G to this Lease. All such snow and ice removal performed by the Lessee or any sublessee will be accomplished in strict compliance with the procedures contained in Exhibit G.

10. Damage to Government Property

Any real or personal property of the United States damaged or destroyed by the Lessee incident to the Lessee's use and occupation of the leased premises shall be promptly repaired or replaced by the Lessee to the satisfaction of the said officer. In lieu of such repair or replacement the Lessee shall, if so required by the said officer, pay to the United States money in an amount sufficient to compensate for the loss sustained by the

Government by reason of damage or destruction of Government property.

11. Access and Inspection

a. Any agency of the United States, its officers, agents, employees, and contractors, may enter upon the leased premises, at all times for any purposes not inconsistent with Lessee's quiet use and enjoyment of them under this Lease, including but not limited to the purpose of inspection. The Government will give the Lessee or sublessee normally twenty-four (24) hours prior notice of its intention to enter the leased premises unless it determines the entry is required for safety, environmental, operations, or security purposes. The Lessee shall have no claim on account of any entries against the United States or any officer, agent, employee, or contractor thereof.

b. The Lessee acknowledges and agrees that final disposal of the leased premises takes precedence over interim use under this Lease. The Lessee will cooperate with the Government to enable such final disposal to occur on a timely basis. In particular, the Lessee will permit potential buyers, their prospective tenants and subtenants, and the contractors or subcontractors of any of them, to visit the premises on reasonable notice from the Government during regular business hours.

12. Government Non-Liability and Indemnification by Lessee

a. The United States shall not be responsible for damages to property or injuries to persons which may arise from or be attributable or incident to the condition or state or repair of the leased premises, or the use and occupation thereof, or for damages to the property of the Lessee, or for damages to the property or injuries to the person of the Lessee's officers, agents, servants or employees, or others who may be on the leased premises at their invitation or the invitation of any one of them.

b. The Lessee agrees to assume all risks of loss or damage to property and injury or death to persons by reason of or incident to the possession and/or use of the leased premises, or the activities conducted under this Lease. The Lessee expressly waives all claims against the Government for any such loss, damage, personal injury or death caused by or occurring as a consequence of such possession and/or use of the leased premises or the conduct of activities or the performance of responsibilities under this Lease. The Lessee further agrees to indemnify, save, hold harmless, and defend the Government, its officers, agents and employees, from and against all suits, claims, demands or actions, liabilities, judgments, costs and attorneys' fees arising out of, or in any manner predicated upon personal injury, death or property damage resulting from, related to, caused by or arising out of the possession and/or use of the leased premises or any activities conducted or services furnished

in connection with or pursuant to this Lease. The agreements contained in the preceding sentence do not extend to claims for damages caused solely by the gross negligence or willful misconduct of officers, agents or employees of the United States, without contributory fault on the part of any person, firm or corporation. The Government will give the Lessee notice of any claim against it covered by this indemnity as soon after learning of it as practicable.

13. Insurance

a. All Risk. The Lessee shall in any event and without prejudice to any other rights of the Government bear all risk of loss or damage to the premises, together with the improvements thereon, arising from any causes whatsoever, with or without fault by the Government, the following: fire; lightning; storm; tempest; explosion; impact; aircraft; vehicles; smoke; riot; civil commotion; bursting or overflowing of water tanks, apparatus, or pipes; boiler and machinery coverage against loss or damage by explosion of steam boilers, pressure vessels and similar apparatus now or hereafter installed; flood; labor disturbances; or malicious damage.

b. Insurance:

(1) Lessee's Insurance: During the entire period this Lease shall be in effect, the Lessee or any sublessee at its expense will carry and maintain:

(a) Property insurance coverage, including but not limited to special perils coverage against the risks enumerated in paragraph 13a above, shall at all times be in an amount equal to at least 100% of the full replacement value of the building, building improvements and personal property on or near the leased premises;

(b) Commercial general liability coverage for bodily injury and property damage insurance, including but not limited to, insurance against assumed or incidental contractual liability under this Lease, with respect to the leased premises and improvements thereon, to afford protection with limits of liability in amounts approved from time to time by the Government, but not less than Three Million Dollars ($3,000,000) in the event of bodily injury and death to any number of persons in any one accident, and not less than Three Million Dollars ($3,000,000) for property damage;

(c) If and to the extent required by law, workmen's compensation or similar insurance in form and amounts required by law;

(2) Lessee's Contractor's Insurance: During the entire period this Lease shall be in effect, the Lessee shall either carry and maintain the insurance required below at its expense or require any contractor performing work on the leased premises to carry and maintain at no expense to the Government:

(a) Commercial general liability coverage for bodily injury and property damage insurance, including, but not limited to, contractor's liability coverage and incidental contractual liability coverage, of not less than Three Million Dollars ($3,000,000) with respect to personal injury or death, and Three Million Dollars ($3,000,000) with respect to property damage;

(b) Workmen's compensation or similar insurance in form and amounts required by law.

(3) Policy Provisions: All insurance which this Lease requires the Lessee or any sublessee to carry and maintain or cause to be carried or maintained pursuant to this Condition 13b shall be in such form, for such amounts, for such periods of time, and with such insurers as the Government may require or approve. All policies or certificates issued by the respective insurers for commercial liability and special perils insurance will name the Government as an additional insured, provide that any losses shall be payable notwithstanding any act

or failure to act or negligence of the Lessee or the Government or any other person, provide that no cancellation, reduction in amount, or material change in coverage thereof shall be effective until at least sixty (60) days after receipt by the Government of written notice thereof, provide that the insurer shall have no right of subrogation against the Government, and be reasonably satisfactory to the Government in all other respects. In no circumstances will the Lessee be entitled to assign to any third party rights of action which the Lessee may have against the Government.

(4) Delivery of Policies: The Lessee shall deliver or cause to be delivered promptly to the Government a certificate of insurance evidencing the insurance required by this Lease and shall also deliver no later than thirty (30) days prior to the expiration of any such policy, a certificate of insurance evidencing each renewal policy covering the same risks.

c. Loss or Damage: In the event that any item or part of the leased premises, together with the improvements thereon, shall require repair, rebuilding, or replacement resulting from loss or damage, the risk of which is assumed by the Lessee under Condition 13a, the Lessee shall promptly give notice thereof to the Government. The Lessee will as soon as practicable after the casualty restore such item or part of the leased premises and improvements thereon as nearly as possible to the

condition which existed immediately prior to such loss or damage, subject to Condition 18 of the Lease.

14. Compliance with Applicable Laws

a. The Lessee will at all times during the existence of this Lease promptly observe and comply, at its sole cost and expense, with the provisions of all applicable Federal, state, and local laws, regulations, and standards, and in particular those provisions concerning the protection of the environment and pollution control and abatement.

b. The Lessee shall comply with all applicable laws, ordinances, and regulations of the State of New Hampshire, the County of Rockingham, and the City of Portsmouth with regard to construction, sanitation, licenses or permits to do business, and all other matters.

c. This condition does not constitute a waiver of Federal Supremacy or Federal or State of New Hampshire sovereign immunity. Only laws and regulations applicable to the leased premises under the Constitution and statutes of the United States are covered by this condition.

d. Responsibility for compliance as specified in this Condition 14 rests exclusively with the Lessee. The Department of the Air Force assumes no enforcement or supervisory responsiblity

except with respect to matters committed to its jurisdiction and authority. The Lessee shall be liable for all costs associated with compliance, defense of enforcement actions or suits, payment of fines, penalties, or other sanctions and remedial costs related to Lessee's or any sublessee's use of the leased premises.

15. Construction and Modification of Leased Premises

a. The Lessee shall not construct or make or permit its sublessees or assigns to construct or make any substantial alterations, additions, or improvements to or installations upon or otherwise modify or alter the leased premises in any substantial way without the prior written consent of the Government. Such consent may include a requirement to provide the Government with a performance and payment bond satisfactory to it in all respects and other requirements deemed necessary to protect the interests of the Government. For construction or alterations, additions, modifications, improvements or installations (collectively "work") in the proximity of operable units that are part of a National Priorities Listed (NPL) Site, such consent may include a requirement for written approval by the Remedial Project Managers appointed under the Pease Air Force Base Federal Facility Agreement. Except as such written approval shall expressly provide otherwise, all such approved alterations, additions, modifications, improvements and installations shall become Government property when annexed to the leased premises.

b. All plans for construction or alterations, additions, modifications, improvements, or installations ("construction plans" or "remodeling plans") pursuant to Condition 15a above by the Lessee must comply with the provisions of Conditions 22 and 23 and be approved in writing by the Government before the commencement of any construction project. In addition, the designs for all Lessee connections to Pease Air Force Base utilities will comply with DOD/USAF construction standards and be subject to Pease Air Force Base review and approval. DOD/USAF construction standards are available through the office of the Commander. The Lessee will submit any remodeling plans to the Commander for approval.

c. The Air Force review process for either a construction project or a utility connection will be completed within thirty (30) days of receipt of plans and specifications. In the event problems are detected during review, immediate notice will be provided by telephone to the Lessee or its representative designated for the purpose. Approval will not be unreasonably withheld.

d. All construction shall be in accordance with the approved designs and plans and without cost to the Government. The Lessee shall not proceed with excavation, demolition, or construction until it receives written notice from the Government that such designs and plans are acceptable to the Government.

e. All matters of ingress, egress, contractor haul routes, construction activity and disposition of excavated material, in connection with the lease herein granted, shall be coordinated with the Government. All excavation and construction activity shall be accomplished during periods (including hours of the day) acceptable to the said officer.

f. The Commander is authorized to grant approvals and consents under this Condition 15. Approvals and consents for work in the proximity of operable units that are part of an NPL Site require review by the Office of the Deputy Assistant Secretary of the Air Force (Environment, Safety and Occupational Health). Disapprovals may be reviewed by the Office of the Deputy Assistant Secretary of the Air Force (Installations). Such review is discretionary. A request for review will be submitted to the Commander, who will forward it through channels with his comments within ten (10) business days after he receives the request.

16. Utilities and Services

The Lessee will be responsible at its sole expense for all utilities, janitorial services, building maintenance and grounds maintenance for the leased premises. Utilities services will be provided through meters, if possible. The Lessee will purchase, install, and maintain all such meters at its own cost and without cost and expense to the Government. The Lessee will pay, in addition to the cash rent which is required under this

Lease, the charges for any utilities and services furnished by the Government which the Lessee may require in connection with its use of the leased premises. The charges and the method of payment for each utility or service will be determined by the appropriate supplier of the utility or service in accordance with applicable laws and regulations, on such basis as the appropriate supplier of the utility or service may establish. It is expressly understood and agreed that the Government in no way warrants the continued maintenance or adequacy of any utilities or services furnished by it to the Lessee.

a. Subject to Conditions 16b and 16c below, the Lessee may purchase from the Government the following utility services: electricity, water, high pressure water heat, and sewage.

b. Any sale of a utility service will be in accordance with 10 U.S.C. § 2481 and Air Force Regulation (AFR) 91-5.

c. The Lessee agrees to enter into a separate contract for each utility service procured under Condition 16a above at rates to be specified in each contract.

17. Taxes

The Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this Lease

may be imposed upon the Lessee with respect to the leased premises. Title 10, United States Code, § 2667(e) contains the consent of Congress to the taxation of the lessee's interest in the leased premises, whether or not the premises are in an area of exclusive Federal jurisdiction. Should Congress consent to taxation of the Government's interest in the property, this Lease will be renegotiated.

18. Surrender of Leased Premises

On or before the date of expiration of this Lease, or its earlier termination hereunder, the Lessee shall vacate and surrender the leased premises to the Government. Subject to Condition 15a, the Lessee shall remove its property from the leased premises and restore them to as good order and condition as that existing on the beginning date of this Lease, damages beyond the control of the Lessee due to fair wear and tear, excepted. If the Lessee shall fail or neglect to remove its property, then, at the option of the Air Force, the property shall either become the property of the United States without compensation therefor, or the Air Force may cause it to be removed and the premises to be restored at the expense of the Lessee, and no claim for damages against the United States or its officers or agents shall be created by or made on account of such removal and restoration work.

19. Disputes

a. Except as otherwise provided in this Lease, any dispute concerning a question of fact arising under this Lease which is not disposed of by agreement shall be decided by the authorized officer of the Government. He or she shall reduce the decision to writing and mail or otherwise furnish a copy to the Lessee. The decision of the authorized officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Lessee mails or otherwise furnishes to the authorized officer a written appeal addressed to the Secretary of the Air Force. The decision of the Secretary or his or her duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this Lease as limiting judicial review of any such decision to cases where fraud by such official or his or her representative or board is alleged: provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under this condition, the Lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Lessee shall proceed diligently with the performance of the Lease in accordance with the decision of the authorized officer.

b. This provision does not preclude consideration of questions of law in connection with decisions provided for in Condition 19a above. Nothing in this provision, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

20. Rules and Regulations

The use and occupation of the leased premises shall be subject to the general supervision and approval of the said officer and to such reasonable rules and regulations as may be prescribed by him or her from time to time.

21. Notices

a. No notice, order, direction, determination, requirement, consent or approval under this Lease shall be of any effect unless it is in writing.

b. All notices to be given pursuant to this Lease shall be addressed, if to the Lessee, to:

Executive Director
Pease Development Authority
Building 90
Pease Air Force Base, NH 03803

if to the Government, to:

509 Combat Support Group Commander
Pease Air Force Base
New Hampshire 03803

or as may from time to time be directed by the parties. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope or wrapper, addressed as aforesaid and sent certified mail, return receipt requested.

22. Environmental Protection

a. The Lessee will comply with the environmental laws and regulations set out in Exhibit "F," and all other Federal, state, and local laws, regulations, and standards that are applicable to Lessee's activities on the leased premises. See also Condition 14.

b. The Lessee shall be solely responsible for obtaining at its cost and expense any environmental permits required for its operations under the Lease, independent of any existing Pease Air Force Base permits.

c. The Lessee shall indemnify and hold harmless the Government from any costs, expenses, liabilities, fines, or penalties resulting from discharges, emissions, spills or other releases, storage, disposal, or any other action by the Lessee giving rise to Government liability, civil or criminal, or responsibility under Federal, State or local environmental laws. This provision shall survive the expiration or termination of the Lease, and the Lessee's obligations hereunder shall apply whenever

the Government incurs costs or liabilities for the Lessee's actions of the types described in this Condition 22.

d. The Government's rights under this Lease specifically include the right for Air Force officials to inspect the Lessee's premises for compliance with environmental, safety, and occupational health laws and regulations, whether or not the Government is responsible for enforcing them. Such inspections are without prejudice to the right of duly constituted enforcement officials to make such inspections.

e. Except as provided in Condition 22f below, the Government is not responsible for any removal or containment of asbestos. The Lessee and any sublessee will submit any remodeling plans to the Commander for approval as required under Condition 15b of the Lease. If the plans require the removal of asbestos, an asbestos disposal plan must be submitted concurrently with the remodeling plans. The asbestos disposal plan will identify the proposed disposal site for the asbestos.

f. The Government shall be responsible for the removal or containment of friable asbestos existing in the leased premises on the beginning date of the Lease as identified in the environmental condition report hereto (Exhibit E). The Government agrees to abate all such existing friable asbestos as provided in this Condition 22f and Condition 22g below. The Government may choose the most economical means of remediating any friable

asbestos, which may include removal or containment, or a combination of removal and containment. The foregoing agreement does not apply to non-friable asbestos which may be disturbed by the Lessee's or sublessee's activities and thereby become friable. Non-friable asbestos which becomes friable through or as a consequence of the Lessee's or sublessee's activities under this Lease will be abated by the Lessee at its sole cost and expense.

g. Notwithstanding any other provision of the Lease, the Lessee and its sublessee do not assume any liability or responsiblity for environmental impacts and damage caused by the Government's use of toxic or hazardous wastes, substances or materials on any portion of Pease Air Force Base, including the leased premises, prior to the beginning date of this Lease. The Lessee and its sublessee have no obligation to undertake the defense, remediation and cleanup, to include the liability and responsiblity for the costs of damage, penalties, legal and investigative services solely arising out of any claim or action in existence now, or which may be brought in the future by third parties or any governmental body against the Government, because of any use of, or release from, any portion of Pease Air Force Base (including the leased premises) of any toxic or hazardous wastes, substances or materials prior to the beginning date of this Lease. Furthermore, the Government recognizes and acknowledges its obligation to indemnify the Lessee and any sublessee to the extent required by the provisions of Public Law No. 101-519, Section 8056.

h. The Government acknowledges that Pease Air Force Base has been identified as a National Priority List (NPL) Site under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) of 1980, as amended. The Lessee understands that the Government will provide it with a copy of the Pease Air Force Base Federal Facility Agreement ("Interagency Agreement" or "IAG") once it has been executed, and agrees that should any conflict arise between the terms of the IAG and the provisions of this Lease, the terms of the IAG will take precedence. The Lessee further agrees that notwithstanding any other provision of the Lease, the Government assumes no liability to the Lessee or its sublessees should implementation of the IAG interfere with the Lessee's use of the leased premises. The Lessee shall have no claim on account of any such interference against the United States or any officer, agent, employee or contractor thereof, other than for abatement of rent.

(1) The Air Force, the United States Environmental Protection Agency (EPA), and the New Hampshire Department of Environmental Services (NHDES) and their officers, agents, employees, contractors, and subcontractors have the right, upon reasonable notice to the Lessee and any sublessee, to enter upon the leased premises for the purposes enumerated in this subparagraph and for such other purposes consistent with any IAG provided pursuant to this Condition 22h:

(a) to conduct investigations and surveys, including, where necessary, drilling, testpitting, borings and other activities related to the Pease Air Force Base Installation Restoration Program ("Pease AFB IRP") or the IAG;

(b) to inspect field activities of the Air Force and its contractors and subcontractors in implementing the Pease AFB IRP or the IAG;

(c) to conduct any test or survey required by the EPA or NHDES relating to the implementation of the IAG or environmental conditions at the leased premises or to verify any data submitted to the EPA or NHDES by the Air Force relating to the IAG or such conditions;

(d) to construct, operate, maintain or undertake any other response or remedial action as required or necessary under the Pease AFB IRP or the IAG, including, but not limited to monitoring wells, pumping wells and treatment facilities.

(2) The Lessee agrees to comply with the provisions of any health or safety plan in effect under the Pease AFB IRP or the IAG or during the course of any of the above described response or remedial actions. Any inspection, survey, investigation, or other response or remedial action will, to the extent practicable, be coordinated with representatives

designated by the Lessee and any sublessee. The Lessee and any sublessee shall have no claim on account of such entries against the Unites States or any officer, agent, employee, contractor, or subcontractor thereof.

(3) The Lessee further agrees that in the event of any sublease or assignment of the leased premises pursuant to Condition 7 of the Lease, it shall provide to the EPA and NHDES by certified mail a copy of the agreement of sublease or assignment of the leased premises within fourteen (14) days after the effective date of such transaction.

i. Pease Air Force Base air emissions offsets will not be made available to the Lessee. The Lessee shall be responsible for obtaining from some other source(s) any air pollution credits that may be required to offset emissions resulting from its activities under the Lease.

j. Any hazardous waste permit under Resource Conservation and Recovery Act, or its New Hampshire equivalent, shall be limited to generation and transportation. The Lessee shall not, under any circumstances, allow any hazardous waste to remain on or about the leased premises for any period in excess of ninety (90) days. Any violation of this requirement shall be deemed a material breach of this Lease. Government hazardous waste storage facilities will not be available to the Lessee. The Lessee must provide at its own expense such hazardous waste

storage facilities, complying with all laws and regulations, as it needs for temporary (less than ninety (90) days) storage.

k. Air Force accumulation points for hazardous and other wastes will not be used by the Lessee or any sublessee. Neither will the Lessee or sublessee permit its hazardous wastes to be co-mingled with hazardous waste of the Air Force.

l. The Lessee shall have a completed and approved plan for responding to hazardous waste, fuel, and other chemical spills prior to commencement of operations on the leased premises. Such plan shall be independent of Pease Air Force Base and except for initial fire response and/or spill containment, shall not rely on use of Pease Air Force Base personnel or equipment. Should the Government provide any personnel or equipment, whether for initial fire response and/or spill containment, otherwise on request of the Lessee, or because the Lessee was not, in the opinion of the said officer, conducting timely cleanup actions, the Lessee agrees to reimburse the Government for its costs.

23. Special Provisions

a. The Lessee acknowledges that it has read the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) prepared by the Government in connection with this Lease and understands that the operations described in the EA/FONSI are the only ones that have been assessed in compliance with the

National Environmental Policy Act of 1969 (NEPA). The Lessee agrees that any operation, type and quantity of chemicals used or emissions caused, employees, vehicle trips, flights of aircraft, or any other parameter contained in the EA/FONSI (collectively, "EA/FONSI parameters") which might have environmental impact or is regulated by Federal or State environmental laws may not be changed or modified without the prior written consent of the said officer. The EA/FONSI parameters are hereby incorporated by reference and made an integral part of this Lease as though fully set forth in this Condition 23a. A decision on a proposal by the Lessee for any change in the EA/FONSI parameters may require further environmental studies or assessments, the cost of which will be borne by the Lessee. The EA and FONSI are on file at Pease Air Force Base. Copies will be made available, on request, by the Commander.

b. The Lessee shall comply with all applicable Federal, state, and local occupational safety and health regulations, and with all Air Force safety, health and fire regulations, standards, tech orders, and procedures in common use work and operating areas, including ramps and taxiways.

c. The Lessee shall be responsible for determining whether it is subject to local building codes or building permit requirements, and for compliance with them to the extent they are applicable.

d. The Lessee acknowledges that it understands that Pease Air Force Base is an operating military installation which could remain closed to the public prior to its complete disposal and accepts that Lessee's operations may from time to time be hampered by temporary restrictions on access, such as identity checks and auto searches. The Lessee further acknowledges that it understands that the Air Force strictly enforces Federal laws and Air Force regulations concerning controlled substances (drugs) and agrees that the Government will not be responsible for lost time or costs incurred due to delays in entry, temporary loss of access, barring of individual employees from the base under Federal laws authorizing such actions, limitation or withdrawal of an employee's on-base driving privileges, or any other security action that may cause employees to be late to or unavailable at their work stations, or delay arrival of parts and supplies.

e. The Lessee shall be responsible for control of its employees in restricted and controlled areas, including obtaining and controlling restricted area badges. The Lessee and its employees shall strictly comply with restricted and controlled area entry procedures.

f. The Lessee will be responsible at its cost and expense for any improvements, renovations and repair of any parking area included in the leased premises. The Lessee also will provide at its expense any physical security it deems necessary for the privately-owned vehicles of its employees,

contractors and subcontractors. The Lessee agrees that the Government will not be responsible for loss or damage to the parked vehicles of its employees, contractors and subcontractors and it will indemnify and hold the Government harmless from any claims for such loss or damage.

g. The Lessee acknowledges that it understands that the Government is not responsible for and will not provide any structural fire protection, police or ambulance services for the Lessee or any sublessee.

24. Use of Other Pease Air Force Base Facilities

a. Flying Facilities

(1) Subject to the provisions of subparagraphs (a), (b), (c), and (d) of this Condition 24a(1) and the Operating Agreement, the Lessee shall have the right to use the runways, taxiways, parking aprons and ramps ("flying facilities") of Pease AFB on a noninterference basis with Government operations.

(a) Aircraft operations will be limited to those directly related to the corporate aircraft operations the Lessee is authorized to conduct under this Lease. The number of aircraft operations (defined as one takeoff and one landing) in any calendar month will not exceed seventy-five (75).

(b) The Lessee will pay landing fees for all aircraft using the flying facilities in support of its operations. Landing fees will be determined and paid in accordance with AFR 55-20. The Lessee also agrees to execute any releases or documents that may be required as a condition for use of the flying facilities by nongovernment aircraft pursuant to AFR 55-20.

(c) The Government will respond to fire and crash rescue emergencies involving civil aircraft in support of the Lessee's operations under this Lease within the limits of the capabilities of the fire fighting and crash rescue ("CFR") organization the Government maintains in support of its military operations at Pease AFB. The Lessee acknowledges that it understands that the Government will provide emergency fire fighting and crash rescue service only so long as a CFR organization is required for military operations at Pease Air Force Base. The Lessee agrees that after the Government determines that a CFR organization is no longer required for such military operations, the Lessee (or its sublessee) will assume the responsibility for and provide, at its sole cost and expense, all CFR services required to support the Lessee's (or its sublessee's) operations under this Lease. The Lessee agrees to release the Government, its officers, agents and employees from all liability arising out of or connected with the use of or the failure to use government CFR equipment or personnel for fire control and crash rescue activities and to indemnify the Government, its officers,

agents, and employees, against all claims arising out of the use of or failure to use government CFR equipment or personnel. The Lessee further agrees to execute and maintain in effect a hold harmless agreement as required by applicable Air Force regulations for all periods during which emergency fire fighting and crash rescue service is provided by the Government in support of the civil aircraft.

(d) The Lessee agrees that all aircraft in support of its operations which may have to taxi, park, run engines or be towed on the runway, flight line, ramp, restricted areas or environs in arriving, operating on, and departing Pease Air Force Base will strictly comply with all procedures required under or pursuant to the Operating Agreement.

(e) Procedures governing use of the flying facilities by aircraft in support of the Lessee's operations are contained in the Operating Agreement.

(2) The Lessee acknowledges that it understands that maintenance of the flying facilities is solely for Government purposes. The Government will provide information on any areas it deems unsafe to taxi any civil aircraft. The Government shall not be liable for damage to aircraft in support of the Lessee's operation while taxiing, to include Foreign Object Damage (FOD).

b. Wash Rack

(1) The Lessee shall have the right to use the Government wash rack located on the portion of Pease Air Force Base outside the cantonment area of the New Hampshire Air National Guard. Such use shall be on a noninterference basis with Government operations under written procedures to be established by the Government in its sole discretion. Such procedures will be attached to the Operating Agreement as "Attachment A" within thirty (30) days after execution of the Lease by all parties.

(2) If pretreatment is required for any industrial wastes placed in the Pease Air Force Base sewage treatment system by the Lessee by applicable National Pollutant Discharge Elimination System (NPDES) permits, Environmental Protection Agency (EPA) regulations, or Pease Air Force Base's contracts for wastewater treatment, the Lessee shall pretreat such wastes as required. The Government will give sympathetic consideration to pretreatment in Pease Air Force Base facilities, provided they are suitable for the purpose, have capacity available, and arrangements for reimbursement satisfactory to the Commander are agreed upon.

25. General Provisions

a. Convenant against Contingent Fees. The Lessee warrants that no person or agency has been employed or retained to

solicit or secure this Lease upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Lessee for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Lease without liability or in its discretion to require the Lessee to pay, in addition to the lease rental or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

b. Officials not to Benefit. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Lease or to any benefit to arise therefrom, but this provision shall not be construed to extend to this Lease if made with a corporation for its general benefit.

c. Nondiscrimination. The Lessee shall use the leased premises in a nondiscriminatory manner to the end that no person shall, on the ground of race, color, religion, sex, age, handicap or national origin, be excluded from using the facilities or obtaining the services provided thereon, or otherwise be subjected to discrimination under any program or activities provided thereon.

(1) As used in this condition, the term "facility" means lodgings, stores, shops, restaurants, cafeterias,

restrooms, and any other facility of a public nature in any building covered by, or built on land covered by, this Lease.

(2) The Lessee agrees not to discriminate against any person because of race, color, religion, sex, or national origin in furnishing, or refusing to furnish, to such person the use of any facility, including all services, privileges, accommodations, and activities provided on the leased premises. This does not require the furnishing to the general public the use of any facility customarily furnished by the Lessee solely to tenants or to Air Force military and civilian personnel, and the guests and invitees of any of them.

d. Gratuities. The Government may, by written notice to the Lessee, terminate this Lease if it is found after notice and hearing, by the Secretary of the Air Force, or his/her duly authorized representative, that gratuities in the form of entertainment, gifts, or otherwise, were offered or given by the Lessee, or any agent or representative of the Lessee, to any officer or employee of the Government with a view toward securing an agreement or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such agreement; provided that the existence of the facts upon which the Secretary of the Air Force or his/her duly authorized representative makes such finding, shall be an issue and may be reviewed in any competent court. In the event this Lease is so terminated, the Government shall be

entitled (a) to pursue the same remedies against the Lessee as it could pursue in the event of a breach of the Lease by the Lessee, and (b) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary of the Air Force or his/her duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Lessee in providing any such gratuities to any such officer to employee. The rights and remedies of the Government provided in this article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Lease.

e. No Joint Venture. Nothing contained in this Lease will make, or will be construed to make, the parties hereto partners or joint venturers with each other, it being understood and agreed that the only relationship between the Government and the Lessee is that of landlord and tenant. Neither will anything in this Lease render, or be construed to render, either of the parties hereto liable to any third party for the debts ;or obligations of the other party hereto.

f. Records and Books of Account. The Lessee agrees that the Comptroller General of the United States or the Auditor General of the United States Air Force or any of their duly authorized representatives shall, until the expiration of three (3) years after the expiration or earlier termination of this Lease, have access to and the right to examine any directly

pertinent books, documents, papers, and records of the Lessee involving transactions related to this Lease. The Lessee further agrees that any sublease of the leased premises (or any part thereof) will contain a provision to the effect that the Comptroller General of the United States or the Auditor General of the United States Air Force or any of their duly authorized representatives shall, until three (3) years after the expiration or earlier termination of this Lease, have access to and the right to examine any directly pertinent books, documents, papers, and records of the sublessee involving transactions related to the sublease.

g. Failure of Government to Insist on Compliance. The failure of the United States to insist in any one or more instances, upon strict performance of any of the terms, covenants or conditions of this Lease shall not be construed as a waiver or a relinquishment of the Government's rights to the future performance of any such terms, covenants or conditions, but the obligations of the Lessee with respect to such future performance shall continue in full force and effect.

h. Entire Agreement. It is expressly agreed that this written instrument embodies the entire agreement between the parties regarding the use of the leased premises by the Lessee, and there are no understandings or agreements, verbal or otherwise, between the parties except as expressly set forth herein. This instrument may only be modified or amended by mutual

agreement of the parties in writing and signed each of the parties hereto.

26. Government Representatives and Their Successors

a. The Commander, 509th Combat Support Group (509 CSG), Pease Air Force Base, has been duly authorized to administer this Lease and execute and administer the Operating Agreement (Exhibit C) until closure of Pease Air Force Base. After closure of the base, the Pease Disposal Management Team (DMT) Site Manager ("Site Manager") will assume responsibility for general management functions for the base.

b. Except as otherwise specifically provided, any reference in the Lease to "Commander" or "said officer" shall mean the Commander of the 509 CSG or the DMT Site Manager, as the case may be, and shall include his or her authorized representatives and the DMT Site Manager's duly appointed successors.

27. Amendments

a. This Lease may be amended at any time by mutual agreement of the parties. Amendments to the Lease must be approved by the Deputy Assistant Secretary of the Air Force (Installations) to become effective.

b. The Operating Agreement may be amended by mutual agreement of the parties to it. The approval of the Deputy Assistant Secretary is not required for any amendment to the Operating Agreement so long as the amendment is consistent with the Lease.

28. Extension of Lease

This Lease may be extended for additional terms of one year, subject to the provisions of Condition 6, by mutual agreement of the parties.

29. Exhibits

Seven (7) exhibits are attached to and made a part of this Lease, as follows:

a. Exhibit A - Description of Leased Premises

b. Exhibit B - Map of Pease Air Force Base

c. Exhibit C - Operating Agreement

d. Exhibit D - Condition Report

e. Exhibit E - Environmental Condition Report

f. Exhibit F - List of Environmental Laws and Regulations

g. Exhibit G - Snow and Ice Removal Areas and Procedures

30. Reporting to Congress

Pursuant to the Base Closure and Realignment Act (BCRA), P. L. 100-526, this Lease is not subject to Title 10, United States Code, Section 2662.

IN WITNESS WHEREOF I have hereunto set my hand by authority of the Secretary of the Air Force this _____ day of _____, 19__.

By: _____

Title: _____

THIS LEASE is also executed by the Lessee this _____ day of _____, 19__.

By: _____[SEAL]

Title: _____

Reviewed and approved as to form, substance and execution.

_____ _____

Date Assistant Attorney General

COMMONWEALTH OF VIRGINIA)
) SS.:
COUNTY OF ARLINGTON)

On the _____ day of _____, 19__, before me, Kathleen L. Peyton, the undersigned Notary Public, personally appeared James F. Boatright, personally known to me to be the person whose names is subscribed to the foregoing Lease, and personally known to me to be the Deputy Assistant Secretary of the Air Force for Installations, and acknowledged that the same was the act and deed of the Secretary of the Air Force and that he executed the same as the act of the Secretary of the Air Force.

_____
Notary Public, Commonwealth of Virginia

My commission expires:

[ATTACH OR INSERT ACKNOWLEDGMENT FOR LESSEE]

EXHIBIT A

DESCRIPTION OF LEASED PREMISES

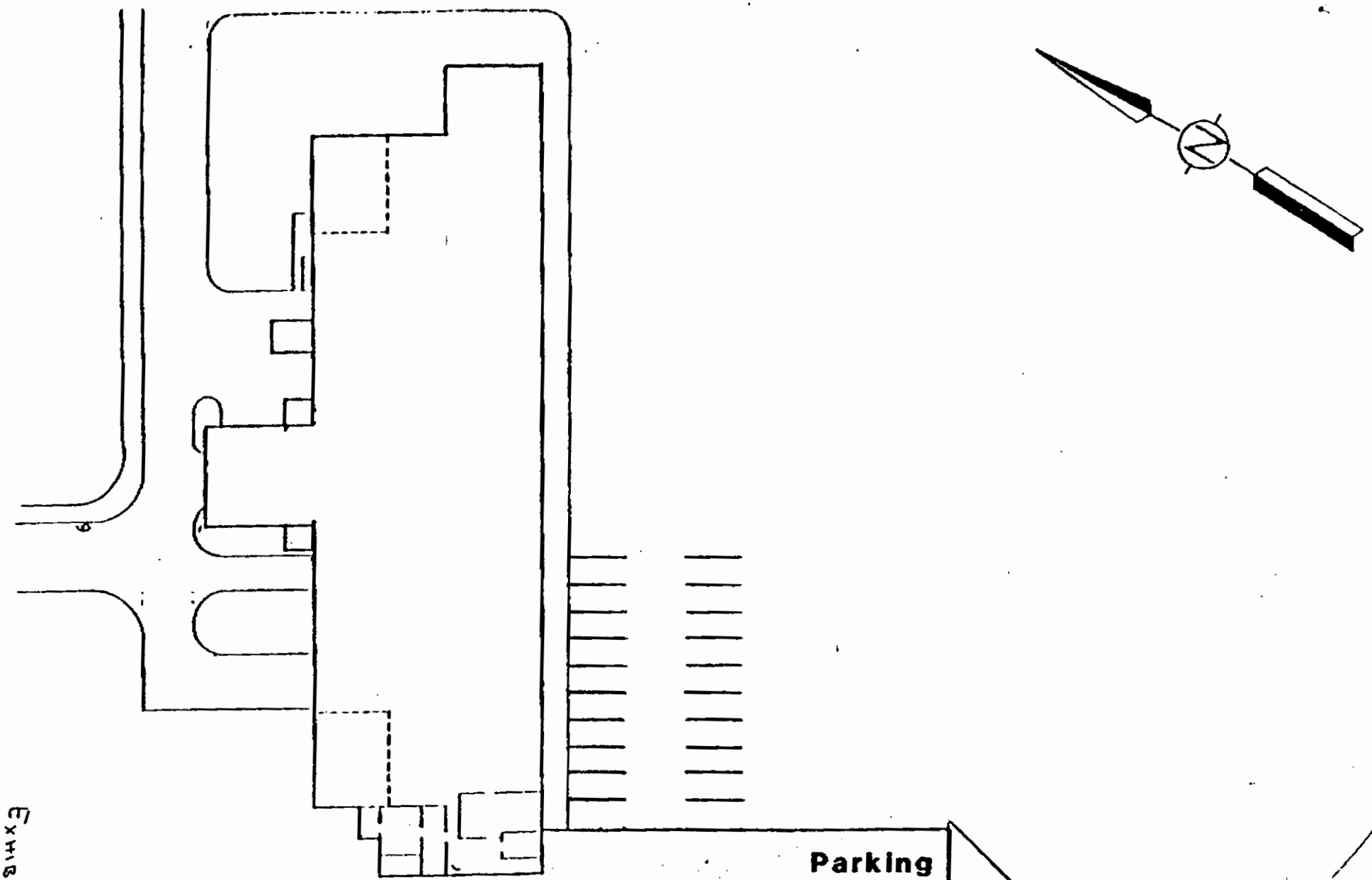
For purposes of the foregoing lease agreement between the Department of the Air Force and the State of New Hampshire Pease Development Authority, the "leased premises" shall include the following:

1. The nosedock hangar known as "Building No. 215" located at the eastern edge of the runway and parking apron at Pease Air Force Base, consisting of approximately 28,400 square feet.

2. All reasonable and necessary rights of ingress and egress to Building No. 215 by way of walkways, driveways and roadways connected to it.

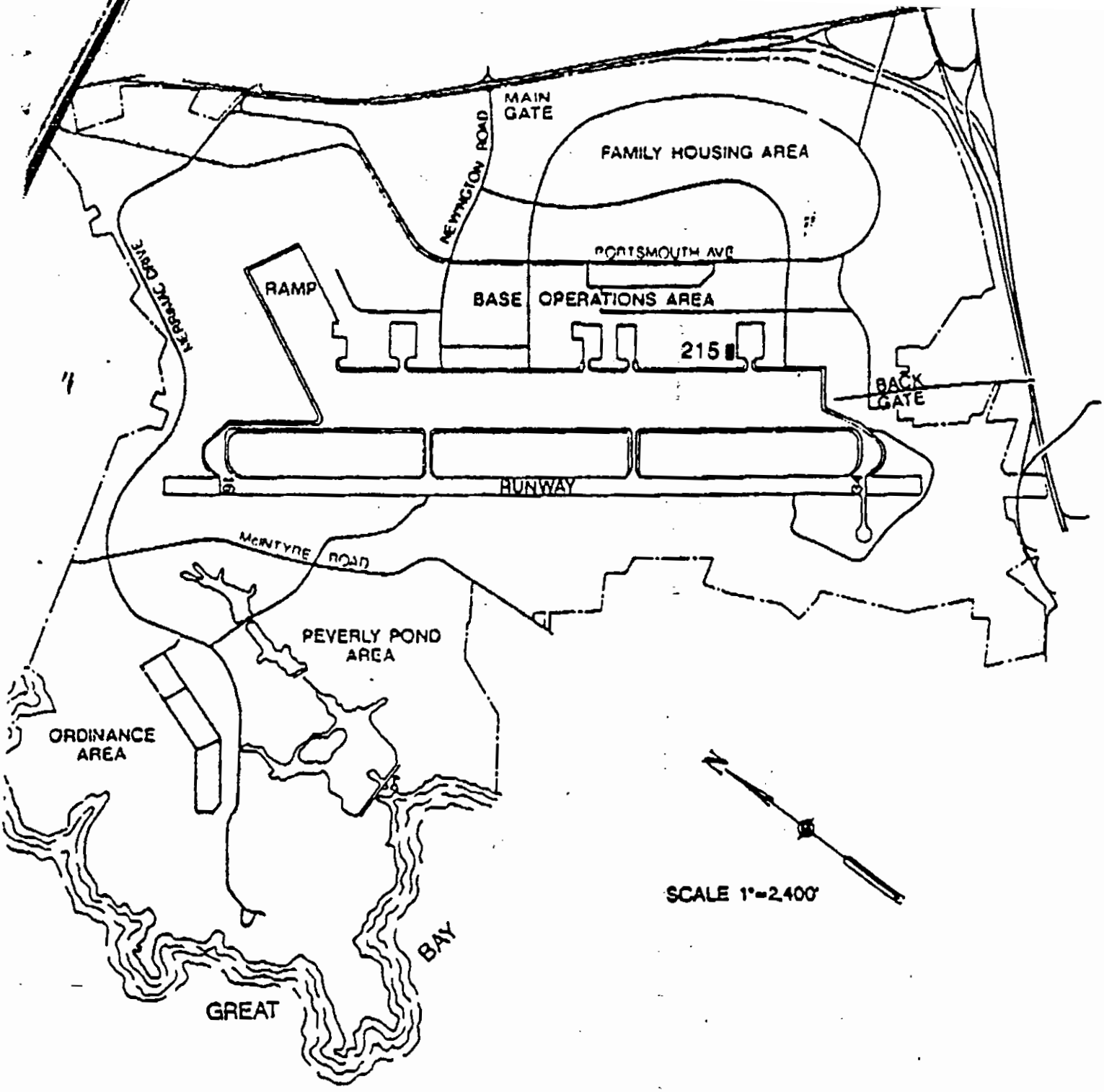
3. Parking space for twenty (20) vehicles in the parking area on the southeast side of Building No. 215. The parking spaces will be located in close proximity to the building and designated for the exclusive use of the Lessee.

EXHIBIT B-1



SITE PLAN BLDG # 215

SCALE: 1" = 50'-0"



INSTALLATION MAP and PROPOSAL LOCATION

Figure 2-1

EXHIBIT B-2

END
F205
OFT
206
SEGREGATED MAGAZINE
20100
Swimming pool
203
204
211
1080
202
213
212
214
215

EXHIBIT B-3

EXHIBIT C

OPERATING AGREEMENT

[TO BE ATTACHED WHEN DEVELOPED]

EXHIBIT D

CONDITION REPORT

[TO BE ATTACHED WHEN COMPLETED]

EXHIBIT E

ENVIRONMENTAL CONDITION REPORT

[TO BE ATTACHED WHEN COMPLETED]

Exhibit F

LIST OF ENVIRONMENTAL LAWS AND REGULATIONS

Air Quality:	(a)	Clean Air Act & Amendments
	(b)	40 CFR Parts 50-52, 61, 62, 65-67 and 81
	(c)	RSA ch. 125-C, Air Pollution Control, and rules adopted thereunder
	(d)	RSA ch. 125-H, Air Toxic Control Act, and rules adopted thereunder
Hazardous Materials:	(a)	Hazardous Materials Transportation Act and Department of Transportation Regulations thereunder
	(b)	Emergency Planning and Community Right-To-Know Act
	(c)	49 CFR Parts 100-179
	(d)	40 CFR Part 302
	(e)	RSA ch. 277-A, Toxic Substances in the Workplace, and rules adopted thereunder
Hazardous Waste:	(a)	Resource Conservation and Recovery Act (RCRA) of 1976 and RCRA Amendments of 1984
	(b)	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended
	(c)	40 CFR Parts 260-271, 300, 302
	(d)	RSA ch. 147-A, Hazardous Waste Management and rules adopted thereunder
Water Quality:	(a)	Clean Water Act and Amendments
	(b)	Safe Drinking Water Act
	(c)	40 CFR Title 100-143, 401 and 403
	(d)	RSA ch. 146-A, Oil Spillage in Public Waters, and rules adopted thereunder
	(e)	RSA ch. 485, New Hampshire Safe Drinking Water Act, and rules adopted thereunder
	(f)	RSA ch. 485-A, Pollution and Waste Disposal, and rules adopted thereunder

EXHIBIT G

SNOW AND ICE REMOVAL AREAS AND PROCEDURES

I. Description of the Snow and Ice Removal Areas that will be accomplished by the Government

A. Road, streets, parking lots, and other areas (except airfield).

(1) Newington Street - Main Gate to Flightline Road.

(2) Portsmouth Avenue - Bulk Storage to Grafton Drive.

(3) Rockingham Drive and Hospital entry drive.

(4) Concord Avenue.

(5) Dover Avenue and Durham Street.

(6) Franklin Avenue via Bldgs 239 and 234 driveways and Exeter Street including Bldg 130, Motor Pool, and driveway to Bldg 136.

(7) Fire Lanes and Hospital parking lots.

(8) Rye Street and Sewage Plant.

(9) Parking lots and streets for Buildings #2, 11, 23, 32, 68, 69, 89, 124, 161, 203, 226, 232, 238, 239, 339, 354, 355, 359, 360, 361, 395, 398, 406, 408, 419, 420, 10010, 10400, 10405, 10804, 10806, 10880, 10803, 10808, 10830, 10825, 10875, 10860, 80901.

B. Airfield areas.

(1) Runway/Overruns.

(2) Taxiways parallel, A, B, C, and D.

(3) NAVAIDS Bldg 10804, 10806, 418 and Lowry Lane (access road).

(4) Jet engine trim pad north side "D" taxiway (entrance only).

II. Snow and Ice Removal Procedures.

A. Roads, street, parking lots, and other area (except airfield).

(1) Ice or compacted snow can be removed with a grader or underbody scraper. The grader will start in the center of the

street and progress to the curb line. A street plow following the grader will aid in disposing of the windrow created by the grader.

(2) Ice on base streets west of the railroad track will be treated with dry sand to prevent vehicles from carrying chlorides onto the airfield.

(3) Salt and Sand. Salt and/or sand should be used to control icing on selected areas of base streets. Salt shall not be applied to streets west of Portsmouth Avenue to avoid tracing salt onto the ramp. Salt use will be kept to absolute minimum and will be applied at selected intersections and steep areas of base streets. Salt use shall be coordinated and controlled by the Commander.

B. Airfield areas.

(1) Snow Removal. (To Be Developed).

(2) Ice Removal and Control.

(a) Ice on airfield pavements should be reduced to 1/4 inch thickness prior to the application of urea. Excess water and loose snow should be removed by snow sweepers. Urea is applied at the rate of 1 pound per 100 Sq Ft. The brine resulting from the urea application should be swept to the edges of the runway to aid in removing any ice thereon.

(b) Serrated cutting edges on alternate scrapers will aid in removing hard ice on the taxiways and also reduce the probability of the urea blowing off the pavement if a cross wind is blowing.

(c) Only two chemicals are approved by the Air Force for use on airfield pavements; urea, shotted or drilled, meeting MIL Spec MIL-U-10866C, Class 2 and isopropyl alcohol, grad B, Fed. Spec TT-1-735A.

(d) At Pease AFB, urea is spread using a GFE truck mounted spreader capable of being calibrated. Alcohol is not normally used.

JIM,
NEED THESE BACK

LEASE FOR BASE CLOSURE

PROPERTY (INTERIM BASIS)ON

NORTON AIR FORCE BASE, CALIFORNIA

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Lease No. NO-90-0006

DEPARTMENT OF THE AIR FORCE

LEASE

OF PROPERTY ON NORTON AIR FORCE BASE, CALIFORNIA

THIS LEASE, made between the Secretary of the Air Force, of the first part, and Inland Valley Development Agency, a joint powers authority under California law, 385 North Arrowhead Avenue, San Bernardino, California 92415-0129, of the second part, WITNESSETH:

The Secretary of the Air Force, under the authority contained in Title 10, United States Code, Section 2667, has determined that the property hereby leased is not excess property, as defined by 40 U.S.C. 472; is not for the time needed for public use; and leasing it will be advantageous to the United States and in the public interest. Therefore, for the consideration set out below, the Secretary of the Air Force ("Government" or "Air Force") hereby leases to the party of the second part ("Lessee") the premises or property described in Exhibit "A" and shown on Exhibit "B" hereto ("leased premises" or "premises"), for use on an interim basis pending its final disposal pursuant to the Base Closure and Realignment Act, P. L. 100-526.

THIS LEASE is granted subject to the following conditions:

1. Term

This Lease shall be for a term of three (3) years, beginning on July 10, 1990 and ending on July 9, 1993, unless sooner terminated in accordance with the provisions of this Lease.

2. Use of Leased Premises

a. The sole purpose for which the leased premises and any improvements thereon may be used, in the absence of prior written approval of the Government for any other use, is for the conduct of commercial aircraft maintenance and modification operations and directly related activities.

b. This Lease authorizes interim use of land and facilities on Norton Air Force Base for purposes which will facilitate the local community's economic adjustment to the impacts resulting from the impending closure of the installation and not interfere with, delay, or retard final disposal of the property by the Government. The Lessee understands and acknowledges that this Lease is not and does not constitute a commitment by the Government as to the ultimate disposal of the leased premises or of Norton Air Force Base, in whole or in part, to the Lessee or any agency or instrumentality thereof, or to any sublessee.

c. The Lease may be terminated by the Government as provided in Condition 6. The Lessee understands and agrees that the Government need not state a reason for termination and waives any claims or suits against the Government arising out of any such termination.

3. Subjection to Existing and Future Easements and Rights-of-Way

This Lease is subject to all outstanding easements and rights-of-way for any purpose with respect to the leased premises. The holders of such easements and rights-of-way ("outgrants"), present or future, shall have reasonable rights of ingress and egress over the leased premises in order to carry out the purpose of the outgrant. These rights may also be exercised by workers engaged in the construction, installation, maintenance, operation, repair or replacement of facilities located on the outgrants and by any federal, state or local official engaged in the official inspection thereof.

4. Operating Agreement

The Operating Agreement attached hereto as Exhibit "C" is incorporated into this Lease by reference. In the event of any inconsistency between the provisions of the Operating Agreement, as it presently exists or may be amended, and the provisions of this Lease, the provisions of this Lease will control.

5. Rent

a. The Lessee shall pay to the United States rent as follows:

(1) for each year this Lease shall be in effect, facility/area rent in the amount of Seven Hundred Six Thousand Nine Hundred Twenty Dollars ($706,920). Facility/area rent shall be payable in equal quarterly installments of One Hundred Seventy-Six Thousand Seven Hundred Thirty Dollars ($176,730) each in advance on or before the first day of the beginning month of each such quarter-year period.

(a) Facility/area rent in the amount of Five Hundred Eighty-Three Thousand Nine Hundred Twenty Dollars ($583,920) for the hangar facility, identified as Building 763 on Exhibits "A" and "B" ("Hangar 763") (Exhibit A, Items 1, 2, 3, 4, 5, 6, and 7) and the parking area (Exhibit A, Item 9) shall begin on the first day of occupancy or use of Hangar 763 by the Lessee. "Occupancy" or "use" shall mean any activity or presence, to include preparation and construction, in Hangar 763 which the Air Force determines is inconsistent with its continued exclusive use of the entire hangar facility.

(b) Facility/area rent in the amount of One Hundred Twenty-Three Thousand Dollars ($123,000) for the use of the warehouse facility identified as Building 747, Southeast

Annex, on Exhibits "A" and "B" ("Warehouse Annex 747") (Exhibit A, Item 8) shall begin on the earlier of the first day of occupancy or use of Warehouse Annex 747 by the Lessee or six (6) months from the beginning date of the Lease. "Occupancy" or "use" shall mean any activity or presence, to include preparation and construction, in Warehouse Annex 747.

(c) If the facility/area rent under Condition 5a(1)(a) or Condition 5a(1)(b) above commences on a day other than the first day of the beginning month of a quarter-year period, that portion of the facility/area rent which is payable for the quarter-year period shall be prorated.

(2) for each calendar day or any portion thereof that an aircraft in support of the Lessee's operations shall occupy ramp parking during the existence of this Lease, ramp parking rent in an amount of One Hundred Dollars ($100.00) per aircraft. Ramp parking rent shall be payable in arrears upon receipt of appropriate bills from the Government and forwarded with the facility/area rent due for the following quarter-year period. Ramp parking rent shall begin on the day following the beginning date of the Lease term.

(3) Rent payments due under Conditions 5a(1) and 5a(2) above shall be made promptly when due, without any deduction or setoff. Interest at the rate prescribed by the Secretary of the United States Treasury shall be payable on any rent payment

required to be made under this Condition 5a that is not paid within fifteen (15) days after the date on which such payment is due. Interest shall accrue beginning on the day after the rent payment is due and end on the day payment is received by the Government.

b. The Lessee will reimburse all Air Force costs associated with granting this Lease and any renewal of it. Such costs include, but are not limited to, expenses incurred in connection with the conduct of appraisals, environmental studies required by the National Environmental Policy Act (NEPA), any environmental audit of the leased premises conducted solely for purposes of this Lease, and relocating Air Force operations out of Docks 3 and 4. Payment of these costs shall be made promptly upon receipt of appropriate bills from the Government.

c. The Lessee shall pay to the Government on demand any sum which may have to be expended after the expiration or termination of this Lease in restoring the premises to the condition required by Condition 18.

d. Compensation in each case shall be made payable to the Treasurer of the United States and forwarded by the Lessee direct to the Commander, 63 Combat Support Group, Norton Air Force Base, California ("Commander" or "said officer").

6. Termination

a. This Lease may be terminated by the Deputy Assistant Secretary of the Air Force (Installations) at any time upon the failure of the Lessee to comply with the terms of this Lease. No money or other consideration paid by the Lessee or which may be due up to the effective date of termination will be refunded. Prior to termination, the Lessee must be informed, in writing, by the said officer of the terms with which the Lessee is not complying and afforded a period of fifteen (15) business days to return to compliance with the Lease's provisions or begin the actions necessary to bring it into compliance with the Lease in accordance with a compliance schedule approved by the Government, if the time required to return to compliance exceeds the fifteen (15) business day period.

b. This Lease may be terminated by either the Lessee (subject to the provisions of Condition 18 below) or the Government at any time by giving the other party thirty (30) days' written notice. No money or other consideration paid by the Lessee or which may be due up to the effective date of termination will be refunded or waived, as the case may be. Notwithstanding the foregoing, the Government agrees that until it has adopted a plan for the final disposal of Norton Air Force Base, it will exercise its right of termination under this Condition 6b only in case of a national emergency declared by the President of the United States.

7. Assignment or Subletting

a. The Lessee shall neither transfer nor assign this Lease or any interest therein or any property on the leased premises, nor sublet the leased premises or any part thereof or any property thereon, nor grant any interest, privilege, or license whatsoever in connection with this Lease without the prior written consent of the Government. Such consent shall not be unreasonably withheld or delayed, subject to the provisions of Conditions 7b, 7c, and 7d below.

b. Any assignment or sublease granted by the Lessee shall be subject to all of the terms and conditions of this Lease and shall terminate immediately upon the expiration or any earlier termination of this Lease, without any liability on the part of the Government to the Lessee or any assignee or sublessee. Under any assignment made, with or without consent, the assignee shall be deemed to have assumed all of the obligations of the Lessee under this Lease. No assignment or sublease shall relieve the Lessee of any of its obligations hereunder.

c. The Lessee shall furnish the Government, for its prior written consent, a copy of each agreement of sublease or assignment it proposes to execute. Such consent may include the requirement to delete, add or change provisions in the sublease instrument as the Government shall deem necessary to protect its

interests. Consent to any sublease shall not be taken or construed to diminish or enlarge any of the rights or obligations of either the of the parties under the Lease. Consent or rejection or any required changes shall be provided within twenty-one (21) days of receipt of the proposed agreement.

d. Any sublease agreement must include the provisions set forth in Conditions 22, 23 and 24 of the Lease and expressly provide that (1) the sublease is subject to all of the terms and conditions of the Lease; (2) it shall terminate with the expiration or earlier termination of the Lease; (3) the sublessee shall assume all of the Lessee's obligations and responsibilities under the Operating Agreement (Exhibit C); and (4) in case of any conflict between the Lease and the sublease, the Lease will control. A copy of the Lease and the Operating Agreement must be attached to the sublease agreement.

8. Condition of Leased Premises

a. The Lessee has inspected, knows and accepts the condition and state of repair of the leased premises. It is understood and agreed that they are leased in an "as is," "where is" condition without any representation or warranty by the Government concerning their condition and without obligation on the part of the Government to make any alterations, repairs or additions. The Government shall not be liable for any latent or patent defects in the leased premises. The Lessee acknowledges

that the Government has made no representation or warranty concerning the condition and state of repair of the leased premises nor any agreement or promise to alter, improve, adapt, or repair them which has not been fully set forth in this Lease.

b. A condition report signed by representatives of the Government and the Lessee will be attached as Exhibit "D" and made a part of this Lease within ten (10) business days of the beginning date of this Lease. The report sets forth the condition of the leased premises with respect to physical appearance and condition as determined from the joint inspection of them by the parties.

c. An environmental condition report signed by representatives of the Government and the Lessee will be attached as Exhibit "E" and made a part of this Lease within sixty (60) days of the beginning date of this Lease. The report sets forth the condition of the leased premises with respect to environmental matters as determined from the joint environmental inspection of them by the parties.

9. Maintenance of Leased Premises

The Lessee, at its own expense, shall at all times protect, preserve, and maintain the leased premises, including any improvements located thereon, in good order and condition, and

exercise due diligence in protecting the leased premises against damage or destruction by fire and other causes.

10. Damage to Government Property

Any real or personal property of the United States damaged or destroyed by the Lessee incident to the Lessee's use and occupation of the leased premises shall be promptly repaired or replaced by the Lessee to the satisfaction of the said officer. In lieu of such repair or replacement the Lessee shall, if so required by the said officer, pay to the United States money in an amount sufficient to compensate for the loss sustained by the Government by reason of damage or destruction of Government property.

11. Access and Inspection

a. The United States, its officers, agents, employees, and contractors, may enter upon the leased premises, at all times for any purposes not inconsistent with Lessee's quiet use and enjoyment of them under this Lease, including but not limited to the purpose of inspection. The Government will give the Lessee or sublessee normally twenty-four (24) hours prior notice of its intention to enter the leased premises unless it determines the entry is required for safety, environmental, or security purposes. The Lessee shall have no claim on account of such entries against

the United States or any officer, agent, employee, or contractor thereof.

b. The Lessee acknowledges and agrees that final disposal of the leased premises takes precedence over interim use under this Lease. The Lessee will cooperate with the Government to enable such final disposal to occur on a timely basis. In particular, the Lessee will permit potential buyers, their prospective tenants and subtenants, and the contractors or subcontractors of any of them, to visit the premises on reasonable notice from the Government during regular business hours.

12. Government Non-Liability and Indemnification by Lessee

a. The United States shall not be responsible for damages to property or injuries to persons which may arise from or be attributable or incident to the condition or state or repair of the leased premises, or the use and occupation thereof, or for damages to the property of the Lessee, or for damages to the property or injuries to the person of the Lessee's officers, agents, servants or employees, or others who may be on the leased premises at their invitation or the invitation of any one of them.

b. The Lessee agrees to assume all risks of loss or damage to property and injury or death to persons by reason of or incident to the possession and/or use of the leased premises, or the activities conducted under this Lease. The Lessee expressly

waives all claims against the Government for any such loss, damage, personal injury or death caused by or occurring as a consequence of such possession and/or use of the leased premises or the conduct of activities or the performance of responsibilities under this Lease. The Lessee further agrees to indemnify, save, hold harmless, and defend the Government, its officers, agents and employees, from and against all suits, claims, demands or actions, liabilities, judgments, costs and attorneys' fees arising out of, or in any manner predicated upon personal injury, death or property damage resulting from, related to, caused by or arising out of the possession and/or use of the leased premises or any activities conducted or services furnished in connection with or pursuant to this Lease. The agreements contained in the preceding sentence do not extend to claims for damages caused solely by the gross negligence or willful misconduct of officers, agents or employees of the United States, without contributory fault on the part of any person, firm or corporation. The Government will give the Lessee notice of any claim against it covered by this indemnity as soon after learning of it as practicable.

13. Insurance

a. All Risk. The Lessee shall in any event and without prejudice to any other rights of the Government bear all risk of loss or damage to the premises, together with the improvements thereon, arising from any causes whatsoever, with or

without fault by the Government, including but not limited to, fire; lightning; storm; tempest; explosion; impact; aircraft; vehicles; smoke; riot; civil commotion; bursting or overflowing of water tanks, apparatus, or pipes; boiler and machinery coverage against loss or damage by explosion of steam boilers, pressure vessels and similar apparatus now or hereafter installed; flood; labor disturbances; earthquake, malicious damage; or any other casualty or act of god. For purposes of this Condition 13a only, "premises" shall be deemed to include all of Hangar 763, whether or not it is included in the description of the leased premises in Exhibit A.

b. Insurance:

(1) Lessee's Insurance: During the entire period this Lease shall be in effect, the Lessee at its expense will carry and maintain:

(a) All-risks property and casualty insurance against the risks enumerated in paragraph 13a above in an amount at all times equal to at least 100% of the full replacement value of the improvements and personal property on or near the leased premises;

(b) Public liability and property damage insurance, including but not limited to, insurance against assumed or contractual liability under this Lease, with respect to the

leased premises and improvements thereon, to afford protection with limits of liability in amounts approved from time to time by the Government, but not less than Five Million Dollars ($5,000,000) in the event of bodily injury and death to any number of persons in any one accident, and not less than Five Million Dollars ($5,000,000) for property damage;

(c) If and to the extent required by law, workmen's compensation or similar insurance in form and amounts required by law;

(2) Lessee's Contractor's Insurance: During the entire period this Lease shall be in effect, the Lessee shall either carry and maintain the insurance required below at its expense or require any contractor performing work on the leased premises to carry and maintain at no expense to the Government:

(a) Comprehensive general liability insurance, including, but not limited to, contractor's liability coverage and contractual liability coverage, of not less than Five Million Dollars ($5,000,000) with respect to personal injury or death, and Five Million Dollars ($5,000,000) with respect to property damage;

(b) Workmen's compensation or similar insurance in form and amounts required by law.

(3) Policy Provisions: All insurance which this Lease requires the Lessee to carry and maintain or cause to be carried or maintained pursuant to this Condition 13b shall be in such form, for such amounts, for such periods of time, and with such insurers as the Government may require or approve. All policies or certificates issued by the respective insurers for public liability and all-risks property insurance will name the Government as an additional insured, provide that any losses shall be payable notwithstanding any act or failure to act or negligence of the Lessee or the Government or any other person, provide that no cancellation, reduction in amount, or material change in coverage thereof shall be effective until at least thirty (30) days after receipt by the Government of written notice thereof, provide that the insurer shall have no right of subrogation against the Government, and be reasonably satisfactory to the Government in all other respects. In no circumstances will the Lessee be entitled to assign to any third party rights of action which the Lessee may have against the Government.

(4) Delivery of Policies: The Lessee shall deliver or cause to be delivered promptly to the Government a certificate of insurance evidencing the insurance required by this Lease and shall also deliver no later than thirty (30) days prior to the expiration of any such policy, a certificate of insurance evidencing each renewal policy covering the same risks.

c. Loss or Damage: In the event that any item or part of the leased premises, together with the improvements thereon, shall require repair, rebuilding, or replacement resulting from loss or damage, the risk of which is assumed by the Lessee under Condition 13a, the Lessee shall promptly give notice thereof to the Government. The Lessee will as soon as practicable after the casualty restore such item or part of the leased premises and improvements thereon as nearly as possible to the condition which existed immediately prior to such loss or damage, subject to Condition 18 of the Lease.

14. Compliance with Applicable Laws

a. The Lessee will at all times during the existence of this Lease promptly observe and comply, at its sole cost and expense, with the provisions of all applicable Federal, state, and local laws, regulations, and standards, and in particular those provisions concerning the protection and enhancement of environmental quality and pollution control and abatement.

b. The Lessee shall comply with all applicable laws, ordinances, and regulations of the State of California, the County of San Bernardino, and the City of San Bernardino with regard to construction, sanitation, licenses or permits to do business, and all other matters.

c. This condition does not constitute a waiver of Federal Supremacy or sovereign immunity. Only laws and regulations applicable to the leased premises under the Constitution and statutes of the United States are covered by this condition. The United States presently exercises exclusive Federal jurisdiction over the leased premises. The Government will notify the Lessee of any change in legislative jurisdiction within thirty (30) days of the occurence of the event.

d. Responsibility for compliance as specified in this Condition 14 rests exclusively with the Lessee. The Department of the Air Force assumes no enforcement or supervisory responsiblity except with respect to matters committed to its jurisdiction and authority. The Lessee shall be liable for all costs associated with compliance, defense of enforcement actions or suits, payment of fines, penalties, or other sanctions and remedial costs.

15. Construction and Modification of Leased Premises

a. The Lessee shall not construct or make or permit its sublessees or assigns to construct or make any substantial alterations, additions, or improvements to or installations upon or otherwise modify or alter the leased premises in any substantial way without the prior written consent of the Government. Such consent may include a requirement to provide the Government with a performance and payment bond satisfactory to it in all respects and other requirements deemed necessary to protect

the interests of the Government. Except as such written approval shall expressly provide otherwise, all such approved alterations, additions, modifications, improvements and installations shall become Government property when annexed to the leased premises.

b. All plans for construction or alterations, additions, modifications, improvements, or installations ("construction plans" or "remodeling plans") pursuant to Condition 15a above by the Lessee must be approved in writing by the Government before the commencement of any construction project. In addition, the designs for all Lessee connections to Norton Air Force Base utilities will comply with DOD/USAF construction standards and be subject to Norton Air Force Base review and approval. DOD/USAF construction standards are available through the office of the Commander or the Base Civil Engineer. The Lessee will submit any remodeling plans to the Base Civil Engineer for approval.

c. The Air Force review process for either a construction project or a utility connection will be completed within thirty (30) days of receipt of plans and specifications. In the event problems are detected during review, immediate notice will be provided by telephone to the Lessee or its representative designated for the purpose. Approval will not be unreasonably withheld.

d. All construction shall be in accordance with the approved designs and plans and without cost to the Government. The Lessee shall not proceed with excavation, demolition, or construction until it receives written notice from the Government that such designs and plans are acceptable to the Government.

e. All matters of ingress, egress, contractor haul routes, construction activity and disposition of excavated material, in connection with the lease herein granted, shall be coordinated with the Government. All excavation and construction activity shall be accomplished during periods (including hours of the day) acceptable to the said officer.

f. The Commander is authorized to grant approvals and consents under this Condition 15. Disapprovals may be reviewed by the Office of the Deputy Assistant Secretary of the Air Force (Installations). Such review is discretionary. A request for review will be submitted to the Commander, who will forward it through channels with his comments within ten (10) business days after he receives the request.

16. Utilities and Services

The Lessee will be responsible at its sole expense for all utilities, janitorial services, building maintenance and grounds maintenance for the leased premises. Utilities services will be provided through meters, if possible. The Lessee will

purchase, install, and maintain all such meters at its own cost and without cost and expense to the Government. The Lessee will pay, in addition to the cash rent which is required under this Lease, the charges for any utilities and services furnished by the Government which the Lessee may require in connection with its use of the leased premises. The charges and the method of payment for each utility or service will be determined by the appropriate supplier of the utility or service in accordance with applicable laws and regulations, on such basis as the appropriate supplier of the utility or service may establish. It is expressly understood and agreed that the Government in no way warrants the continued maintenance or adequacy of any utilities or services furnished by it to the Lessee.

a. Subject to Conditions 16b and 16c below, the Lessee may purchase from the Government the following utility services: electric power, steam, water, and sewage.

b. Any sale of a utility service will be in accordance with 10 U.S.C. § 2481 and Air Force Regulation (AFR) 91-5.

c. The Lessee agrees to enter into a separate contract for each utility service procured under Condition 16a above at rates to be specified in each contract.

17. Taxes

The Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this Lease may be imposed upon the Lessee with respect to the leased premises. Title 10, United States Code, § 2667(e) contains the consent of Congress to the taxation of the lessee's interest in the leased premises, whether or not the premises are in an area of exclusive Federal jurisdiction. Should Congress consent to taxation of the Government's interest in the property, this Lease will be renegotiated.

18. Surrender of Leased Premises

On or before the date of expiration of this Lease, or its earlier termination hereunder, the Lessee shall vacate and surrender the leased premises to the Government. Subject to Condition 15a, the Lessee shall remove its property from the leased premises and restore them to as good order and condition as that existing on the beginning date of this Lease, damages beyond the control of the Lessee due to fair wear and tear, excepted. If the Lessee shall fail or neglect to remove its property, then, at the option of the Air Force, the property shall either become the property of the United States without compensation therefor, or the Air Force may cause it to be removed and the premises to be restored at the expense of the Lessee, and no claim for damages

against the United States or its officers or agents shall be created by or made on account of such removal and restoration work.

19. Disputes

a. Except as otherwise provided in this Lease, any dispute concerning a question of fact arising under this Lease which is not disposed of by agreement shall be decided by the said officer. He or she shall reduce the decision to writing and mail or otherwise furnish a copy to the Lessee. The decision of the said officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Lessee mails or otherwise furnishes to the said officer a written appeal addressed to the Secretary of the Air Force. The decision of the Secretary or his or her duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this condition, the Lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Lessee shall proceed diligently with the performance of the Lease in accordance with the decision of the said officer.

b. This condition does not preclude consideration of questions of law in connection with decisions provided for in Condition 19a above. Nothing in this condition, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

20. Rules and Regulations

The use and occupation of the leased premises shall be subject to the general supervision and approval of the said officer and to such reasonable rules and regulations as may be prescribed by him or her from time to time.

21. Notices

a. No notice, order, direction, determination, requirement, consent or approval under this Lease shall be of any effect unless it is in writing.

b. All notices to be given pursuant to this Lease shall be addressed, if to the Lessee, to:

Mr. W. R. Holcomb, Co-Chairman
Inland Valley Development Agency
385 North Arrowhead Avenue
Fourth Floor
San Bernardino, California 92415-0129

with a copy to:

Reid & Hellyer
A Professional Corporation
P. O. Box 1300
Riverside, California 92502-1300
Attention: Frank J. Delany, Esq.

if to the Government, to:

Combat Support Group Commander
63 CSG/CC
Norton Air Force Base, California 92409

or as may from time to time be directed by the parties. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope or wrapper, addressed as aforesaid and sent certified mail, return receipt requested.

22. Environmental Protection

a. The Lessee will comply with the environmental laws and regulations set out in Exhibit "F," and all other Federal, state, and local laws, regulations, and standards that are applicable to Lessee's activities on the leased premises. See also Condition 14.

b. If pretreatment is required for any industrial wastes placed in the Norton Air Force Base sewage treatment system by the Lessee by applicable National Pollutant Discharge Elimination System (NPDES) permits, Environmental Protection Agency (EPA) regulations, or Norton Air Force Base's contracts for wastewater treatment, the Lessee shall pretreat such wastes as required. The Government will give sympathetic consideration to

pretreatment in Norton Air Force Base facilities, provided they are suitable for the purpose, have capacity available, and arrangements for reimbursement satisfactory to the said officer are agreed upon.

c. The Lessee shall be solely responsible for obtaining at its cost and expense any environmental permits required for its operations under the Lease, independent of any existing Norton Air Force Base permits.

d. Norton Air Force Base air emissions offsets will not be made available to the Lessee. The Lessee shall be responsible for obtaining from some other source(s) any air pollution credits that may be required to offset emissions resulting from its activities under the Lease.

e. Any hazardous waste permit under Resource Conservation and Recovery Act, or its California equivalent, shall be limited to generation and transportation. The Lessee shall not, under any circumstances, allow any hazardous waste to remain on or about the leased premises for any period in excess of ninety (90) days. Any violation of this requirement shall be deemed a material breach of this Lease. Government storage facilities will not be available to the Lessee. The Lessee must provide at its own expense such storage facilities complying with all laws and regulations it needs for temporary (less than ninety (90) days) storage.

f. Air Force accumulation points for hazardous and other wastes will not be used by the Lessee or any sublessee. Neither will the Lessee or sublessee permit its hazardous wastes to be co-mingled with hazardous waste of the Air Force.

g. The Lessee shall have a completed and approved plan for responding to hazardous waste, fuel, and other chemical spills prior to commencement of operations on the leased premises. Such plan shall be independent of Norton Air Force Base and except for initial fire response and/or spill containment, shall not rely on use of Norton Air Force Base personnel or equipment. Should the Government provide any personnel or equipment, whether for initial fire response and/or spill containment, otherwise on request of the Lessee, or because the Lessee was not, in the opinion of the said officer, conducting timely cleanup actions, the Lessee agrees to reimburse the Government for its costs.

h. The Lessee shall indemnify and hold harmless the Government from any costs, expenses, liabilities, fines, or penalties resulting from discharges, emissions, spills, storage, disposal, or any other action by the Lessee giving rise to Government liability, civil or criminal, or responsibility under Federal, State or local environmental laws. This provision shall survive the expiration or termination of the Lease, and the Lessee's obligations hereunder shall apply whenever the Government

incurs costs or liabilities for the Lessee's actions of the types described in this Condition 22.

i. The Government's rights under this Lease specifically include the right for Air Force officials to inspect the Lessee's premises for compliance with environmental, safety, and occupational health laws and regulations, whether or not the Government is responsible for enforcing them. Such inspections are without prejudice to the right of duly constituted enforcement officials to make such inspections. Although Norton Air Force Base is presently under exclusive Federal jurisdiction, the Lessee shall not seek to exclude state or local environmental and occupational health safety inspectors on the grounds that they lack jurisdiction.

j. Except as provided in Condition 22k below, the Government is not responsible for any removal or containment of asbestos. The Lessee and any sublessee will submit any remodeling plans to the Base Civil Engineer for approval as required under Condition 15b of the Lease. If the plans require the removal of asbestos, an asbestos disposal plan and a copy of the notification which the Lessee or sublessee has provided to the South Coast Air Quality Management District (SCAQMD) must be submitted concurrently with the remodeling plans. The asbestos disposal plan will identify the proposed disposal site for the asbestos.

k. The Government shall be responsible for the removal or containment of friable asbestos existing in the leased premises on the beginning date of the Lease as identified in the environmental condition report hereto (Exhibit E). The Government agrees to abate all such existing friable asbestos as provided in this Condition 22k and Condition 22n below. The Government may choose the most economical means of remediating any friable asbestos, which may include removal or containment, or a combination of removal and containment. The foregoing agreement does not apply to non-friable asbestos which may be disturbed by the Lessee's or sublessee's activities and thereby become friable. Non-friable asbestos which becomes friable through or as a consequence of the Lessee's or sublessee's activities under this Lease will be abated by the Lessee at its sole cost and expense.

l. The Government acknowledges that Norton Air Force Base has been identified as a National Priority List (NPL) Site under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) of 1980, as amended. The Lessee acknowledges that the Government has provided it with a copy of the Norton Air Force Base Interagency Agreement (IAG) entered into by EPA Region 9, the State of California, and the Air Force on June 29, 1989, and agrees that should any conflict arise between the terms of the IAG and the provisions of this Lease, the terms of the IAG will take precedence. The Lessee further agrees that the Government assumes no liability to the Lessee or its sublessees should implementation of the IAG interfere with the

Lessee's use of the leased premises. The Lessee shall have no claim on account of any such interference against the United States or any officer, agent, employee or contractor thereof, other than for abatement of rent.

m. The Air Force and/or its contractors and subcontractors have the right to enter upon the leased premises and conduct investigations and surveys, to include drillings, compiling, etc., as required or necessary under the Norton Air Force Base Installation Restoration Program or the IAG. These inspections or surveys will, to the extent practicable, be coordinated with a representative designated by the Lessee or its sublessee. The Lessee shall have no claim on account of such entries against the Unites States or any officer, agent, employee, contractor, or subcontractor thereof.

n. The Lessee and its sublessee do not assume any liability or responsiblity for environmental impacts and damage caused by the Government's use of toxic or hazardous wastes, substances or materials on any portion of Norton Air Force Base, including the leased premises, prior to the beginning date of this Lease. The Lessee and its sublessee have no obligation to undertake the defense, remediation and cleanup, to include the liability and responsiblity for the costs of damage, penalties, legal and investigative services solely arising out of any claim or action in existence now, or which may be brought in the future by third parties or any governmental body against the Government,

because of any use of, or release from, any portion of Norton Air Force Base (including the leased premises) of any toxic or hazardous wastes, substances or materials prior to the beginning date of this Lease.

23. Special Provisions

a. The Lessee acknowledges that it has read the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) prepared by the Government in connection with this Lease and understands that the operations described in the EA/FONSI are the only ones that have been assessed in compliance with the National Environmental Policy Act of 1969 (NEPA). The Lessee agrees that any operation, type and quantity of chemicals used or emissions caused, employees, vehicle trips, flights of aircraft, or any other parameter contained in the EA/FONSI (collectively, "EA/FONSI paremeters") which might have environmental impact or is regulated by Federal or State environmental laws may not be changed or modified without the prior written consent of the said officer. The EA/FONSI paremeters are hereby incorporated by reference and made an integral part of this Lease as though fully set forth in this Condition 23a. A decision on a proposal by the Lessee for any change in the EA/FONSI paremeters may require further environmental studies or assessments, the cost of which will be borne by the Lessee. The EA and FONSI are on file at Norton Air Force Base. Copies will be made available, on request, by the Commander.

b. The Lessee shall comply with all applicable Federal, state, and local occupational safety and health regulations, and with all Air Force safety, health and fire regulations, standards, tech orders, and procedures in common use work and operating areas, including ramps and taxiways.

c. The Lessee shall be responsible for determining whether it is subject to local building codes or building permit requirements, and for compliance with them to the extent they are applicable.

d. The Lessee acknowledges that it understands that Norton Air Force Base is an operating military installation which will remain closed to the public prior to its complete disposal and accepts that its operations may from time to time be hampered by temporary restrictions on access, such as identity checks and auto searches. The Lessee further acknowledges that it understands that the Air Force strictly enforces Federal laws and Air Force regulations concerning controlled substances (drugs) and agrees that the Government will not be responsible for lost time or costs incurred due to delays in entry, temporary loss of access, barring of individual employees from the base under Federal laws authorizing such actions, limitation or withdrawal of an employee's on-base driving privileges, or any other security action that may cause employees to be late to or unavailable at their work stations, or delay arrival of parts and supplies.

(1) All officers, agents, employees, and contractors of Lessee shall comply with Norton Air Force Base entry control regulations, including requirements to obtain identification cards and car stickers and to display them to proper authorities upon request.

(2) The Lessee shall be responsible for control of its employees in restricted and controlled areas, including obtaining and controlling restricted area badges, and for the costs of security checks when needed to comply with Air Force regulations. The Lessee and its employees shall strictly comply with flight line restricted and controlled area entry procedures. The Lessee will be responsible for arranging and paying for security training for its employees.

(3) The Lessee will be responsible at its cost and expense for any improvements, renovations and repair of the parking area included in the leased premises. The Lessee also will provide at its expense any physical security it deems necessary for the privately-owned vehicles of its employees, contractors and subcontractors. The Lessee agrees that the Government will not be responsible for loss or damage to the parked vehicles of its employees, contractors and subcontractors and it willindemnify and hold the Government harmless from any claims for such loss or damage.

(4) Any police alarm installed by the Lessee on the leased premises must be compatible with the Wells Fargo alarm system presently in use on Norton Air Force Base. Any increased costs to the Government from such alarm installation, including increased response costs, will be reimbursed by the the Lessee.

e. The Lessee will install an above-ground storage tank which will be connected to the base sewer lines to collect the deluge system waste water if the Government determines installation of the tank is necessary to comply with applicable Federal, state or local legal requirements. The tank will have a one hundred ten per cent (110%) volume secondary containment system. The valve from the tank to the sewer will remain closed until an inspection of any waste water in the tank has been conducted and the results have been coordinated through the Commander. Any discharge into the sewer must be approved in writing by the Commander.

f. The Lessee understands and acknowledges that open and above ground explosives storage sites at Norton Air Force Base present a hazard to aircraft using runway 6-24 and certain identified taxiways. The Lessee hereby assumes responsibility for and agrees to indemnify and hold the Government harmless from any claims for damages to property or injuries to persons which may arise from incidents involving such explosives where the property or persons are on Norton Air Force Base premises incident to the Lessee's or sublessee's use of the leased premises.

24. Replacement Facilities

a. The Lessee acknowledges that its occupancy and use of the leased premises and use of other Norton Air Force Base facilities will displace certain Air Force activities and interfere with others. Therefore, the Lessee agrees that it will, at its expense, furnish the facilities and improvements (collectively, "replacement facilities") necessary to relocate the displaced Air Force activities and minimize interference with other Air Force activities and relocate the supplies, equipment, fixtures and other items of Government property to the replacement facilities. At such time as the replacement facilities are completed accepted by the Government and the displaced Air Force activities have been relocated in them, the Lessee may occupy Hangar 763.

b. Upon execution of the Lease, the Lessee will construct, renovate, and/or install the replacement facilities substantially in accordance with the description and sketches attached hereto as Exhibit "G" and more particularly described in plans and specifications to be agreed upon pursuant to Condition 24d. The Lessee will be responsible for all costs related to planning, design, contracting, construction, renovation and installation of the replacement facilities and asbestos abatement, if required.

c. The replacement facilities will be completed as soon as possible and no later than one hundred twenty (120) days after the beginning date of the Lease, subject however, to excusable delays, i.e., unavoidable delays due to acts of God, enemy action, civil commotion, fire, inclement weather, or similar causes or any other causes beyond the reasonable control and without the fault or negligence of the Lessee and/or those engaged in the construction, renovation or installation of the replacement facilities.

d. Construction plans and specifications (collectively, "plans") for the replacement facilities will be provided by the Lessee and must be approved by the Government in writing prior to the commencement of any construction, renovation, or installation. Such approval shall not be unreasonably withheld or delayed. The Lessee will be responsible for all supervision and inspection necessary to assure compliance with the approved plans. If the plans require the removal of asbestos, the Lessee will submit concurrently with them an asbestos disposal plan and a copy of the notification to SCAQMD as required under Condition 22j of the Lease.

e. The replacement facilities, when completed and accepted by the Government, shall become Government property. Government acceptance of the replacement facilities is conditioned on the facilities being completed in accordance with the approved plans.

f. The Lessee acknowledges it understands that the Government has no funds to plan or construct, renovate or install the replacement facilities and agrees that it and its sublessee will make no claim against the Government in any way related to or arising out of the furnishing of the replacement facilities.

g. The Lessee will be responsible for repair or replacement of any pavements, underground or overhead utility pipes and lines, buildings and Government personal property damaged by the Lessee or sublessee or its contractors or subcontractors during construction, renovation or installation of the replacement facilities.

25. Use of Other Norton Air Force Base Facilities

a. Flying Facilities

(1) Subject to the provisions of subparagraphs (a), (b), (c), and (d) of this Condition 25a(1) and the Operating Agreement, the Lessee shall have the right to use the runways, taxiways, parking aprons and ramps ("flying facilities") of Norton AFB on a noninterference basis with Government operations.

(a) Aircraft operations will be limited to those directly related to the commercial aircraft maintenance and modification operations the Lessee is authorized to conduct under

this Lease. The number of aircraft operations (defined as one takeoff and one landing) in any calendar month will not exceed five (5).

(b) The Lessee will pay landing fees for all aircraft using the flying facilities in support of its operations. Landing fees will be determined and paid in accordance with AFR 55-20. The Lessee also agrees to execute any releases or documents that may be required as a condition for use of the flying facilities by nongovernment aircraft pursuant to AFR 55-20.

(c) The Government will respond to fire and crash rescue emergencies involving civil aircraft in support of the Lessee's operations under this Lease within the limits of the capabilities of the fire fighting and crash rescue ("CFR") organization the Government maintains in support of its military operations at Norton AFB. The Lessee acknowledges that it understands that the Government will provide emergency fire fighting and crash rescue service only so long as a CFR organization is required for military operations at Norton Air Force Base. The Lessee agrees that after the Government determines that a CFR organization is no longer required for such military operations, the Lessee (or its sublessee) will assume the responsibility for and provide, at its sole cost and expense, all CFR services required to support the Lessee's (or its sublessee's) operations under this Lease. The Lessee agrees to release the

Government, its officers, agents and employees from all liability arising out of or connected with the use of or the failure to use government CFR equipment or personnel for fire control and crash rescue activities and to indemnify the Government, its officers, agents, and employees, against all claims arising out of the use of or failure to use government CFR equipment or personnel. The Lessee further agrees to execute and maintain in effect a hold harmless agreement as required by applicable Air Force regulations for all periods during which emergency fire fighting and crash rescue service is provided by the Government in support of the civil aircraft.

(d) The Lessee agrees that all aircraft in support of its operations which may have to taxi, park, run engines or be towed on the runway, flight line, ramp, restricted areas or environs in arriving, operating on, and departing Norton Air Force Base will strictly comply with all procedures required under or pursuant to the Operating Agreement.

(e) Procedures governing use of the flying facilities by aircraft in support of the Lessee's operations are contained in the Operating Agreement.

(2) The Lessee acknowledges that it understands that maintenance of the flying facilities is solely for Government purposes. The Government will provide information on any areas it deems unsafe to taxi a 747 aircraft. The Government shall not be

liable for damage to aircraft in support of the Lessee's operation while taxiing, to include Foreign Object Damage (FOD).

b. Wash Rack

The Lessee shall have the right to use the Government wash rack on a noninterference basis with Government operations under procedures established in the Operating Agreement.

26. General Provisions

a. Convenant against Contingent Fees. The Lessee warrants that no person or agency has been employed or retained to solicit or secure this Lease upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Lessee for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Lease without liability or in its discretion to require the Lessee to pay, in addition to the lease rental or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

b. Officials not to Benefit. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Lease or to any benefit to arise

therefrom, but this provision shall not be construed to extend to this Lease if made with a corporation for its general benefit.

c. Nondiscrimination. The Lessee shall use the leased premises in a nondiscriminatory manner to the end that no person shall, on the ground of race, color, religion, sex, age, handicap or national origin, be excluded from using the facilities or obtaining the services provided thereon, or otherwise be subjected to discrimination under any program or activities provided thereon.

(1) As used in this condition, the term "facility" means lodgings, stores, shops, restaurants, cafeterias, restrooms, and any other facility of a public nature in any building covered by, or built on land covered by, this Lease.

(2) The Lessee agrees not to discriminate against any person because of race, color, religion, sex, or national origin in furnishing, or refusing to furnish, to such person the use of any facility, including all services, privileges, accommodations, and activities provided on the leased premises. This does not require the furnishing to the general public the use of any facility customarily furnished by the Lessee solely to tenants or to Air Force military and civilian personnel, and the guests and invitees of any of them.

d. Gratuities. The Government may, by written notice to the Lessee, terminate this Lease if it is found after notice and hearing, by the Secretary of the Air Force, or his/her duly authorized representative, that gratuities in the form of entertainment, gifts, or otherwise, were offered or given by the Lessee, or any agent or representative of the Lessee, to any officer or employee of the Government with a view toward securing an agreement or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such agreement; provided that the existence of the facts upon which the Secretary of the Air Force or his/her duly authorized representative makes such finding, shall be an issue and may be reviewed in any competent court. In the event this Lease is so terminated, the Government shall be entitled (a) to pursue the same remedies against the Lessee as it could pursue in the event of a breach of the Lease by the Lessee, and (b) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary of the Air Force or his/her duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Lessee in providing any such gratuities to any such officer to employee. The rights and remedies of the Government provided in this article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Lease.

e. No Joint Venture. Nothing contained in this Lease will make, or will be construed to make, the parties hereto partners or joint venturers with each other, it being understood and agreed that the only relationship between the Government and the Lessee is that of landlord and tenant. Neither will anything in this Lease render, or be construed to render, either of the parties hereto liable to any third party for the debts ;or obligations of the other party hereto.

f. Records and Books of Account. The Lessee agrees that the Comptroller General of the United States or the Auditor General of the United States Air Force or any of their duly authorized representatives shall, until the expiration of three (3) years after the expiration or earlier termination of this Lease, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Lessee involving transactions related to this Lease. The Lessee further agrees that any sublease of the leased premises (or any part thereof) will contain a provision to the effect that the Comptroller General of the United States or the Auditor General of the United States Air Force or any of their duly authorized representatives shall, until three (3) years after the expiration or earlier termination of this Lease, have access to and the right to examine any directly pertinent books, documents, papers, and records of the sublessee involving transactions related to the sublease.

30. Reporting to Congress

Pursuant to the Base Closure and Realignment Act (BCRA), P. L. 100-526, this Lease is not subject to Title 10, United States Code, Section 2662.

IN WITNESS WHEREOF I have hereunto set my hand by authority of the Secretary of the Air Force this 10th day of July, 1990.

By: _____

Title: John O. Rittenhouse
Deputy for Installations Management
Deputy Assistant Secretary of the Air Force
(Installations)

THIS LEASE is also executed by the Lessee this 10th day of July, 1990.

INLAND VALLEY DEVELOPMENT AGENCY, a joint powers authority under California law

By: _____
W. R. ("Bob") Holcomb
Its: Co-Chairman

And: _____
Robert L. Hammock
Its: Co-Chairman

STATE OF _____)
: ss.
COUNTY OF _____)

On this 10th day of July, 1990, before me, _____, a Notary Public in and for said County and State, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the _____ of the Air Force for _____, and acknowledged to me that he/she executed the same as the act of the Secretary of the Air Force.

_____
Notary Public in and for said
County and State

STATE OF CALIFORNIA)
: ss.
COUNTY OF SAN BERNARDINO)

On this 10th day of July, 1990, before me, _____ a Notary Public in and for said County and State, personally appeared W. R. ("BOB") HOLCOMB and ROBERT L. HAMMOCK, personally known to me (or proved to me on the basis of satisfactory evidence) to be the Co-Chairmen of INLAND VALLEY DEVELOPMENT AGENCY, a joint powers authority under California law, the corporation that executed the within instrument and acknowledged to me that said corporation executed it.

_____
Notary Public in and for said
County and State

EXHIBIT A

DESCRIPTION OF LEASED PREMISES

DESCRIPTION	SQUARE FOOTAGE
1. Dock 3, Building 763 Described as starting from the southeast corner of Building 763, west 238 feet to west barrier wall, Dock 3; north 203 feet to northwest corner of Dock 3; east 238 feet to northeast corner of Dock 3; south 203 feet to point of origin.	48,314 sq feet
2. Dock Separation Area, Building 763 Described as starting from a point 20 feet east of K3, west 61 feet to a point 18 feet west of J3; north 203 feet to a point 18 feet west of J12; east 61 feet to a point 20 feet east of K12; south 203 feet to point of origin.	12,383 sq feet
3. Dock 4, Building 763 Described as starting from a point at the southeast corner of Dock 4, approximately 18 feet west of J3; west 240 feet to a point 5 feet west of G3; north 203 feet to a point 5 feet west of G12; east 240 feet to a point 18 feet west of J12; south 203 feet to point of origin.	48,720 sq feet
4. Area north of Dock 3, Building 763 Described as starting at the southeast corner of N13; west 233 feet to a point 12 feet west of L13; north 50 feet to a point 12 feet west of L15; east 233 feet to N15; south 50 feet to point of origin.	11,650 sq feet
5. Area North of Dock 4, Building 763 Described as starting at I13, west 130 feet to H13; north 50 feet to H15; east 130 feet to I15; south 50 feet to point of origin.	6,500 sq feet
6. Office Space, Ground Floor, Building 763 Described as a two-story office, located north of Dock 4 starting at G12, north 25 feet to G14, then east 65 feet, south to a line connecting G13 and H13, then west 65 feet to G12.	3,250 sq feet

7. Office Space, Second Floor, Building 763 — 20,875 sq feet

   Described as beginning at a point 15 feet north of R15, west 25 feet to approximately 10 feet south of 016, then north 235 feet to 025, then east 100 feet to X25, then south 200 feet to X17, then west 75 feet to R17, then south 35 feet to point of origin, excluding the equipment room within this area, which is reserved for exclusive use of the Air Force.

8. Warehouse Building 747, Southeast Annex — 38,471 sq feet

   Described as a metal structure attached to the southwest main structure by warehouse doors. Operates as a stand-alone building, with separate entrances and exterior loading docks.

9. Space for 326 vehicles

   Described as existing parking area south of A Street, north of Mill Street, bounded on the west by a line 30 feet east of Building 575 and on the west by the curvature of Mill Street.

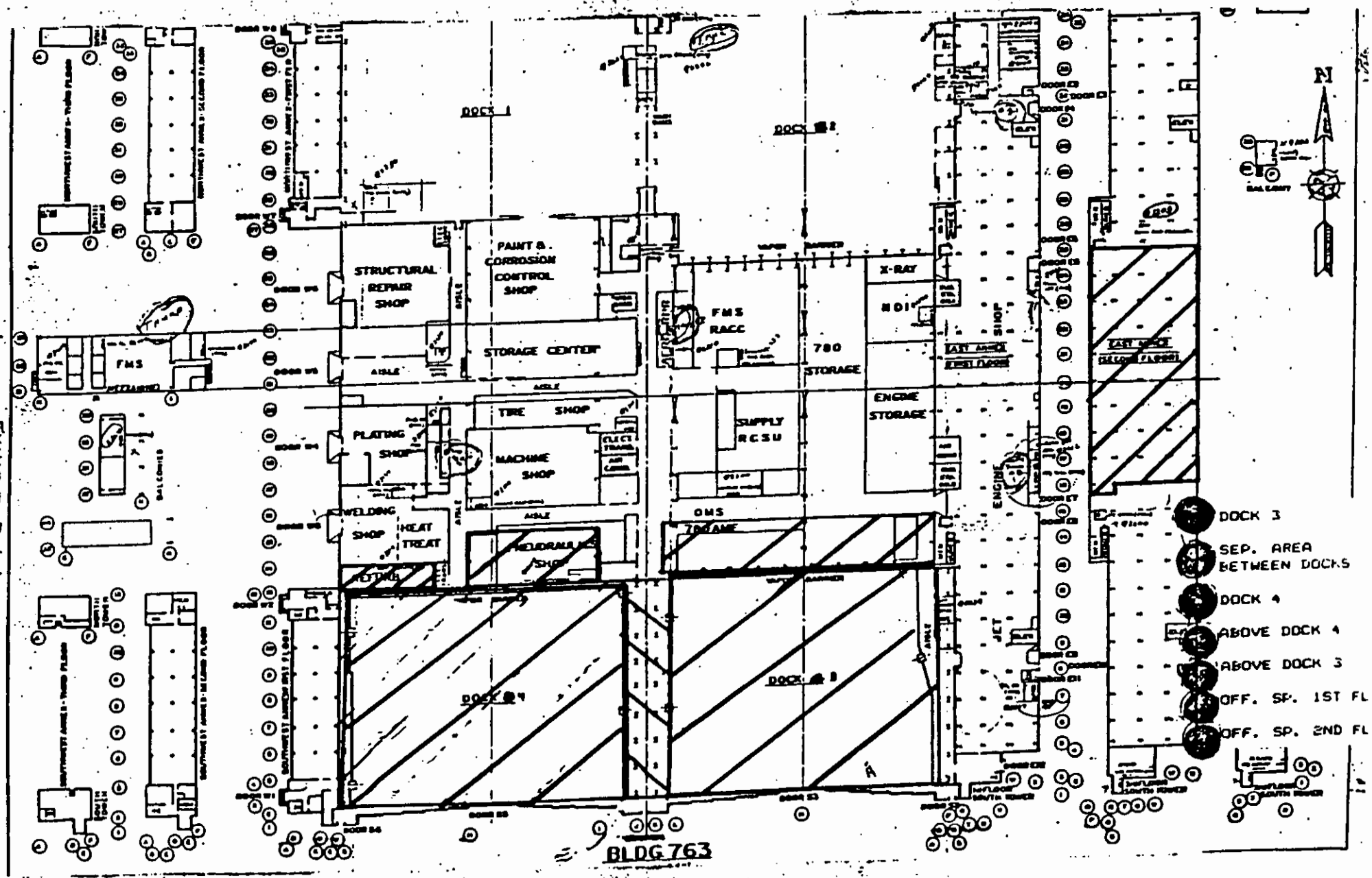

DOCK 1
DOCK 2
PAINT & CORROSION CONTROL SHOP
STRUCTURAL REPAIR SHOP
STORAGE CENTER
FMS
FMS RACC
780 STORAGE
X-RAY
NDI
ENGINE STORAGE
TIRE SHOP
PLATING SHOP
MACHINE SHOP
SUPPLY RCSU
WELDING SHOP
HEAT TREAT
OMS
DOCK 4
DOCK 3
JCT
ENGINE SHOP
N
DOCK 3
SEP. AREA BETWEEN DOCKS
DOCK 4
ABOVE DOCK 4
ABOVE DOCK 3
OFF. SP. 1ST FL
OFF. SP. 2ND FL
BLDG 763

EXHIBIT R-1

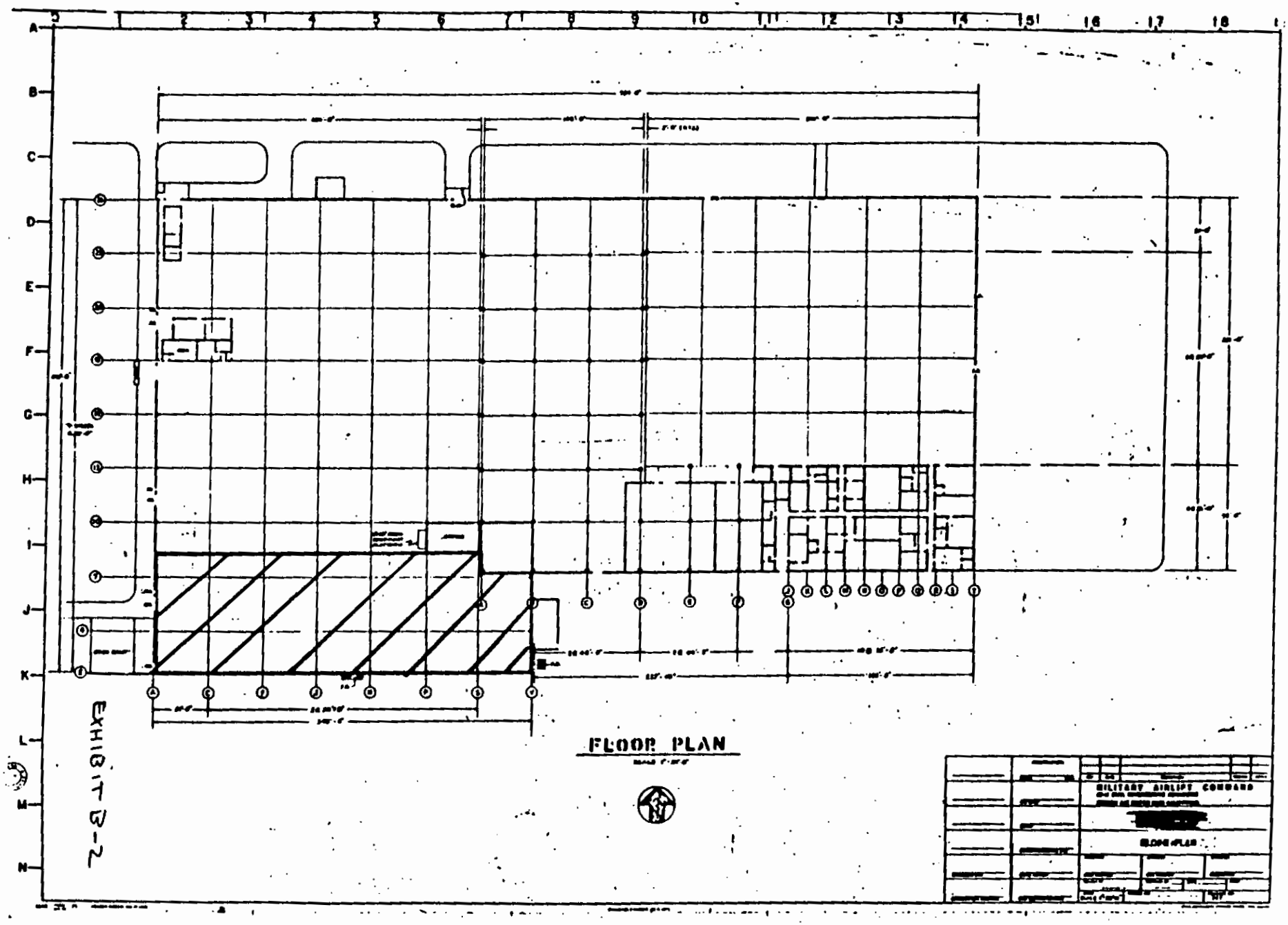
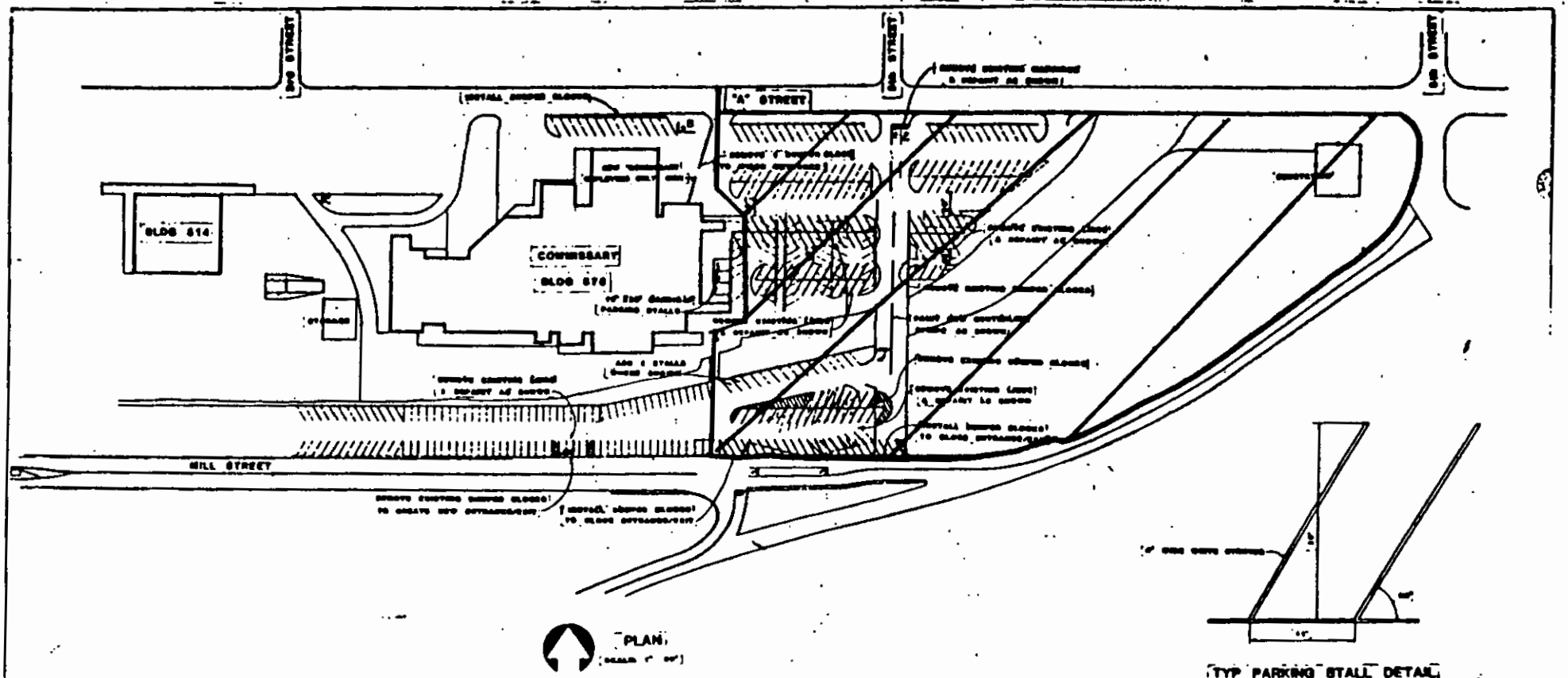


EXHIBIT B-2
FLOOR PLAN
MILITARY AIRLIFT COMMAND



PLAN

TYP PARKING STALL DETAIL

NOTES

LEGEND

MILITARY AIRLIFT COMMAND

EXHIBIT B-3

Issue 2.

QUESTION

To what extent has response to recurring environmental problems, such as petroleum contamination of soils, been standardized? Have standard or generic feasibility studies/corrective measures studies been developed for such recurring problems? If so, please describe the elements of such a study or attach an example. Have RI/FS requirements been integrated with NEPA requirements at any bases to expedite cleanup?

RESPONSE

The Air Force is pursuing ways to standardize the cleanup process where there are similar contaminants. We have been working with EPA to consider the preparation of a model RI/FS for sites contaminated with petroleum products. This would be similar to the model RI/FS which EPA has prepared for municipal landfills. We are embarking on the preparation of a "generic" or "standard" Air Force approach for the cleanup of petroleum products.

Second, we have encouraged the use of a single contractor for the assessment and study phases for all of the sites at an installation. This precludes hand-offs between multiple contractors, precludes several contractors assessing the characteristics of the installation and fosters a good working relationship with the installation and regulators.

Third, we are encouraging the remedial project manager (RPM) to take advantage of studies for sites with similar contamination at other installations. By using the site descriptions database, the RPM can determine the location of similar sites and obtain a copy of the studies which may permit the preparation of a focused RI/FS.

Fourth, we have encouraged the RPM to talk with RPMs at installations in the same State and EPA region. This will provide crossfeed on the expectations of the regulators and the approach taken for similar sites. RPMs can also take advantage of the reports which have been accomplished at similar sites.

Fifth, we have incorporated the requirements of NEPA into the RI/FS and address, if any, NEPA peculiar requirements. This usually precludes the need for a separate NEPA document.

We believe each of these efforts will serve to streamline the regulatory process, decrease the time to accomplish the work and reduce costs.

Issue 3.

QUESTION

How many current or formerly used defense sites are potentially contaminated with unexploded ordnance? Please provide a list of these sites.

RESPONSE

The list below shows Air Force sites potentially contaminated with unexploded ordnance. The total acreage indicates the total size of the reservation whereas the contaminated acreage indicates the extent of contamination within the reservation.

Active Components

LOCATION	TOTAL ACRES	CONTAMINATED ACRES
ALASKA		
Blair Lake Range	33,964	Unavailable
ARIZONA		
Goldwater Range	2,568,985	1,036,770
CALIFORNIA		
Cuddeback Range	7,556	7,556
Edwards Range	300,723	Unavailable
Imperial Valley Range	48,560	Unavailable
FLORIDA		
Eglin Range	134,581	66,400
Avon Park Range	101,029	Unavailable
GEORGIA		
Grand Bay Range	5,866	Unavailable
LOUSIANA		
Claiborne Range	33,556	Unavailable
IDAHO		
Mt Home Small Arms Range	1,622	1,622
Saylor Creek Range	102,746	12,970
NEVADA		
Nellis Range	3,089,860	1,616,014
Nellis Small Arms Range	10,595	10,595
Wendover AFAF	15,010	15,010
NEW MEXICO		
Holloman AFB	41,811	463
Kirtland AFB	18,302	3,840
Melrose Range	6,714	1,269

ATTACHMENT 3

Active Components (cont.)

LOCATION	TOTAL ACRES	CONTAMINATED ACRES
NORTH CAROLINA		
Dare County Range	46,604	Unavailable
SOUTH CAROLINA		
Poinsett Range	8,349	Unavailable
UTAH		
Hill Range	348,767	348,767
Wendover AFAF	138	138
Wendover RRL	548,369	548,369

Air National Guard Components

LOCATION	TOTAL ACRES	CONTAMINATED ACRES
ARKANSAS		
Ft Chafee Weapons Range	Unavailable	7,840
COLORADO		
Ft Carson Weapons Range	Unavailable	3,110
Airburst Range	80	80
GEORGIA		
Townsend Naval Center	Unavailable	3,822
INDIANA		
Atterbury Reserve Forces Area	Unavailable	5,120
Jefferson Range	1,033	1,033
KANSAS		
Smoky Hill ANG Range	Unavailable	9,600
MICHIGAN		
Grayling Army Center	Unavailable	1,680
MISSISSIPPI		
Ft Shelby Army Center	Unavailable	1,600
MISSOURI		
Ft Leonard Wood Range	Unavailable	2,240
NEW JERSEY		
Warren Grove Range	Unavailable	4,700
NEW YORK		
Ft Drum	Unavailable	19,840
PENNSYLVANIA		
Ft Indiantown Gap ANG	Unavailable	1,203
PUERTO RICO		
Camp Santiago A/G Range	Unavailable	2,982

Air National Guard Components (cont.)

LOCATION	TOTAL ACRES	CONTAMINATED ACRES
TEXAS		
Chase Naval Reserve Center	Unavailable	2,511
WISCONSIN		
Finley Weapons Range	Unavailable	5,370

Air Force Reserve Components

LOCATION	TOTAL ACRES	CONTAMINATED ACRES
OKLAHOMA		
Falcon	14,880	Unavailable

Issue 4.

QUESTION

Are there any specific examples where the oversight and regulatory responsibilities of environmental regulatory agencies were combined or reconciled? Did this expedite the process of environmental restoration at the base? Would IAGs at all base closure sites provide a method to identify regulatory responsibilities?

RESPONSE

The main issue of regulatory oversight/responsibility is the overlap between CERCLA and RCRA. Most states retain the flexibility of implementing their regulatory prerogatives under RCRA if they do ot concur with the DoD approach under CERCLA. Where we have been able to negotiate interagency agreements (IAGs) between the state, EPA and the Air Force, the potential for conflicts is significantly reduced. However, the price to pay for this agreement is increased time required to coordinate the cleanup approach/documentation needed and the concurrence on deliverables. For closure bases, the Air Force recommends the initiation of agreements between the redevelopment agency, the state regulators and the Air Force. Refer to the attached letter from Mr Vest (SAF/MIQ) to Mr Courter (Base Closure Commission).

1 Tab
1. SAF/MIQ Ltr to Mr Courter

ATTACHMENT 4

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

20 MAY 1991

The Honorable James A. Courter
Chairman, Defense Base Closure and Realignment Commission
1625 K Street, N.W., Suite 400
Washington, D.C. 20006-1604

Dear Mr. Courter:

In my testimony to the Commission on May 10, 1991 I discussed several impediments which I believe seriously hamper our ability to transition property at closing installations to economically productive civilian use. These impediments concern our ability to clean up contaminated sites in a timely manner. This letter is in response to your invitation to more fully describe these impediments and suggest ways in which they could be overcome.

Basically, there are five impediments which prevent timely cleanup and disposals. Removal of the impediments will require legislative changes.

Impediment: Listing of closing installations (either in their entirety or by individual site) on the National Priorities List (NPL) under Section 120(d) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) slows the process. Such listing requires strict adherence to the overly complex and time-consuming procedural provisions of the National Contingency Plan (NCP). For example, the Air Force must enter into Federal Facility Agreements (FFA) with the U.S. Environmental Protection Agency (EPA). The schedules dictated by these agreements are inordinately time consuming and cumbersome and restrict the flexibility delegated to the Air Force by the President under the authorities in CERCLA to clean up hazardous waste sites.

Proposal: Exempt closing Air Force bases from listing on the NPL and the strict adherence to the NCP. In lieu of FFAs, the Air Force would enter into less cumbersome, yet equally responsible agreements with appropriate state environmental regulatory offices, the local community redevelopment entity created by the state, and/or the local municipal government with authority to acquire base property.

The state and community would be equal partners in deciding how and when sites will be cleaned up. Each has a vested interest in assuring all remedial actions are protective of human health and the environment; each has a vested interest in expeditiously completing cleanups to facilitate redevelopment of properties for productive civilian uses.

Impediment: Redundancy in two cleanup processes and oversight by separate offices within the Environmental Protection Agency complicates cleanups governed by 1) the corrective action process required by specific sections of the Resource Conservation Recovery Act (RCRA), and 2) the remedial action process required under CERCLA.

Proposal: The framework of the NCP would be used to accomplish both CERCLA and RCRA cleanups. However, the NCP process would be modified, as agreed to by the parties involved, to meet the unique conditions of accelerated cleanup at closing installations. All sites on the installation would need to be included in this cleanup strategy, including those typically considered by EPA under RCRA.

Impediment: A restrictive interpretation of CERCLA Section 120(h) would effectively prohibit transfer of properties until all remedial actions at a site, including those to remediate ground water contamination, are completed.

Proposal: Modify CERCLA section 120(h). Along with amendments such as the one proposed by Congressman Richard Ray to change CERCLA section 120(h), our proposal would place responsibility and accountability with those governmental and community entities which have the greatest vested interest in cleanup of sites and redevelopment of properties at closing installations. While Congressman Ray's proposal would allow parceling of properties, transfer of clean parcels immediately, and transfer of contaminated parcels once remedial actions were underway, we would propose to permit transfer of title to properties being cleaned up at any time during the process. The Air Force, state, and community decision-makers would jointly assess the risk of each of its actions consistent with protecting human health and the environment.

Furthermore, commitments by the Air Force to retain liability until sites are cleaned up to appropriate state and federal standards would ensure follow through. Any transfer documents would require guarantees of access for completion of any cleanup or long-term remedial operations, but our proposal allows for rapid reuse while providing the necessary protections.

Impediment: The integration of CERCLA and National Environmental Policy Act (NEPA) requirements are unnecessarily awkward.

Proposal: The new cleanup process would not be subject to NEPA. However, the process would provide the opportunity for visibility and participation by state and local officials, as well as the public, in the overall decision process. Decisions on cleanup of sites would be based on land uses determined in the disposal and reuse process (which would be conducted under NEPA procedures.) That is, the cleanup process would consider the planned reuse in determining methods and standards for cleanup.

Impediment: The Defense Base Closure and Realignment Act of 1990 declared the Base Closure Account for the Round I closures as the exclusive funding source for environmental restoration. Reliance on this account could limit flexibility in accelerating the cleanup due to lack of funds in a single year. (Thus far Congress has not limited the use of the Round II account in this fashion.)

Proposal: The Defense Environmental Restoration Account (DERA) should be used exclusively as the fund source for conducting cleanups. The Deputy Assistant Secretary of Defense for Environment has testified before Congress this budget year that closure bases will receive priority funding. The inherent flexibility of a large DERA would permit expeditious cleanups to meet rapidly changing or unforeseen conditions which might otherwise delay property transfers.

It is clear we share a common goal with the states, the communities, and Congress. This goal is to clean up our contaminated sites so that properties can be transitioned to economically productive civilian use as soon as possible. We believe our proposals would permit us to achieve this goal. I want to emphasize that these problems cannot be solved by governmental dictates or edicts to clean up within fixed time periods. Each situation is different and is best handled on a site specific basis with the affected stakeholders balancing the community interests of health, environment and economic well-being.

Thank you for the opportunity to expand upon my earlier testimony. We are available to provide further detail on any or all of our proposals.

Sincerely,

GARY D. VEST
Deputy Assistant Secretary of the Air Force
(Environment, Safety and Occupational Health)

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-8000

PRODUCTION AND
LOGISTICS

June 4, 1991

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF DEFENSE
(ENVIRONMENT)
DIRECTOR, PROGRAMS AND BUDGET, OFFICE OF THE
DEPUTY ASSISTANT SECRETARY OF DEFENSE
(ENVIRONMENT)

SUBJECT: Designated Federal Officer for the Environmental Response Task Force

Pursuant to the Section 10(e) of the Federal Advisory Committee Act, I am naming Mr. Thomas E. Baca as the Designated Federal Officer responsible for attending each meeting of the Environmental Response Task Force established by charter dated 17 April 1991. I am also naming Mr. Kevin Doxey as the Alternate Designated Federal Officer.

One of the designated officers must attend each meeting of the Task Force and is authorized to adjourn any meeting if he determines such an adjournment is in the public interest. The Task Force may not hold meetings except with the advance approval of and with an agenda approved by one of these officers.

Colin McMillan

cc: Director, A&M

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

10 APR 1991

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION

SUBJECT: Designation of Environmental Response Task Force Chairman

I hereby designate Mr. Thomas E. Baca, Deputy Assistant Secretary of Defense (Environment), as Chairman of the Environmental Response Task Force established by the National Defense Authorization Act for FY 1991 (P.L. 101-510, Section 2923). The purpose of the Task Force is to study and provide a report to the Secretary of Defense by October 5, 1991, concerning recommendations related to the environmental response actions at military installations or portions of military installations that are closed, or are scheduled to be closed, pursuant to Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (P.L. 100-526).

Donald J. Atwood

U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 5, 1991

Thomas E. Baca
Deputy Assistant Secretary of Defense (Environment)
The Pentagon
Washington, D.C. 20301-8000

Dear Mr. Baca:

I am pleased to designate Anne Shields, Chief, Policy, Legislation and Special Litigation Section, to serve on the Defense Environmental Response Task Force. She can be reached at (202) 514-2586.

Sincerely,

Richard B. Stewart
Assistant Attorney General

Administrator
General Services Administration
Washington, DC 20405

May 6, 1991

The Honorable Donald J. Atwood
Deputy Secretary of Defense
Washington, DC 20301

Dear Mr. Atwood:

Thank you for your letter of April 10, 1991, requesting a designee to represent the General Services Administration on the Defense Environmental Task Force established by section 2923 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510).

I have asked Mr. Earl E. Jones, Commissioner, Federal Property Resources Service, to serve as my designee on the task force. Mr. Jones may be reached by telephone at (202) 501-0210.

We appreciate receiving copies of the law and the task force charter. You may be assured of our full cooperation.

Sincerely,

Richard G. Austin
Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF THE SECRETARY OF DEFENSE

91 JUL 11 PM 2:33

JUN 27 1991

OFFICE OF THE ADMINISTRATOR

Honorable Donald J. Atwood
Deputy Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Mr. Atwood:

I would like to thank you for the opportunity to be a member of the Task Force established by the National Defense Authorization Act for FY 1991. The issue of base closure and environmental cleanup presents some unique issues that will pose a challenge to our agencies. The Task Force, with its broad based membership of Federal, State and environmental representatives, is most appropriate to suggest solutions to this challenge.

Because the issues to be addressed by the Task Force involve Federal facilities cleanup and compliance, as well as the National Environmental Policy Act (NEPA), I would like to designate Mr. Christian Holmes, Deputy Assistant Administrator for Federal Facilities as EPA's representative. His alternate will be Mr. Richard Sanderson, Director, Office of Federal Activities. Mr. Holmes is the senior EPA official solely responsible for the oversight and enforcement of environmental protection activities at federal facilities; he is very knowledgeable of the issues concerning base closure and is familiar with your agency's environmental program, including the Installation Restoration Program. Mr. Holmes and Mr. Baca have an excellent working relationship which will further enhance the Task Force. As the alternate, Mr. Sanderson's experience concerning Federal facilities is quite extensive and includes coordinating EPA's efforts on NEPA and base closure.

Once again, thank you for the opportunity to work with your agency on such an important initiative.

Sincerely,

F. Henry Habicht II
Deputy Administrator

40842

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 1991

OFFICE OF ENFORCEMENT

Lieutenant Colonel Hayden Bryan
The Pentagon
Washington, D.C. 20301-8000

Dear Sir:

This is notification that Christian Holmes is the designee for attending the Baca's Task Force Meeting today, Wednesday June 19, 1991.

Sincerely,

Raymond B. Ludwiszewski
Acting Assistant Administrator
for Enforcement

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 16 1991

OFFICE OF ENFORCEMENT

Mr. Thomas E. Baca
Deputy Assistant Secretary of Defense (Environment)
Room 3D833, the Pentagon
Washington, D.C. 20310-8000

Dear Tom:

Because of the upcoming meeting with the Western Governors Association on July 22, I am unable to attend the Task Force meeting scheduled for this week. My alternate, Gordon Davidson, Director, Office of Federal Facilities Enforcement, will be attending. Mr. Davidson will be representing the Agency and can vote on all matters, as required.

I look forward to the next meeting and am very interested in the recommendations being considered by the Task Force.

Sincerely,

Christian R. Holmes
Deputy Assistant Administrator
for Federal Facilities

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

REPLY TO
ATTENTION OF

20 May 1991

MEMORANDUM FOR THE DEPUTY ASSISTANT SECRETARY OF DEFENSE
(ENVIRONMENT)

SUBJECT: COE Designee for Defense Environmental Response Task Force -- INFORMATION MEMORANDUM

In a memorandum to Secretary Stone dated April 10, 1991, Mr. Atwood requested that you be advised of the Chief of Engineers designee to the Defense Environmental Response Task Force.

LTG Hatch has selected MG Offringa, the Assistant Chief of Engineers, as his representative to this task force.

Susan Livingstone
Assistant Secretary of the Army
(Installations, Logistics & Environment)

NATIONAL GOVERNORS' ASSOCIATION

Booth Gardner
Governor of Washington
Chairman

John Ashcroft
Governor of Missouri
Vice Chairman

Raymond C. Scheppach
Executive Director

Hall of the States
444 North Capital Street
Washington, D.C. 20001-1572
Telephone (202) 624-5300

May 17, 1991

The Honorable Pete Wilson
Governor of California
State Capitol
Sacramento, CA 95814

Dear Pete:

I am pleased to invite you to appoint a representative to an environmental response task force created by PL 101-510 (the FY 1991 Defense Authorization Act) to advise the Secretary of Defense regarding environmental matters at closing military bases. I understand you will appoint Mr. James Strock, your Secretary for Environmental Protection, to this position.

As you know, the purpose of the task force is to advise the Secretary regarding ways to improve interagency coordination of environmental response actions at military installations being closed under the Base Closure and Realignment Act, and ways to consolidate and streamline the practices and policies of relevant federal and state agencies so that environmental actions may be carried out more expeditiously. I am sure you agree with me that this matter is of high importance for all the states concerned.

I am by way of a copy of this letter informing the Department of Defense of this appointment. If you would like any additional information, please don't hesitate to contact me or Mr. Thomas Baca, Deputy Assistant Secretary of Defense for Environment.

Sincerely,

Booth

Governor Booth Gardner

cc: Mr. Thomas Baca

STATE OF CALIFORNIA

JAMES M. STROCK
Secretary for Environmental Protection
555 Capitol Mall, P.O. Box 2815
Sacramento, CA 95812
(916) 445-3846

July 15, 1991

PETE WILSON, Governor

Mr. Thomas E. Baca
Deputy Assistant Secretary of Defense (Environment)
Washington, D.C. 20301-8000

Dear Mr. Baca:

Regrettably, I am unable to attend personally the July meeting of the Defense Environmental Response Task Force. Pursuant to Rule 6 of the Procedural Rules of the Defense Environmental Response Task Force, I hereby designate Mr. Brian A. Runkel of the California Office of Environmental Protection as my designated Alternate to represent the National Governor's Association at the Defense Environmental Response Task Force's next meeting in Washington, D.C. on July 17-18, 1991. Mr. Runkel has full authority to vote and otherwise act on my behalf at this meeting.

Should you have any questions, please contact me at (916) 445-3846.

Sincerely,

James M. Strock
Secretary for
Environmental Protection

cc: Ben Haddad
Mary McDonald
Tom Curtis, NGA

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
HALL OF THE STATES
444 NORTH CAPITOL STREET
WASHINGTON, D.C. 20001
(202) 628-0435
TELECOPIER (202) 347-4882

CHRISTINE T. MILLIKEN
Executive Director
General Counsel

April 30, 1991

Mr. Thomas E. Baca
Deputy Assistant Secretary for Environment
Office of the Assistant Secretary for Production and Logistics
Department of Defense
The Pentagon
Room 3D833
Washington, D.C. 20301-8000

Dear Mr. Baca:

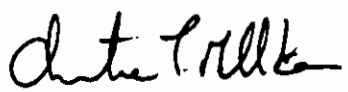
This letter is in response to Deputy Secretary Atwood's request for NAAG to name a designee to a task force to study and report on environmental response actions at military institutions that are closed or may be closed.

Attorney General Mary Sue Terry, NAAG's President, has designated Attorney General Dan Morales of Texas to be the NAAG representative. General Morales will be represented at the working meetings by Sam Goodhope, Special Assistant Attorney General (environment). Mr. Goodhope's address and phone number are as follows:

Mr. Sam Goodhope
Office of the Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 475-4679, Switchboard - (512) 463-2191.

Please direct your communications directly to Mr. Goodhope with a copy to NAAG, Attention: Ann Hurley, Senior Environment Counsel, 444 North Capitol Street, Suite 403, Washington, D.C., 20001.

Sincerely,



Christine T. Milliken

cc: Attorney General Mary Sue Terry, President
Attorney General Ken Eikenberry, President-elect
Attorney General Dan Morales, Texas
Sam Goodhope, Texas
Ann Hurley, NAAG Senior Environment Counsel

The message also announced that, pursuant to Public Law 96-114, as amended by Public Laws 98-33, 99-161, and 100-674, the Chair announces, on behalf of the Republican leader, his appointment of Rod DeArment, of Virginia, and Mary McAuliffe, of Virginia, as members of the Congressional Award Board.

The message also announced that, pursuant to Public Law 96-380, the Chair, on behalf of the Vice President, appoints Mr. AKAKA, to the Advisory Commission on Intergovernmental Relations, vice, Mr. LEVIN, resigned.

DESIGNATION OF HON. STENY H. HOYER TO ACT AS SPEAKER PRO TEMPORE TO SIGN ENROLLED BILLS AND JOINT RESOLUTIONS THROUGH JULY 9, 1991

The SPEAKER pro tempore laid before the House the following communication from the Speaker:

WASHINGTON, DC,
June 27, 1991.

I hereby designate the Honorable STENY H. HOYER to act as Speaker pro tempore to sign enrolled bills and joint resolutions through July 9, 1991.

THOMAS S. FOLEY,
Speaker, House of Representatives.

The SPEAKER pro tempore. Without objection, the designation is agreed to.

There was not objection.

APPOINTMENT OF MEMBERS TO THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

The SPEAKER pro tempore. On behalf of the Speaker, pursuant to the provisions of section 2(a) of Public Law 96-380, the Chair announces the Speaker's appointment of the following Members of the House to the Advisory Commission on Intergovernmental Relations: Mr. WEISS of New York and Mr. THOMAS of Wyoming.

APPOINTMENT TO A TASK FORCE TO MAKE FINDINGS AND RECOMMENDATIONS FOR ENVIRONMENTAL RESTORATION AT MILITARY BASES SCHEDULED FOR CLOSURE

The SPEAKER pro tempore. On behalf of the Speaker, pursuant to the provisions of section 2923(c)(2) of Public Law 101-510, the Chair announces the Speaker's appointment of Mr. Don Gray of Fort Washington, MD, to the task force to make findings and recommendations for environmental restoration at military bases scheduled for closure.

ELECTION OF MEMBERS TO CERTAIN STANDING COMMITTEES

Mr. HOYER. Mr. Speaker, by direction of the Democratic caucus, I offer a privileged resolution (H. Res. 186) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. Res. 186

Resolved, That the following named Members be, and they are hereby, elected to the following standing committees of the House of Representatives:

Committee on Education and Labor: John W. Olver, Massachusetts to rank following Mr. Roemer, Indiana.

Committee on Science, Space, and Technology: Eliot L. Engel, New York; John W. Olver, Massachusetts.

The resolution was agreed to.

A motion to reconsider was laid on the table.

PROPOSED TAX CREDIT FOR CHILDREN RAISES WEIGHTY ISSUES

(Mr. RICHARDSON asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. RICHARDSON. Mr. Speaker, does the country know that 1 out of 5 children grow up in poverty? Does the country know that 1 out of 4 children grow up with only one parent? Does the country know that 25 percent of our high school students drop out or that 1 out of 2 Hispanics do not make it out of high school?

Mr. Speaker, recently the National Commission on Children delivered a very useful report, the centerpiece being a $1,000 tax credit for every young child. A lot of important issues were raised.

Should single parents, if the absent spouse did not pay his or her child support, get Government pay? Should there be any condition for this tax credit, or should the Government give payments on a no-strings-attached basis?

Should parents be given the choice of what public school thier child attends? Should employers be forced to give workers job-protected leave for childbirth, adoptions, and family emergencies? Should more emphasis be put on helping families stay together and less on foster care?

Should children be guaranteed universal health coverage? Should employers be required to extend health insurance to both children and pregnant women who are required to contribute to Government insurance programs?

A lot of important issues are raised by this report, Mr. Speaker. Let us focus more on the future. Let us focus on domestic programs, on children.

KUWAIT SOFTENS SENTENCES

(Mr. LAGOMARSINO asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. LAGOMARSINO. Mr. Speaker, yesterday on the final day of martial law in Kuwait, the Crown Prince and Prime Minister Saad Abdullah Al-Sabah commuted the death sentences of 29 persons convicted of collaborating with Iraq.

I commend the Crown Prince for this bold move which, I am sure, is not popular in all circles in Kuwait. Having personally visited Kuwait and seen the horrors of Iraqi brutality, I can understand the Kuwaiti people's demand for ultimate justice to those who helped Iraq and caused so much pain and suffering. It's hard to forgive and show leniency under these circumstances.

I am encouraged by this judicial action and the ending of 4 months of martial law in Kuwait. Coupled with the announcement of elections next year, I hope this marks the beginning of a new phase of real political and legal reforms in Kuwait. While over 300 cases have been dismissed or resulted in acquittals, I hope the remaining 125 cases now transferred to the regular court system will be tried with fairness and respect for due process and the rights of the accused.

INTRODUCTION OF LEGISLATION TO PROVIDE FOR ADJUSTMENT OF COLAS FOR TOP GOVERNMENT OFFICIALS

(Ms. LONG asked and was given permission to address the House for 1 minute and to revise and extend her remarks.)

Ms. LONG. Mr. Speaker, under current law, the President has the authority to reduce, cancel, or postpone COLA's for General Schedule employees during times of war or severe economic crisis, but there is no similar mechanism to reduce, cancel, or postpone COLA's for Members of Congress, Federal judges and Justices, or other top Government officials under these same dire circumstances.

This is simply an unfair situation. I am pleased that today a number of Members and I are introducing legislation to address this issue, to remedy what we believe is an inequity among those of us who work for the taxpayers of this Nation.

Our bill would simply provide that the rate of COLA's for Members, judges, and other top Government officials would never exceed that for General Schedule employees.

Mr. Speaker, the purpose of this legislation is simple—to treat the COLA's of Members of Congress, Federal judges and Justices, and other top Government officials the same as the COLA's of General Schedule Government employees. It is in the interest of fairness and equity that we introduce this measure.

□ 1110

REMOVE HUNGARY FROM LIST OF COMMUNIST NATIONS

(Mr. THOMAS of Wyoming asked and was given permission to address the House for 1 minute.)

HWAC
an association of engineering and science firms practicing in hazardous waste management

1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474 FAX 202-898-0068

July 31, 1991

Mr. Thomas Baca
Deputy Assistant Secretary
of Defense [Environment]
400 Army Navy Drive
Room 206
Arlington, Virginia 22202-2884

BY HAND

Dear Mr. Baca:

The following comments are provided by HWAC in response to the meetings held earlier this month by the Defense Environmental Response Task Force to consider issues involving the coordination of environmental response actions at military installations.

HWAC is an association of over 120 engineering and science firms practicing in hazardous waste management. HWAC's members comprise 80% of the hazardous waste revenues reflected in the Engineering News Record's summary of the top 500 engineering firms. Our members investigate, as well as develop and implement, remedies to clean up the environmental damage created by others. HWAC members are not generators of waste, including waste at DOD facilities, but are firms with the technical capabilities to assist DOD in cleanup. HWAC operates under the umbrella of the 5000 member American Consulting Engineers Council.

HWAC is concerned that DOD's efforts to close unneeded facilities will be jeopardized by failure to come to grips with the serious nature of potential liabilities for cleanup contractors. We believe that without resolution of the liability issues, DOD will be unable to attract the quality of engineering expertise that is required to address effectively the wide range of environmental issues at these facilities. The appropriate allocation of risk between DOD and the private firms performing environmental restoration activities is, in our view, critical to the success of DOD's base closure efforts.

As you are aware, last year, Congress expressly recognized the vital role that experienced environmental restoration firms play in the cleanup of DOD facilities and that these firms are being negatively affected by unquantifiable, uninsurable, long-term liabilities associated with hazardous waste cleanup. Congress directed DOD to study the liability issues and report

HWAC
an association of engineering and science firms practicing in hazardous waste management

1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474 FAX 202-898-0068

back by March 31, 1991 with findings and recommendations. Many HWAC members participated actively in the forum underlying the DOD study, which was conducted in January by the Society of American Military Engineers (SAME), and we believe the report of those proceedings went a long way to accurately characterize the problems facing engineering firms undertaking environmental restoration work at DOD facilities. We were obviously disappointed that DOD did not complete its report and include firm recommendations for addressing the liability issues in time to allow Congress to address the recommendations in this year's Authorization Bill. We continue to believe that the Department's best interest, and the best interest of the communities where these facilities are located, lies in prompt and fair allocation of liabilities between the DOD as the owner of the facilities, and the restoration contractors. We have and will continue to work with the DOD staff to reach a solution for these concerns.

Risk Sharing Using Current Authorities

Until Congress can address the specific issues involved with DOD contracts, we hope that DOD will move expeditiously to address risk sharing through existing authorities. Specifically, we believe DOD should seriously consider the use of Public Law 85-804 indemnification in appropriate cases and provide direction concerning use of P.L. 85-804 to its contracting agencies. Currently, when contractors identify risks that should merit P.L. 85-804 protection, they are routinely informed by DOD contracting officers that statutory indemnification will not be considered, regardless of the site or the issues involved. DOD's contracting agencies have simply not been advised that use of P.L. 85-804 is a viable option. Further, DOD should consider use of the limited indemnification provided by FAR 52.228-7 ("Insurance -- Liability to Third Persons") in appropriate cases. Again, DOD contracting officers routinely advise that this clause is not available. Finally, for NPL sites, DOD needs to establish a process for implementing CERCLA section 119 indemnity. There appears to be very little recognition in the Department that this provision exists and is available for certain DOD environmental restoration contracts.

HWAC
an association of engineering and science firms practicing in hazardous waste management

1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474 FAX 202-898-0068

The Federal Register meeting notice indicated that the Task Force would be examining consolidation and streamlining of current practices with respect to environmental response actions, including changes to existing laws, regulations and administrative policies. While we clearly recognize that the process could be improved and expedited, HWAC is concerned that DOD not shorten the study and investigation phase to the point where substantial questions are raised about the effectiveness of waste characterization and the viability of the remedial design. A premature cutoff of the study and investigation phase: (1) affects the accuracy of the risk assessment and, therefore, impacts the quality of the risk information provided to the public; and (2) could result in locating differing site conditions during the cleanup that will likely produce delays, as well as additional costs and increased potential for litigation.

Contracting Strategies

The presentations made to the Task Force identify contracting strategies as an area where DOD could make improvements. We agree. DOD contracting activities would benefit from a better understanding of the various forms of contracts that are appropriate for environmental restoration activities. We have found that several DOD contracting organizations are not sufficiently familiar with cost type contracts and use fixed-price contracts inappropriately without consideration of the complexity or the unknown factors in the work. For example, cost reimbursement type contracts are much more appropriate for remedial investigation and design work. We have also found that many DOD contracting offices are unfamiliar with the Brooks Bill procedures for selection of Architect/Engineering firms. Brooks Bill procedures are designed to assure the qualifications of the contractor are the primary factor in selection.

With respect to turn-key contracts, we believe that while they may be usable in some limited circumstances, they will not be appropriate or produce the best results in all cases. DOD should be wary of the surface appeal of solving all of its problems at facility by simply dumping the entire site on a private contractor. Turn-key contracts: (1) do not provide DOD with the flexibility to tailor the contracting method to the

HWAC
an association of engineering and science firms practicing in hazardous waste management

1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474 FAX 202-898-0068

specific project; (2) largely abdicate Departmental control and decision-making authority over critical site decisions; (3) may preclude the use of innovative and alternative technologies, depending on the expertise and makeup of the design/build team; (4) may limit competition to the largest contractors and preclude competition from small firm with significant hazardous waste expertise; and (5) are not likely to be suitable for large complex hazardous waste sites.

Conclusion

Resolution of liability issues facing environmental restoration contractors is, in our view, critical to DOD's efforts to ensure that the closed bases are cleaned up before they are transferred to private parties or to state and local entities. We cannot assure the nation that the best possible scientists and engineers will be available for this urgent task unless we resolve the liability and risk sharing issues that have been raised.

HWAC looks forward to working with you in the near future to resolve the liability concerns set forth above, as well as to discuss expedited cleanup issues and potential contracting mechanisms. You should be aware that in addition to HWAC's Federal Action Committee, whose members you have met, HWAC's Technical Practices and Business Practices Committees include members with specialized expertise in the areas of cleanup technology implementation, insurance, and contracting.

Please fell free to contact Jim Janis at (703) 934-3175 to set up a meeting or if you have questions.

Sincerely,

Michael K. Yates

Michael K. Yates
President

cc: Mr. Kevin Doxey
Laurent R. Hourcle, Esq.
Mr. Matthew Prastein

I:\CLI1\027074\37365.MAC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

4WD-RCRAFFB

JUL 2 9 1991

Mr. Thomas E. Baca
Deputy Assistant Secretary
Office of Deputy Assistant Secretary
for Defense (Environment)
400 Army-Navy Drive
Suite 206
Arlington, Virginia 22202

Re: Defense Environmental Response Task Force
Defense Base Closure and Realignment Act, P.L. 101-510
EPA/Region IV Comments for the Record

Dear Mr. Baca:

I am very pleased at the progress of the Defense Environmental Response Task Force in their efforts to improve interagency coordination, and streamline Federal/State practices, policies, and administrative procedures at closing military installations. You have an aggressive agenda that we in Region IV join our Headquarters office in wholly supporting.

As you know, Region IV has a large responsibility with respect to overseeing environmental restoration ongoing and planned at military installations in the Southeast. I share your charge in doing all that we can as a regulatory agency to determine ways to achieve rapid, high quality remediation of sites at both active and closing bases. I am confident that the efforts of the Task Force will have a positive effect on accelerating environmental restoration.

I would like to take this opportunity to provide Regional comments and recommendations on some of the issues under examination by the Task Force. Your consideration of these comments and recommendations is appreciated.

Sincerely yours,

Joe R. Franzmathes for

Greer C. Tidwell
Regional Administrator

Enclosure

cc: Col. Lawrence Hoercle, OAGC, Department of Defense
Mr. Christian Holmes, EPA, Headquarters

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE
EPA/REGION IV COMMENTS AND RECOMMENDATIONS

DELEGATION OF RESPONSIBILITY

Comments on this issue being examined by the Task Force relate specifically to making better use of the State Memorandum of Agreements (SMOAs). The Department of Defense, in negotiating SMOAs should give consideration to the future date in time when the state would have capacity and expertise to provide timely regulatory oversight of Defense environmental restoration. The SMOAs provide a funding mechanism to ensure adequate resource for state administrative and technical oversight. Experience observed by EPA, Region IV with respect to the current SMOAs indicates that interagency coordination could be expedited. The following comments reinforce the Task Force's emphasis on regulatory assurance that their agencies are providing sufficient staff for their oversight role.

Recommendation

- Propose action to require states to enter into a State Memorandum of Agreement to formalize their oversight role particularly with respect to non-National Priority List sites.

- Propose conditions of the SMOAs to include a timeline whereby the state would have fundable full-time positions or the equivalent resource, and adequate technical expertise to provide technical review and oversight on environmental restoration.

- Propose regulatory review timelines for primary document reviews analagous to the approach taken in the Interagency Agreements. This is extremely important at closing bases that are not on the National Priorities List and do not have a separate agreement that addresses response times.

CONTRACTS FOR EXECUTING CLEANUPS

The execution of contracts in environmental restoration is a key element in expeditious remedial investigations and remedial actions. This cannot be over-emphasized. It is without question that contracting mechanisms and time for execution can be the largest impediment to the environmental restoration program. Experience has shown us that remedial investigations negotiated on fixed price contracts were greatly protracted if revisions were needed to the scope of work. The dedicated procurement authority at each DoD center and the recognition of the need for a combination of contract types for environmental restoration activities as discussed in the Task Force on July 17-18, 1991 is a necessary improvement in the execution of contracts.

Recommendation

- Propose action that embraces a matrix of contracts and dedicated procurement.

RCRA/CERCLA - Regionally, we have integrated the technical reviews conducted under these two statutes. This is conserving an immense amount of resource and keeping redundacy to a minimum. In our opinion the administrative processes of both statutes still apply; the permit and appeal process under RCRA, and the administrative process and record under CERCLA must be retained. Until the Hazardous and Solid Waste Amendments were enacted in 1984, RCRA was not a cleanup program for non-regulated units. The magnitude of the original RCRA program, staff turnover, and state funding problems are causing the states to lag behind in authorization of the Hazardous and Solid Waste Amendments. These factors weigh heavily on a CERCLA lead for cleanup.

Recommendation

- Propose a recommendation that the statutory overlap be eliminated in the reauthorization of either statute.

- Propose an evaluation of Subpart K of National Contingency Plan as the appropriate interim vehicle to effect a change in the redundancy. Region IV believes that this may be a regulatory means of eliminating the redundancy of the statutes in the near term.

NEPA/CERCLA - Region IV highly endorses the Task Force's recommendation to examine where NEPA and CERCLA can and should be coordinated.

Recommendation

- Propose support for the close coordination of NEPA/CERCLA requirements where appropriate.

NATIONAL PRIORITIES LISTING OF SITES

There has been much discussion by the task force as to why military installations have been included the entire installation on the National Priorities List. Section 104(d)(4) of CERCLA authorizes the Federal government to treat two or more noncontiguous facilities for the purposes of listing, if such facilities are related on the basis of geography or their potential threat to public health, welfare, or the environment, e.g., two or more noncontiguous sites are threatening the same part of an aquifer or surface water. Reference the Federal Register/Vol.49, No. 185, Pg 37076, September 21, 1984. Region IV supports listing a military installation as one site if the criteria for doing so are met. Military installations in the Southeast have a large number of "sites" throughout the installa- tion affecting a common aquifer or surface water. New areas of contamination are continuing to be identified at our Federal facilities on the National Priorities List.

Recommendation

- Consider the utility of listing a Federal facility in its entirety when proposing an action on this issue.

RESOURCE AVAILABILITY/MANPOWER STUDIES

Region IV supports the hard look at resource needs that the Task Force is recommending. However, the percentages and numbers include both compliance and environmental restoration. We believe that resource needed for environmental restoration should be evaluated independently. Additionally, technical requirements under RCRA and CERCA are complex, and require a level of expertise before they can be effectively applied. Implementation of environmental restoration often-times in the past was delayed because studies and investigations had to be repeated due to inadequate technical evaluations and/or oversight of those studies by the Defense Services. Region IV would like to see the Task Force emphasize the skills and training required to implement environmental restoration as well as evaluate resource availability.

Recommendation

- Propose a separate analysis of resource availability for the Environmental Restoration Program.

- Propose action for assuring appropriate training and skills mix to execute the environmental restoration program.

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

June 26, 1991

The Honorable William K. Reilly
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Reilly:

The Department of Defense is currently engaged in a process to close military installations pursuant to the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526) and the Defense Base Closure and Realignment Act of 1990 (Title XXIX of Public Law 101-5110). A significant number of the military bases targeted for closure by the Defense Department are facilities on the Superfund National Priorities List.

Recently, two bills, H.R. 2179 and H.R. 2197, relating to the cleanup and transfer of real property at military installations have been referred to the Committee on Energy and Commerce. Other Members of Congress faced with closing facilities in their districts have expressed concerns about the pace of cleanup in relation to the closure schedule and the ability to transfer or use of portions of the facilities for commercial activity to lessen the economic impacts on the surrounding communities. As you are aware, Section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requires that all remedial action necessary to protect human health and the environment be taken before the date of transfer of real property owned by the United States where hazardous substances have been released, disposed of, or stored for a year or more.

Pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, we request information in response to the following questions no later than Friday, July 26, 1991 to assist the Committee in evaluating the progress of environmental restoration at military installations and other Federal facilities scheduled for closure and the options for commercial utilization of such facilities.

1. Please identify each military installation scheduled for closure that is on the NPL. For each facility please specify the date of final listing on the NPL, the date a comprehensive RIFS was initiated, the date the RIFS will be completed for the entire facility, and the date, if sooner, that the nature and extent of all surface and groundwater contamination will be known.

2. For each NPL facility identified in response to question (1) please provide a copy of any baseline risk assessment (including exposure and toxicity assessment) or record of decision that has been issued for the facility or any operable unit.

3. For each facility identified in response to question 1, please provide a diagram showing the boundaries of the installation, the boundaries of the NPL site, and to the extent feasible the areas of surface and groundwater contamination.

4. Please identify each military installation that is subject to closure pursuant to Public Law 100-568 and 101-510 which has not been evaluated pursuant to the hazard ranking system (HRS) and may yet be listed on the NPL. For each facility that falls in this category, please specify the current state of evaluation and indicate when an HRS evaluation and final listing determination will be completed.

5. For each facility identified in response to questions 1 and 3, please indicate the date when all remedial action necessary to protect human health and the environment will be completed. If long-term pumping and treating of groundwater is contemplated as part of the remedial action, indicate when all remedial action except the pumping and treating phase is expected to be completed.

6. For each facility identified in response to questions 1 and 3, please identify and describe areas of the NPL facility which are free from surface or groundwater contamination or where all remedial action necessary to protect human health and the environment has been undertaken. Under what circumstances would EPA support the transfer by deed of a contaminated area of real property owned by the United States?

7. Does EPA interpret Section 120 to authorize a transfer by deed [with the covenant required by Section 120(h)(3)(B)] of real property within an NPL facility prior to the time when all remedial action necessary to protect human health and the environment has been taken for the entire NPL facility? If so, would the transfer of such property be required to meet the criteria for delisting NPL facilities?

8. For each facility identified in response to questions 1 and 3, please provide a copy of the timetable and deadlines for expeditious completion of the remedial investigation and feasibility study which is required to be published pursuant to Section 120(e)(1) of CERCLA.

9. Has EPA authorized or participated in the leasing of any real property at an NPL facility on a federal installation? If so, please describe the circumstances. Is EPA aware of the leasing of any other real property owned by the United States which is subject to Section 120(h) of CERCLA? If so, please describe the circumstances.

10. For each facility identified in response to question 1, please describe the reasons for the configuration of the boundaries of the NPL site in relation to the areas of waste contamination and the boundaries of the entire installation.

11. In Colorado v. U.S. Department of the Army, Civil Action No. 86-C-2524 (D. Colo.), the United States Department of the Army asserted that the listing of a facility on the NPL results in exclusive jurisdiction under CERCLA for enforcement and remediation and effectively preempts state authority under the Resource Conservation and Recovery Act (RCRA) for the property within the NPL site. On February 24, 1989, United States District Court Judge Jim R. Carrigan issued an interlocutory decision rejecting the federal government's position and held that "RCRA enforcement by the State is not precluded by CERCLA or in the circumstances here presented." In light of Judge Carrigan's opinion, does EPA contend that state authority pursuant to RCRA is effectively preempted by CERCLA at NPL sites? Has the federal government moved for reconsideration of Judge Carrigan's opinion or brought an appeal. If so, what is the current status of the litigation on the CERCLA-RCRA jurisdictional issue? Please identify any other federal facilities where the federal government has asserted a position similar to that taken in the Colorado case on the jurisdictional issue.

Should you have any questions, please contact Richard A. Frandsen (225-3147) of the Committee staff or Anne Forristall (225-9304) of the staff of the Subcommittee on Transportation and Hazardous Materials.

Thank you for your cooperation with the work of the Committee.

Sincerely,

JOHN D. DINGELL, Chairman
Committee on Energy and Commerce

Al SWIFT, Chairman
Subcommittee on Transportation
and Hazardous Materials

cc: The Honorable Leon E. Panetta
The Honorable Vic Fazio
The Honorable George E. Brown, Jr.
The Honorable Jerry Lewis
The Honorable William H. Zeliff, Jr.
The Honorable Glen Browder
The Honorable Robert F. (Bob) Smith
The Honorable Olympia J. Snowe
The Honorable John J. Rhodes, III
The Honorable Robert T. Matsui
The Honorable Ben Nighthorse Campbell
The Honorable Nancy Pelosi
The Honorable Jack Reed
The Honorable Thomas H. Andrews
The Honorable Richard Ray
The Honorable Gary Condit
The Honorable Les Aspin
The Honorable Lee H. Hamilton
The Honorable Norman F. Lent
The Honorable Don Ritter

Mr. Thomas E. Baca, Deputy Assistant
Secretary of Defense

Pacific Studies Center

222B View Street, Mountain View, CA 94041 USA 415/969-1545; Fax 415/968-1126

TO: Defense Environmental Response Task Force
FROM: Lenny Siegel, Chief Researcher, National Toxics Campaign Fund's Military Toxics Network
SUBJECT: Base Closure Cleanup Requirements
DATE: August 2, 1991

I am pleased to see that your task force is seriously looking into the issues that trouble virtually every American community faced with the closure of a major military base. I am optimistic that parties who frequently find themselves in adversarial roles can work together to promote simultaneously the environmental and economic health of communities that have hosted Pentagon installations.

The community groups and environmental activists with which we work support the transfer of clean or cleaned portions of contaminated military bases, provided that 1) the obligation remains to clean the remainder of the facility; 2) studies of the entire operating unit are completed; 3) buffer zones separate areas scheduled for re-use from contaminated areas or property, including wells and truck routes needed for cleanup; and 4) the public, and in particular tenants and purchasers, be fully informed of present and past contamination at the facility.

We recognize that most military bases have significant groundwater contamination, primarly with solvents and fuels. While surface contamination, other than landfills and ordnance ranges, can generally be remediated in the time it takes to close a base, it should take decades to return groundwater to an acceptable condition. Yet in most cases there is no reason why the land above contaminated groundwater cannot be made available for residential, commercial, or industrial uses.

Nevertheless, most people who have not fully studied these problems are not familiar with the unique legal challenges posed by groundwater contamination. I believe it is important that your recommendations and subsequent regulations specifically refer to land above contaminated groundwater when discussing the re-use of property during cleanup.

Furthermore, though I recognize that the restoration of ordnance ranges raises difficult technical, fiscal, and environmental problems, I am opposed to any policy which suggests that none of these facilities will be cleaned up. Unfortunately, both unexploded and exploded ordnance pose serious toxic hazards. Based upon today's technology, I think it is important to address each of these properties on a case by case basis.

While the short-term re-use of military bases may be based on the level of cleanup, it is extremely important to environmental groups that long-term cleanup standards, designed to protect public health and the environment, not be abandoned because conditions appear compatible with interim uses. Hazardous waste tends to leak and spread, and any restoration strategy which ignores this is likely to lead to greater expense in the long run.

Meeting the growing humanpower needs of Pentagon environmental program is a massive challenge, but it is also an opportunity. Base closings and cutbacks in weapons procurement are forcing the layoffs of tens of thousands of skilled and professional workers, often in the exact locales where environmental professionals and blue-collar cleanup workers are needed. We think DOD can "kill two birds with one stone" by immediately developing retraining programs to prepare

surplus workers for environmental projects. If properly designed, these programs can reduce DOD's overdependence on private consultants and contractors.

Finally, though there are many dedicated professionals working at both regulatory agencies and with various Pentagon agencies, most of these personnel have a short-term attachment to the programs they manage. There is no substitute for the direct involvement of representatives of the affected communities—the long-term neighbors of bases that are being closed. I believe that environmental activists, in particular, play a constructive role in Defense restoration activities when we are invited to take part in technical review and other advisory committees. Community oversight is almost impossible, however, when military officials refuse to share information with the press and the public. We call upon this task force to establish community relations standards to enable and encourage citizen involvement in both the cleanup of contaminated bases and the preparation of those bases for re-use. Eventually, we hope, such standards would apply to all contaminated military properties.

Again, I would like to indicate my general support for the work of this task force. I hope you will carefully consider my suggestions, since we will best be able to take on the "toxic monster" if we're working together.

REPORT OF THE

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

October 1991

REPORT OF THE

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

October 1991

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

12 NOV 1991

Honorable Thomas S. Foley
Speaker of the House
of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to Section 2923 of the National Defense Authorization Act for Fiscal Year 1991, I have the honor to transmit herewith the report of the Defense Environmental Response Task Force.

Sincerely,

Enclosure

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, DC 20301-8000

PRODUCTION AND LOGISTICS

October 4, 1991

Honorable Dick Cheney
Secretary of Defense
Washington, DC 20301

Dear Mr. Secretary:

On behalf of the Defense Environmental Response Task Force, I am forwarding to you our report on ways to expedite environmental response actions at bases being closed under Public Law 100-526, the Base Closure and Realignment Act of 1988. The report was adopted unanimously by the members of the Task Force.

The Task Force chose for consideration several issues that it felt were important for expedited installation cleanup and transfer and that could be implemented within existing law. Nevertheless, there may be additional improvements in current procedures identified as more installations close and opportunities for property transfer develop. I am recommending that the Department continue working with other federal and state agencies to identify opportunities for expediting cleanup procedures, as well as implementing the recommendations of the Task Force. You may also want to use this report as a basis for developing legislative proposals for overcoming unintended statutory barriers to property transfer and economic development.

The scope and nature of our recommendations present an opportunity for more efficient federal and state cooperation. Their implementation can help in expediting the redevelopment of former military installations as viable economic assets without removing the safeguards necessary for the protection of human health and the environment.

Sincerely,

Thomas E. Baca
Chairman
Defense Environmental Response
Task Force

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LIST OF ACRONYMS

A-E	Architect-Engineer
ARAR	Applicable or Relevant and Appropriate Requirement
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
DERA	Defense Environmental Restoration Account
DoD	Department of Defense
DOE	Department of Energy
DoL	Department of Labor
DSMOA	Department of Defense and State Memorandum of Agreement
EPA	Environmental Protection Agency
FACA	Federal Advisory Committee Act
FAR	Federal Acquisition Regulation
FFA	Federal Facility Agreement
FPASA	Federal Property and Administrative Services Act
FY	Fiscal Year
GSA	General Services Administration
HSD	Human Systems Division
HSWA	Hazardous and Solid Waste Amendments
IAG	Interagency Agreement
NAVFAC	Naval Facilities Engineering Command
NCP	National Contingency Plan
NEPA	National Environmental Policy Act
NPL	National Priorities List
PA/SI	Preliminary Assessment/Site Investigation
R&D	Research and Development
RCRA	Resource Conservation and Recovery Act
RD/RA	Remedial Design/Remedial Action
RI/FS	Remedial Investigation/Feasibility Study
TSDF	Treatment, Storage, or Disposal Facility
USACE	U.S. Army Corps of Engineers
USC	United States Code
UST	Underground Storage Tanks

EXECUTIVE SUMMARY

In 1990, the Congress charged the Defense Environmental Task Force with making findings and recommendations on two categories of issues related to environmental response actions at bases that are being closed or realigned under the Base Closure Realignment Act of 1988: a) ways to improve interagency coordination within existing laws, regulations, and administrative policies; and b) ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant federal and state agencies in order to expedite response actions.

SUMMARY OF RECOMMENDATIONS

The Task Force recommends the following :

Land Use and Transfer

DoD, EPA and the state regulatory agencies should develop sound criteria for determining that parcels of land on a closing base are not contaminated or likely to become contaminated by hazardous substances.

DoD, EPA and state regulatory agencies should develop criteria for determining when parcels of contaminated land can be leased or otherwise made available to non-federal users before cleanup is completed.

To the extent that relevant information is available at the time of listing on the NPL, EPA should describe newly listed federal facility sites using the source and extent of contamination as the guiding principle, and EPA should also reconsider the descriptions of military installations on the NPL.

It may be necessary and appropriate for DoD to indemnify subsequent purchasers and other appropriate parties for any cause of action arising out of DoD's use of property, and the Congress may wish to consider amending federal law to authorize such agreements.

Cleanup Process

Integration of the CERCLA cleanup process and RCRA substantive requirements should be done by agreement between the regulatory agencies and DoD.

EPA should promulgate a final corrective action rule that it is, to the extent possible under RCRA, consistent with the NCP.

DoD, EPA, and state regulatory agencies should develop and use generic responses to recurring types of contamination wherever possible.

DoD should consolidate and coordinate the base reuse planning process, environmental impact assessments under NEPA, and cleanup studies under CERCLA wherever possible.

Contracting

DoD should give its contracting centers authority to contract for the performance of all phases of environmental restoration work if they do not already have that authority.

The U.S. Government should establish a hybrid contract format utilizing a pool of contractors and allow DoD acquisition managers flexibility to issue task orders under these contracts.

DoD should expand the current pool of contractors, using cost-reimbursement contracts, if appropriate, to the extent commensurate with DoD's ability to provide close oversight.

DoD should establish a dedicated procurement cell at each DoD environmental contracting center to support cleanup efforts at the installations identified for closure.

DoD should enhance training so that contracting officers are well equipped to use contracts of various types.

DoD should establish teams of contracting officers, so that their collective expertise will allow them to use all types of contracts.

DoD should establish a close liaison and formal coordination process with the Department of Labor with regard to determining the wage classification for positions of personnel dealing with new, emerging remedial technologies.

Regulatory Responsibilities

DoD, EPA, and the state environmental agencies should make better use of IAGs, FFAs, and DSMOAs.

DoD, EPA, and state regulatory agencies should provide sufficient staff and other resources needed to implement these agreements and expedite cleanups.

Effective implementation of the agreements to speed the process of cleanup should be a key element of the job descriptions and performance evaluations of the individuals in each agency with specific cleanup responsibilities.

States with closing bases, EPA, DoD, and other interested parties should also create a centralized process, such as the base closure committee the State of California and EPA's Region IX are establishing, to facilitate cleanup and redevelopment of closing bases, accelerate cleanup schedules, provide a forum for improved communication and help resolve issues affecting the base closure process.

States should consider adopting a process recently agreed to by California and DoD addressing the environmental restoration and the reuse of non-NPL military bases.

Resources and Funding

DoD should assess the personnel needs of an accelerated restoration program.

The Military Services should expand environmental education programs to retrain engineers, scientists, and contracting specialists who have been displaced from other job assignments due to base closures and realignments.

The Congress and the Administration should also ensure that adequate resources are available to DoD, EPA, and the states for environmental restoration and oversight at closing bases.

Existing DSMOAs should be reviewed as soon as possible to ensure that states will be fully reimbursed for their oversight activities. These additional oversight activities may require amendments to DSMOAs.

DoD should investigate the feasibility of using a custodial or other type of trust funded by the proceeds of land transfer to fund long-term cleanup activities at closing bases.

FINDINGS AND RECOMMENDATIONS

Land Use and Transfer

The Task Force found that parcels of uncontaminated land or facilities on a closing base can be leased, sold, or otherwise transferred to non-military users consistent with federal cleanup law.[1] Uncontaminated areas must be clearly defined, however, and this will require the development of specific criteria for determining whether an area is uncontaminated and the extent of this uncontaminated area. The Task Force recommends that the Department of Defense (DoD), the U. S. Environmental Protection Agency (EPA), state environmental regulatory agencies, and other appropriate federal and state agencies, develop sound criteria for determining that parcels of land on a closing base are not contaminated or likely to become contaminated by hazardous substances. A buffer zone between uncontaminated parcels being transferred and any contaminated area, or other methods, should be used to ensure that no contamination will reach the transferred land. State laws and municipal ordinances regarding subdivision of property should be studied as part of the land use planning process for each base to determine their applicability and impact on the alternatives being considered.

The Task Force found that, consistent with federal cleanup law, DoD may also transfer any property on closing bases where all necessary remedial action has been taken according to established criteria. The Task Force found that DoD may transfer by deed, without violating Section 120(h)(3) of CERCLA, any surplus real property on bases to be closed or realigned only where all necessary remedial action, determined by criteria established in accordance with CERCLA and applicable state law has been taken. Section 120(h)(3) prohibits the transfer by deed of ownership of DoD property meeting the conditions of Section 120(h)(3) on which necessary remedial action has not yet been taken. The provision, however, does not appear to restrict transfers by contractual arrangements such as leases, options, licenses, and installment sales contracts, which allow some beneficial use of contaminated property by a party other than the fee simple owner without execution of deeds.

Section 120(h)(3) of CERCLA also does not restrict transfers of real property interests between federal agencies or departments. Thus, the Task Force concluded that DoD may transfer ownership of real property on which hazardous substances were stored, disposed of, or released, or interests therein, to another federal agency as long as the transferee agency and DoD make arrangements that ensure that remedial action is completed.

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[1]Section 120(h)(3) of CERCLA.

The Task Force concluded that in certain circumstances parcels of contaminated land or facilities on a closing base can be leased or otherwise made available to non-federal users before cleanup activities at all contaminated sites on the base have been completed without compromising the apparent policies underlying Section 120(h)(3) of CERCLA. An example of such circumstances would exist where soil contamination has been remediated in accordance with applicable standards, and the residual groundwater contamination poses no significantly increased threat to human health. The Task Force determined that DoD, EPA, and state regulatory agencies need to develop criteria for determining when the proper circumstances exist. The criteria should include at a minimum:

1. The transfer and subsequent use will not significantly increase the risk of harm to human health and the environment.

2. The use of the facility after transfer will not impede the cleanup process.

3. Site conditions and cleanup activities will not present a significant risk of harm to users of the facility.

4. The cleanup process will be completed expeditiously and in accordance with all applicable standards.

5. DoD retains the responsibility for any long-term operation and maintenance of the remedial action and for any necessary removal or remedial action identified in the future, to the extent that DoD is responsible for any such release of hazardous substance, pollutants or contaminants which may have given rise to the required removal or remedial action.

Also, state and local governments and the public must be adequately notified. As a recommendation, the Task Force agreed that it may be necessary and appropriate for DoD to indemnify subsequent purchasers and other appropriate parties (e.g., states, lending institutions, etc.) for any cause of action arising out of DoD's use of the property. The Congress may wish to consider amending federal law to authorize such agreements.

The Task Force found that listing an entire base on the National Priorities List (NPL) -- the list of highest priority sites to be addressed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) -- can delay reuse of property on closing bases because of the concerns of potential purchasers and lending institutions about investing in property on the NPL.

To the extent that the relevant information is available at the time of listing on the NPL, EPA should describe newly listed federal facility sites using the source and extent of contamination as the guiding principle, and EPA should also reconsider the descriptions of military installations that are on the NPL.

Cleanup Process

The Task Force found that the potential exists to consolidate and streamline the practices, policies and procedures of EPA and the state environmental regulatory agencies by promulgating regulations implementing RCRA/HSWA corrective action authority that are consistent with CERCLA. In order to streamline procedures for the purposes of expediting the environmental restoration of military bases, the Task Force believes that EPA needs to consider integrating the CERCLA cleanup process with the RCRA requirements. Integration of CERCLA cleanup process and RCRA substantive requirements should be done by agreement between the regulatory agencies and DoD. In addition, EPA should promulgate a final corrective action rule implementing Sections 3004(u) and (v) of RCRA that is, to the extent possible under RCRA, consistent with the NCP. EPA should also provide for input by states.

The Task Force found that the use of standard or generic responses to recurring types of contamination could expedite the cleanup process and therefore recommends that DoD, EPA, and state regulatory agencies develop and use generic approaches wherever possible.

In addition, the Task Force found that integration of the base reuse planning process, environmental impact analyses under the National Environmental Policy Act (NEPA) and cleanup studies under CERCLA is possible and can expedite cleanup. The Task Force recommends that DoD consolidate and coordinate these processes wherever possible.

Contracting

The Task Force recognized a need for DoD to review its current contracting process for base cleanups. The Task Force found that all of the Services have experienced difficulty in managing environmental cleanup contracts, for various reasons. The Task Force concluded that the current contracting capacity is insufficient and that the Services need to enhance their environmental restoration contracting ability. The following recommendations address this need:

DoD should give its contracting centers authority to contract for the performance of all phases of environmental restoration work if they do not already have that authority. Contracting centers that do not now have the authority to contract for the Remedial Design (RD) and Remedial Action (RA) phases of environmental restoration work would be required to terminate

their site cleanup efforts at a certain point and hand over responsibility to some other contracting center.

The U.S. Government should establish a hybrid contract format utilizing a pool of contractors and allow DoD acquisition managers flexibility to issue task orders under these contracts. Such contracting flexibility will allow DoD managers to pick the most appropriate type or types of contracts and contracting model for each task.

DoD should expand the current pool of contractors, using cost-reimbursement contracts, if appropriate and to the extent commensurate with DoD's ability to provide close oversight. Since close supervision and technical oversight is a must for administering cost-reimbursement contracts, DoD contracting centers should not award such contracts unless they are able to provide that supervision and oversight.

DoD should establish a dedicated procurement cell at each DoD environmental contracting center supporting cleanup efforts at the installations identified for closure. A dedicated procurement cell could reduce reaction time from four to six weeks to one to two weeks once a hybrid basic agreement is placed with a pool of contractors. Closer teamwork between members of the DoD acquisition staff will avoid unnecessary confusion and deter exploitation by contractors.

DoD should enhance training so that contracting officers are well equipped to use contracts of various types. Most DoD contracting officers tend to specialize in one contract type. This situation causes them to be biased toward using the contract type, although it may not be the one most appropriate for the task at hand. A comprehensive cross-training program can alleviate the problem.

In hiring contracting officers, DoD should concentrate on those experienced in using contract types with which the contracting center lacks familiarity. DoD contracting centers should establish teams of contracting officers, so that their collective expertise will allow them to use all types of contracts. Close teamwork will allow contracting officers to train each other.

DoD should establish a close liaison and formal coordination process with the Department of Labor (DoL) with regard to determining the wage classification for positions of personnel dealing with emerging remedial technologies. DoL's labor-rate rulings on restoration work elements affect DoD's flexibility to classify individual remedial action projects. DoD should coordinate with DoL to ensure that DoL considers DoD's concerns before issuing binding regulations.

Regulatory Responsibilities

The Task Force found that EPA's Federal Facilities Listing Policy (FFLP) addresses the application of RCRA and CERCLA authorities at federal facilities on the NPL. Application of this policy in appropriate circumstances may promote expeditious cleanups and reduce the potential for conflicts between the state and the federal government.

The Task Force found that state environmental regulatory agencies and EPA play key roles in base cleanup and closure. The Task Force also found that Interagency Agreements (IAGs), Federal Facility Agreements (FFAs), and Defense and State Memorandums of Agreement (DSMOAs) are intended to reduce delays and confusion that can result from multiple agencies having a role in cleanup decisions. The Task Force also found that, regardless of whether all parties have signed a formal agreement, early involvement of the EPA and the state regulatory agency in the process of investigating potential contamination can expedite the entire process leading to cleanup. The Task Force recommends that DoD, EPA, and the state environmental agencies make better use of IAGs, FFAs, and DSMOAs so that they serve their purposes. The Task Force also recommends that all parties make significant efforts to effectively implement such agreements. DoD, EPA, and state regulatory agencies should provide sufficient staff and other resources needed to implement these agreements and expedite cleanups. Effective implementation of the agreements to speed the process of cleanup should be a key element of the job descriptions and performance evaluations of the individuals in each agency with specific cleanup responsibilities.

States with closing bases, EPA, DoD, and other interested parties should also create a centralized process, such as the base closure committee the State of California and EPA's Region IX are establishing, to facilitate cleanup and redevelopment of closing bases, accelerate cleanup schedules, provide a forum for improved communication, and help resolve issues affecting the base closure process.

States should consider adopting a process, recently agreed to by California and DoD, addressing the environmental restoration and the reuse of non-NPL military bases. EPA should also, upon the state's request, consider letting the state keep the "lead regulatory agency "role after the non-NPL base is listed on the NPL, on a case-by-case basis, in order to maintain consistency throughout the cleanup process.

Resources and Funding

The Task Force found that acceleration of the restoration program for closing bases will stress already strained DoD personnel resources. The Task Force recommends that DoD assess the personnel needs of an accelerated restoration program. In addition, the Task Force

recommends that the Military Services expand environmental education programs to retrain engineers, scientists, and contracting specialists who have been displaced from other job assignments due to base closures and realignments. The Congress and the Administration should also ensure that adequate resources are available to DoD, EPA, and the states for environmental restoration and oversight at closing bases.

The Task Force recognized that base closure activities may result in additional oversight activities for EPA and state regulatory agencies. Therefore, the Task Force recommends that existing DSMOAs be reviewed as soon as possible to ensure that states will be fully reimbursed for their oversight activities. These additional oversight activities may require amendment of DSMOAs.

A trust funded by the proceeds of land transfer may be a way of supplementing the limited pool of financial resources available to clean up closing bases. The Task Force recommends that DoD investigate the feasibility of using a custodial or other type of trust funded by the proceeds of land transfer to fund long-term cleanup activities at closing bases.

INTRODUCTION

THE TASK FORCE CHARTER

Section 2923 of the Fiscal Year (FY) 1991 National Defense Authorization Act mandated creation of a task force charged with identifying ways to improve federal and state agency coordination of environmental response actions and to consolidate and streamline practices, policies, and procedures for cleanup of U.S. military bases slated for closing under Public Law 100-526, the Base Closure and Realignment Act of 1988 (Base Closure Act).

In accordance with Section 2923 (Appendix A of this report), the Secretary of Defense chartered the Defense Environmental Response Task Force on April 17, 1991. The charter specifies the composition, functions, and administration of the Task Force (Appendix B).

The Task Force consisted of the following:

1) the Deputy Assistant Secretary of Defense (Environment), representing the Secretary of Defense, who served as chairman of the Task Force;

2) the Chief of the Policy, Legislation, and Special Litigation Section, Environment and Natural Resources Division, Department of Justice, representing the Attorney General;

3) the Director, Office of Federal Facilities Enforcement, representing the Deputy Assistant Administrator for Federal Facilities Enforcement, appointed by the Administrator of the Environmental Protection Agency (EPA);

4) the Commissioner, Federal Property Resources Service, representing the Administrator of the General Services Administration (GSA);

5) the Assistant Chief of Engineers, representing the Chief of Engineers, Department of the Army;

6) the Secretary for Environmental Protection for the State of California, appointed by the head of the National Governors Association;

7) a Special Assistant Attorney General, representing the Attorney General of the State of Texas, appointed by the head of the National Association of Attorneys General; and

8) a Senior Fellow at the Environmental and Energy Study Institute, representing public interest environmental organizations and appointed by the Speaker of the House of Representatives.

Appendix C provides a list of Task Force members.

The Task Force is scheduled to submit its findings and recommendations to the Secretary of Defense by October 5, 1991 for transmittal to the Congress by November 5, 1991.

TASK FORCE PROCESS

The Secretary of Defense chartered the Defense Environmental Response Task Force under the Federal Advisory Committee Act (FACA). Pursuant to the requirements of FACA, the Task Force conducted its proceedings in public and provided opportunity for the public to comment and participate.

The Task Force decided to concentrate on those measures that would expedite cleanup of federal facilities without resulting in reduced protection of human health and the environment and that could be taken within existing law. Within this context, the Task Force focused on issues of land use transfer, cleanup processes, contracting, regulatory responsibilities, and funding
(Appendix E).

Meeting on June 19, July 17 and 18, and September 27, 1991, in Washington, D.C., the Task Force discussed and heard witnesses on a range of issues related to environmental response at closing bases, including: the circumstances under which land can or can not be transferred; transfer mechanisms; identification of environmental response practices, policies, and procedures applicable to closing bases; technical issues surrounding cleanup of unexploded ordnance; barriers to consolidating authority for cleanup in one agency; and innovative funding mechanisms for cleanup at Department of Defense (DoD) sites. Witnesses also presented case histories of environmental response actions at Chanute, Pease, and Norton Air Force Bases, and at Fort Meade, and commented on the interplay between economic development and environmental requirements, the applicability of environmental cleanup statutes to DoD cleanups, and the parcelling of property. (Appendix D presents a list of witnesses who appeared before the Task Force.)

This report presents the final findings and recommendations of the Task Force resulting from its consideration of this testimony and study of these issues.

STATUTORY REQUIREMENTS FOR BASE CLEANUP

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986,[1] and the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984,[2] are the principal federal statutes governing the cleanup of sites contaminated by hazardous substances.

Section 120 of CERCLA addresses the responsibilities of federal agencies in cleaning up and transferring contaminated properties. Under Section 120(a) of CERCLA, federally owned facilities must comply with CERCLA to the same extent as nongovernmental entities. In addition, 1986 amendments to CERCLA[3] require that DoD's environmental restoration activities be consistent with Section 120 of CERCLA. Section 120(a) requires EPA to use the same criteria to evaluate both federal sites and private sites for the National Priorities List (NPL), the list of highest priority sites under CERCLA. EPA interprets Section 120(a) to mean that the criteria for including federal facilities on the NPL should not be more exclusionary than those applicable to non-federal sites.[4]

Section 120(h) of CERCLA establishes minimum procedures to be followed when federal agencies transfer contaminated property. Under Section 120(h)(1) of CERCLA, whenever any federal agency enters into a contract to sell or transfer real property on which any hazardous substance was stored for one year or more, known to have been released or disposed of, it must include in the contract notice of the type and quantity of the hazardous substance and when the storage, release and disposal occurred.[5] Section 120(h)(3) of CERCLA specifies that the transferring federal agency must provide a covenant in the deed for any transferred real property on which any hazardous substance was (a) stored for one or more years or (b) known to have been released or disposed of. The covenant must warrant that all remediation necessary to

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[1] 42 U.S.C. §§9601-71.

[2] 42 U.S.C. §§6901-6992K.

[3] 10 U.S.C. §2701(a)(2).

[4] See EPA, Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10525 (Mar. 13, 1989).

[5] 42 U.S.C. §9620(h)(1)

protect human health and the environment with respect to any hazardous substance remaining on the property has been taken before the date of the transfer and that the United States will take any additional remedial action found to be necessary after the date of transfer.

Entire military bases, including five on the 1988 list of bases to be closed,[6] and discrete sites within specific bases are listed on the NPL. In addition, some bases include sites that are contaminated with hazardous substances which need to be cleaned up, but which are not listed on the NPL. Section 120(a)(4) of CERCLA requires response actions on such non-NPL sites to comply with all applicable state laws. Finally, regardless of whether a closing base is listed on the NPL, some of the contamination, such as petroleum releases, is not covered by CERCLA and must be cleaned up under other authorities.

Furthermore, some bases include facilities currently regulated under RCRA and HSWA or state hazardous waste regulatory programs (or both); these regulated facilities must be managed in accordance with those statutes. HSWA requires a treatment, storage, or disposal facility (TSDF) that has released hazardous waste into the environment to undertake "corrective action" to clean up the release. Where a base or portion of a base is both listed on the NPL and subject to RCRA authorities, conflicts may arise regarding a particular proposed remedial action with respect to application of RCRA and CERCLA authorities.[7]

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[6]See P.L. 100-526.

[7]The United States and the State of Colorado have been in protracted litigation for five years over state versus federal control and oversight of environmental cleanup at Rocky Mountain Arsenal. While cleanup continues at the Arsenal (almost $400 million to date), the litigation process causes delay, confusion and increased transactions costs.

CHAPTER 1: LAND USE AND TRANSFER

OVERVIEW

Any sale, lease, or other transfer of real estate property owned by the United States must comply with the Federal Property and Administrative Services Act (FPASA). (Appendix F provides an overview of Federal Property Management laws and regulations). A variety of other laws and regulations also affect the transfer of real property on military bases to be closed or realigned. Section 120(h) of CERCLA, for example, applies in cases where any hazardous substance was stored for one year or more, known to have been released, or disposed of, and Section 204(c) of the Base Closure Act (P.L. 100-526) specifically makes applicable the National Environmental Policy Act (NEPA) to the actual closure or realignment of a facility and the transfer of its functions to another military installation. Other statutes impose procedural requirements. Title 10 of the United States Code, Section 2668(a), for example, authorizes the Secretary of a Military Department to grant easements for roads, oil pipelines, utility substations, and any other purpose that he considers advisable.

The Task Force noted that the commercial or industrial potential of facilities on many bases and the interest of state and local communities in the rapid creation of new jobs to replace those lost as base activities wind down often make it desirable to lease or otherwise permit use of such facilities to non-military users before a base is closed. In cases where the facility is within an "area of concern" needing either investigation to determine the need for environmental restoration or actual restoration, the Task Force recognized that, where necessary, restrictions must be placed on non-military use so as to protect the health and safety of the users and to ensure that such use does not interfere with ongoing investigation or cleanup. Differing limitations on interim use may be appropriate during different phases of investigation and restoration.

The Task Force considered three types of areas on closing bases. First, there will be areas within a base that are not subject to Section 120(h)(3) of CERCLA because no hazardous substance was stored for one year or more, known to have been released, or disposed of there. This report refers to these areas as "uncontaminated."

Second, there will be areas on which hazardous substances were stored for one year or more, known to have been released or disposed of, and where all necessary remedial action has been taken for any hazardous substance remaining on the property. This report refers to these areas as "cleaned-up contaminated land," or as land that can be transferred by deed with any appropriate covenants under Section 120(h)(3).

Third, there will be areas on which hazardous substances were stored for one year or more, are known to have been released, or disposed, of and where cleanup is or will be ongoing. For some of these areas, the regulatory agencies and DoD may determine that certain non-military uses of the area will not interfere with the ongoing or future cleanup efforts and will not present health or safety risks to the users. This report refers to these as "contaminated land," or areas where interim cleanup has occurred or is ongoing; the use of such areas will be referred to as interim or short-term use, or use during cleanup.

The procedures for determining interim and final cleanup standards for contaminated land may vary, depending on whether the cleanup is conducted under CERCLA, RCRA, or another statute. However, CERCLA Section 121(d)(2) incorporates cleanup standards from other applicable federal law, and state law that is more stringent than relevant federal standards, if the other standards are legally applicable to the hazardous substance or relevant and appropriate under the circumstances. (The standards are known as "ARARs"). In addition, the procedures for determining appropriate short- and long-term uses of the affected land may vary, depending on whether the cleanup is conducted under CERCLA, RCRA, or another statute. Whether long-term land uses may determine cleanup standards is highly controversial, and in some circumstances may be inconsistent with current law. In order to ensure compliance with applicable law, maintain public confidence, and avoid the potential for future liability, DoD should plan on full compliance with all ARARs in accordance with Section 121 of CERCLA.

Since contamination on many bases ranges from widespread areas to relatively small, discrete areas, the Task Force examined the option of transferring the uncontaminated areas as separate parcels, with DoD retaining the contaminated areas until remedial action is completed. It also considered how to define a contaminated area, particularly where the location and extent (i.e., size, direction of flow, and speed of the plume) of groundwater contamination are unknown, making it difficult to determine precisely the boundaries of a contaminated area before the cleanup is completed. The Task Force also explored the circumstances under which DoD might transfer an uncontaminated surface above contaminated groundwater or a surface above contaminated groundwater for which surface remediation has been completed. The Task Force also noted that prospects for defining and transferring uncontaminated areas are complicated by the potential that activities during the remedial design and remedial action phases (RD/RA) of a cleanup under CERCLA could reveal that contamination extends to an area that had already been transferred.

While acknowledging the advantage of allowing interim use of certain land and facilities needing remedial action, the Task Force recognized that limitations on use may be appropriate. These might include prohibitions on such activities as well-drilling or other subsurface activity. Alternatively, DoD might retain a right of entry for monitoring or place other restrictions on parcels where use has been transferred by lease, license, or other means. The Task Force noted that implementation of such restrictions is critical to the protection of public health and safety, the success of the cleanup, and the resolution of future conflicts between DoD and its lessees or licensees. The Task Force also recognized that the ultimate goal is completed implementation of the approved remedy. In addition, the U.S. Government retains obligation to take any further cleanup action found to be necessary.

Restrictions on use of cleaned-up contaminated land may also be necessary to protect the integrity of the remedial action, particularly where hazardous substances remain on the property. For example, where the remedy includes an impermeable cap over a landfill or other site where hazardous substances are buried, DoD should preclude uses that could cause the cap to be penetrated. The Task Force recommended that restrictions on use should be made a part of a final order of the administrative agency or court having jurisdiction over hazardous substances on the site. Restrictions should also be made a part of the transfer document or deed and "run with the land," so that later owners cannot extinguish or ignore them. On the negative side, the Task Force noted that such restrictions may decrease the marketability of the land, making it more difficult to obtain purchasers and lenders. The Task Force recognized that market factors, coupled with the contamination-related impediments to transfer, may further decrease demand for the land and facilities on closing bases.

The Task Force observed that potential liability under Sections 106 and 107 of CERCLA raises impediments to transfer. Transferees (including lessees) of property from DoD could be considered "owners or operators" of a CERCLA site and therefore liable for the costs of cleanup at the site. In the case of Pease Air Force Base in New Hampshire, this problem was resolved by federal legislation indemnifying the State of New Hampshire and lenders for any liability associated with releases caused by the Air Force.

UNCONTAMINATED LAND

The Task Force found that uncontaminated parcels of land or facilities can be leased, sold, or otherwise transferred to non-military users before all cleanup activities on the base have been completed consistent with the letter and intent of Section 120(h)(3) of CERCLA, which does not clearly prohibit such transfers. The phrases "any real property owned by the United States on which any hazardous substance [was stored, released, or disposed of]" and "the transfer of such property" in Section 120(h) have been subject to scrutiny. Military bases typically cover thousands of acres, but on many bases hazardous substances were stored,

released or disposed of only in specific areas, leaving large sections uncontaminated. Property law provides that a parcel of land may be subdivided and the subdivided portion transferred by its owner, creating a new parcel of real property. Thus the Task Force concluded that an uncontaminated portion of a base can be considered real property on which no hazardous substances have been stored, released, or disposed of, and to which Section 120(h)(3) therefore does not apply.

In order to ensure compliance with Section 120(h)(3), the Task Force found that uncontaminated areas must be narrowly defined. In its deliberations, the Task Force limited "uncontaminated parcels" to areas with neither contamination nor likelihood of contamination of the surface or the subsurface, including the groundwater. The Task Force also found that DoD does not have specific criteria for deciding that an area is uncontaminated. DoD, EPA, and state regulatory agencies should develop a process, including criteria, for determining that an area is not contaminated. This process should at a minimum include a complete check of all records, including aerial photographs and records of past DoD and non-DoD uses of the area, to determine whether activities likely to result in storage, disposal or release of hazardous substances were conducted in the area; an investigation of the subsurface sufficient to ascertain that the groundwater is not currently contaminated by hazardous substances and that no plume of contamination is likely to reach the area; a determination that there is no reason to suspect that any hazardous substance has been or will be released as a result of any DoD or non-DoD activities, including cleanups of other sites; and adequate opportunity for early public participation and input.[8] In developing this process DoD, EPA, and the states should investigate practices and criteria being developed and used in the private sector for determining, and assuring buyers and lenders, that land is not contaminated.[9] The process should include sound

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[8]The Task Force recognized that this requirement for public involvement may be fulfilled through the NEPA process.

[9]DoD, EPA and the states may consider requiring a separate document, called a "Clean Parcel Assessment Document.". In order to prepare such a document and make a determination whether a certain parcel of base property constitutes "uncontaminated land", DoD would need to conduct a preliminary assessment/site inspection or similar investigation of the parcel. A field sampling plan may be required. DoD would also be required to gather existing data, studies, surveys, and other documents that would help substantiate that the parcel is uncontaminated. The contents of the "Clean Parcel Assessment Document" would include the following:

(a) Results of the preliminary assessment, including historical records search, historical aerial photos, interviews with employees, and site inspection report noting any sewer lines, drainage ditches, runoff patterns, etc.

(b) Discussion of status of adjacent and nearby property, and potential for migration of contamination from adjacent or nearby property onto the subject parcel.

(c) Results of sampling designed to document that contamination is not present.

(d) Any proposed reuse plan identifying time frames for such reuse and, if possible, potential buyers or tenants of the parcel.

parameters to make the determination that a parcel is not contaminated. A buffer zone between uncontaminated parcels being transferred and any contaminated area, or other methods, should normally be used to ensure that no contamination will reach the transferred land.

The Task Force found that transferring uncontaminated parcels of a closing base, with appropriate safeguards to prevent interference with the cleanup of contaminated parcels, will speed the process of establishing non-military uses of the land and therefore constitutes an appropriate method of accomplishing reuse. Such transfers will not contravene the policies underlying Section 120(h)(3) if sound or definitive criteria are used for determining that no hazardous substances were stored, disposed of, released on, or are likely to migrate to a particular parcel, and that the transfer is otherwise consistent with the statutory policy of protecting human health and the environment and facilitating the cleanup of sites containing hazardous substances.

Protections for Natural Areas

Noting that certain property on closing bases has significant ecological, scenic, historical, or recreational value, the Task Force recognized that DoD may wish to restrict--and, in some cases, may be required to restrict--specific uses of the property incompatible with the protection of the property's special features. Existing federal law authorizes DoD, in cooperation with the GSA, to protect property with significant natural or historic value through a variety of methods. These authorities and methods are summarized in Appendix G, and the Task Force recommends their use in appropriate situations.

CONTAMINATED LAND

The Task Force found that DoD may transfer by deed, without violating Section 120(h)(3) of CERCLA, any surplus real property on bases to be closed or realigned only where all necessary remedial action, as determined according to criteria established in accordance with CERCLA and applicable state law has been taken. Section 120(h)(3) prohibits the transfer by deed of ownership of DoD property meeting the conditions of Section 120(h)(3) on which necessary remedial action has not yet been taken. The provision, however, does not appear to

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(e) Recommended requirements for land use restrictions, right of access by regulatory agencies for monitoring purposes, and other requirements which address EPA's and states' concerns.

(f) Executive summary explaining the Document's conclusions for public review.

Finally, public notification and participation is required to complete the process for determining whether a certain parcel of base property is considered "uncontaminated" for the purpose of redevelopment and reuse.

restrict transfers by contractual arrangements such as leases, options, licenses, and installment sales contracts, which allow some beneficial use of contaminated property by a party other than the fee simple owner without execution of deeds.

Section 120(h)(3) of CERCLA also does not restrict transfers of real property interests between federal agencies or departments. Thus, the Task Force concluded that DoD may transfer ownership of real property on which hazardous substances were stored, disposed of, or released, or interests therein, to another federal agency as long as the transferring agency and DoD make arrangements that ensure that remedial action is completed.

Often the land parcels and facilities most in demand for civilian use and development are those used for vehicle repair and maintenance, flight operations, and other activities of an industrial nature. Although these activities often result in contamination that must be remediated, cleaning up the surface contamination, which can be accomplished in a relatively short time, can render many areas safe for uses similar to the military use of the area. The Task Force therefore concluded that in appropriate situations DoD should proceed expeditiously with cleanups that render areas in demand for reuse suitable for particular specified uses. However, the Task Force emphasized that partial or interim cleanups will not be substitutes for, or result in the delay of a complete cleanup in accordance with applicable standards. Likewise, such measures should not be allowed if they will result in exposure to hazardous substances that may significantly increase the risk of harm to human health and the environment.

Use During Cleanup

Criteria for Allowable Use. The Task Force concluded that in certain circumstances parcels of contaminated land or facilities on a closing base can be leased or otherwise made available to non-federal users before cleanup activities at all contaminated sites on the base have been completed without compromising the apparent policies underlying Section 120(h)(3) of CERCLA. An example of such circumstances would exist where soil contamination has been remediated in accordance with applicable standards, and the residual groundwater contamination poses no significantly increased threat to human health. The Task Force determined that DoD, EPA, and state regulatory agencies need to develop criteria for determining when the proper circumstances exist. The criteria should include at a minimum:

1. The transfer and subsequent use will not significantly increase the risk of harm to human health and the environment.

2. The use of the facility after transfer will not impede the cleanup process.

3. Site conditions and cleanup activities will not present a significant risk of harm to users of the facility.

4. The cleanup process will be completed expeditiously and in accordance with all applicable standards.

5. DoD retains the responsibility for any long-term operation and maintenance of the remedial action and for any necessary removal or remedial action identified in the future, to the extent that DoD is responsible for any such release of hazardous substance, pollutants or contaminants which may have given rise to the required removal or remedial action.

Also, state and local governments and the public must be adequately notified. As a recommendation, the Task Force agreed that it may be necessary and appropriate for DoD to indemnify subsequent purchasers and other appropriate parties (e.g., states, lending institutions, etc.) for any cause of action arising out of DoD's use of the property. The Congress may wish to consider amending federal law to authorize such agreements.

On a critical related point, the Task Force concluded that DoD, EPA, and state regulatory agencies must in appropriate cases restrict changes from the planned land use on such areas. DoD should design legally enforceable restrictions or conditions to ensure that future land use is compatible with the existing level of contamination and will not impede cleanup activities. These restrictions or conditions should be flexible, and should relate to planned land uses and cleanup activities. Rather than absolute bans on particular land uses, the restrictions or conditions should allow new uses, consistent with state and federal law as well as ongoing and future cleanup.

Leasing Alternatives. Assuming that contaminated property is determined to be safe for certain uses, either before or after cleanup actions are taken, DoD could lease the property subject to covenants that (a) expressly prohibit uses incompatible with the condition of the property, (b) expressly prohibit uses that would impede cleanup activities, (c) ensure that existing site conditions and cleanup activities will not present a significantly increased risk of harm to users, and (d) reserve the right of DoD and other appropriate federal and state agencies and their designees to enter the property in order to complete the remedial action. Such land use restrictions are not intended to reduce DoD's obligation to take permanent remedial action as required by Section 121 of CERCLA. Furthermore, DoD should not allow any use under a lease that would be harmful to human health or the environment.

Leasing also may be the preferable option for uncontaminated parcels in areas where the nature and location of contamination make subdivision or other delineation into contaminated and

uncontaminated lots imprudent or impractical. Leasing of uncontaminated areas also might be advisable where remedial action on adjacent or nearby contaminated areas is ongoing. Although DoD probably could reserve easements permitting access for purposes of remedial action on adjacent parcels for itself and its designees in the deeds of transfer for uncontaminated areas, leasing might be a better alternative. Leases would not convey the same degree of rights to the uncontaminated property as transfers of fee simple ownership (thereby retaining greater DoD control), could be written for a definite term or be terminable at will, and could be written to be more attractive to the third party because there would be less risk using the property than with fee simple ownership.

In certain cases, DoD may want to issue a license for a limited use of base real property for a specific purpose, rather than a lease. Licenses or permits are generally revocable at will of the licensor, although the rule may be different where money is spent with respect to the license by the licensee. In the case of leases, licenses, or permits, DoD should not indemnify lessees, licensees, or permittees for their actions.

Lease-Related Requirements and Limitations. In general, DoD may only lease property that is: (1) under the control of DoD; (2) not currently needed for public use; and (3) not excess property as defined by Section 472 of Title 40, U.S. Code.[10] A limited exception to the general prohibition against leasing excess property exists for real property and associated personal property determined to be excess as the result of base closure or realignment where: (1) the Secretary of the Service controlling the property determines that such action would facilitate state or local economic adjustment efforts, and (2) the Administrator of General Services concurs.[11] Such leases are subject to specific limitations, including requirements that a term not exceed five years and the right for DoD to revoke the lease at will, unless a longer term or omission of the right to revoke promotes the national defense or is in the public interest.

In addition to the legal restrictions on leases of U.S. Government property, other factors specifically limit the utility of leases of contaminated property. Third parties may be reluctant to enter into ground leases for periods less than 20 years because they would not be able to recover or sufficiently benefit from the cost of buildings and other improvements to the property. A similar concern would arise with respect to leases of improved lots unless the lessee did not wish to make any significant building improvements or additions on the property. In certain circumstances a long-term lease may be characterized as a sale for tax or other purposes, thus decreasing its desirability.

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[10]10 U.S.C. § 2667(a).

[11]10 U.S.C. 2667(f).

Alternative Purchase Options Arrangements. The Task Force considered alternative purchase agreements and deferred making a decision, based on GSA guidance. GSA, in conjunction with the Department of Justice, is now reviewing these arrangements.

Installment and Other Executory Contracts. An installment sales contract might prove to be useful for transferring beneficial ownership and the right to use contaminated DoD property prior to the taking of remedial action in certain limited circumstances. The Task Force concluded that such an arrangement would not violate the mandates of Section 120(h)(3) of CERCLA, assuming that no deed is executed and legal title is not transferred until the final payment is made, conditioned upon completion of the remedial action. Although an installment contract might not violate Section 120(h)(3), it raises a number of other practical and legal concerns with respect to most contaminated property, particularly where any significant length of time is expected to pass between execution of the contract and completion of remedial action. These concerns involve the requirements of the FPASA and regulations thereunder. Examples include potentially adverse tax consequences, the determination of compensation for use of the property or the money owed if remedial action is not completed on time and the closing is delayed, and budgetary and accounting complications. Nevertheless, an installment sales contract might be useful in certain circumstances, such as where remedial action was almost completed but the potential purchaser needed to occupy the premises immediately and an interim lease of the property was not possible or desirable.

Transfer

As previously noted, the land and facilities on closing bases most attractive to new non-federal users are often those used for industrial activities by the military and therefore likely to be contaminated. Although surface and other interim cleanup measures can render contaminated land and facilities suitable for certain uses, particularly industrial uses, final cleanup of groundwater contamination, for example, may take decades.

Section 120(h)(3) of CERCLA requires DoD to include in any deed transferring land contaminated by hazardous substances a covenant warranting that all remedial action necessary to protect human health and the environment has been taken before the date of transfer and that the government will take any additional remedial action found to be necessary after the date of transfer. In addition, Section 120(h)(1) of CERCLA requires DoD to include a notice in any contract for the sale or other transfer of real property on which any hazardous substance was stored, released, or disposed of. The notice must include the type and quantity of the hazardous substance and when the storage, release, or disposal took place.

The Task Force found that where remedial action that renders the land safe for, and compatible with, a particular industrial or other approved land use has been taken, the transfer

of use of the land to the new non-military user may be in the public interest. Section 120(h)(3) of CERCLA could prevent the final transfer of fee simple ownership of many parcels of contaminated land for decades if groundwater remediation is needed. The Task Force discussed the merits of transferring certain contaminated parcels before all necessary remedial action was completed, focussing on parcels where surface remediation is complete but where groundwater remediation through pump-and-treat methods will continue for decades. The Task Force concluded that this issue needs to be resolved, but recognized that a definitive interpretation of the phase "all remedial action ... has been taken before the date of such transfer" may not be possible unless the courts or the Congress resolve the issue. The Task Force concluded that having the remedial action in place may protect human health and the environment provided that transfer documents ensure that the cleanup process will be completed by the responsible agency expeditiously and in accordance with all applicable standards.[12] In many instances, leases may not be the most appropriate method of transferring use of land that has been cleaned up to standards compatible with the approved use. Innovative methods of transferring property that do not violate the provisions of Section 120(h)(3) of CERCLA, such as the installment sales contracts discussed above, should be studied to determine their utility for expediting reuse of lands on closing bases without compromising the ultimate cleanup. Such transfers should be limited to parcels where cleanup actions have been taken that made the area compatible with and safe for the approved land use. In addition, the Task Force concluded that DoD will need to restrict changes from the approved land use, as discussed above with respect to leases.

In order to preserve the ability to comply with Section 120 of CERCLA, DoD may need to reserve easements in deeds conveying ownership of contaminated property following completion of remedial action to provide the United States Government and its designees with the right of access to the property for the purpose of conducting any additional remedial action found to be necessary after the date of the transfer.

Similarly, DoD may need to reserve easements in the deeds conveying the ownership of uncontaminated property adjacent to contaminated parcels. Such easements should be obtained where access to the transferred property is necessary to complete remedial action on nearby property or where such access is likely to be necessary if additional contamination is found in the future. The nature of the easements to be reserved will depend in large part upon site-specific circumstances and the local law applicable to easements, which varies substantially from jurisdiction to jurisdiction.

Zoning by local government, in conjunction with other restrictions on land uses, can effectively prevent changes in land use that would be incompatible with remedial actions taken

[12]EPA, in consultation with states, DoD, and other appropriate agencies, is considering whether this issue can be resolved short of court or Congressional action.

on closing bases. As discussed in Appendix F (Federal Property Management Laws and Regulations), local governments must be given the opportunity to zone the property. For example, where interim remedial action has rendered the land suitable for an industrial land use, then a zoning classification that restricts the use of that parcel to industrial uses would preclude most changes in land use that would be incompatible with the levels of cleanup attained by the interim action, such as a change to residential use. Where DoD retains the deed, the lease or other transfer document should include conditions requiring the user to comply with local zoning. A rezoning or special use permit hearing would provide a public forum to consider whether a proposed change in land use would be compatible with the existing status of remediation. This protective function of zoning would be most effective if the initial zoning were done in consultation with DoD and the appropriate environmental regulatory agencies and with full knowledge of the contamination present and the remedial actions taken on the subject land. Because zoning designations and restrictions are subject to change, protection of public health and safety will normally require other types of land use restrictions in addition to zoning controls.

NPL SITE DESCRIPTIONS

After focusing on whether parcels on bases listed on the NPL would be difficult to transfer to non-military users, the Task Force concluded that the NPL listing status of a parcel is not relevant to whether the parcel can be transferred under Section 120(h)(3) of CERCLA. However, the listing of a base on the NPL can pose a problem for base closure and reuse because of the likely concerns of potential purchasers and lending institutions when they consider investing in property on the NPL.

The Task Force heard in EPA testimony that the extent of an NPL site is determined by the extent of the release or releases at the installation, and that the actual extent of the "site" thus becomes known only during the course of the studies that follow NPL listing. At the time of listing, a more general description (e.g., "Pease Air Force Base") is used to identify the area that will undergo further study. Based on EPA testimony, the Task Force inferred that the process of defining NPL sites is the same for federal and non-federal facilities.

The Task Force recognized that, in listing sites on the NPL, EPA often attempts to ensure that the site is identified in such a way as to include all areas of known or likely contamination. However, the military installations included in their entirety on the NPL are different from most private NPL sites because of their size, often comparable to small cities and covering thousands of acres. As a result, when an entire installation is listed, large areas of uncontaminated land are often treated, at least initially, as part of the "site".

To the extent that the relevant information is available at the time of listing on the NPL, the Task Force recommends that EPA describe newly listed federal facility sites using the source and extent of contamination as the guiding principle, and the Task Force also recommends that EPA reconsider the descriptions of military installations that are on the NPL. The Task Force observed that EPA's ability to describe the contaminated portions of installations will be enhanced if DoD provides comprehensive Preliminary Assessment/Site Investigation (PA/SI) information for listing purposes.

FINDINGS AND RECOMMENDATIONS

Transfer of Uncontaminated Parcels

DoD, EPA, state environmental regulatory agencies, and other appropriate federal and state agencies, should develop a process, including sound criteria, for determining whether or not parcels of land on a closing base are contaminated or likely to become contaminated by hazardous substances. DoD should then apply those criteria in transferring uncontaminated parcels of closing bases. Parcels that meet such criteria should be considered for expeditious transfer to non-federal users to facilitate beneficial reuse of the closing base. To expedite base closure and the transfer of property to other uses and users, DoD, EPA, and state regulatory agencies should, as soon as practicable after the criteria are developed, define the boundaries of areas that are not contaminated or likely to become contaminated using legal descriptions. This would facilitate the transfer of uncontaminated areas to other uses and avoid delays in transferring such parcels. A buffer zone between uncontaminated parcels being transferred and any contaminated area, or other methods, should be used to ensure that no contamination reaches the transferred land. State and municipal laws regarding subdivision of property should be studied as part of the land use planning process for each base to determine their applicability and impact on the alternatives being considered.

Protecting Natural and Historic Areas

In consultation with appropriate federal and state agencies, DoD should develop criteria for identifying parcels of land on closing bases that contain important ecological, scenic, recreational, or other natural or historic features the preservation of which would be in the public interest. The Task Force recommends that existing criteria be used where available. Protection of natural and historic areas should also be included in the NEPA documentation for closing bases. DoD should consider the use of conservation easements, restrictive covenants, transferrable development rights, and other techniques to preserve such natural or historic areas as part of the process of transferring property on closing bases to non-military use and control.

Non-Federal Use of Contaminated Parcels

The Task Force found that the end point of cleanup on closing bases must be the completed implementation of the approved remedy. In addition, the U.S. Government retains the obligation to take any further cleanup action found to be necessary.

DoD, EPA, and state environmental regulatory agencies should develop criteria for determining the circumstances where a contaminated parcel of land can be leased or otherwise be returned to beneficial use by non-federal users before all cleanup activities on the parcel have been completed. The criteria should include at a minimum:

1. The transfer and subsequent use will not significantly increase the risk of harm to human health and the environment.

2. The use of the facility after transfer will not impede the cleanup process.

3. Site conditions and cleanup activities will not present a significant risk of harm to users of the facility.

4. The cleanup process will be completed expeditiously and in accordance with all applicable standards.

5. DoD retains the responsibility for any long-term operation and maintenance of the remedial action and for any necessary removal or remedial action identified in the future, to the extent that DoD is responsible for any such release of hazardous substance, pollutants or contaminants which may have given rise to the required removal or remedial action.

Also, state and local governments and the public must be adequately notified.

DoD should incorporate the criteria into guidance, train the appropriate personnel in the application of the criteria, and apply those criteria in leasing, licensing or granting permits for non-federal users of parcels on closing bases. In doing so DoD should consider the criteria and practices used in the private sector. DoD should design legally enforceable restrictions on changes in the land use to ensure that future land use of the parcel is compatible with the existing level of contamination and will not impede cleanup activities. The restrictions should allow new land uses that are consistent with state and federal law as well as with ongoing and future cleanup.

DoD and the regulatory agencies should cooperate with local governments as they apply their zoning regulations to base lands, providing zoning officials with full and usable information about the contamination, remedial actions taken and planned for the closing base, and recommendations for land uses, compatible and incompatible with the remedial actions.

As a recommendation, the Task Force agreed that it may be necessary and appropriate for DoD to indemnify subsequent purchasers and other appropriate parties (e.g., states, lending institutions, etc.) for any cause of action arising out of DoD's use of the property. The Congress may wish to consider amending federal law to authorize such agreements.

Descriptions of Federal Facility NPL Sites

To the extent that the relevant information is available at the time of listing on the NPL, EPA should describe newly listed federal facility sites using the source and extent of contamination as the guiding principle, and EPA should also reconsider the descriptions of military installations that are on the NPL.

CHAPTER 2: CLEANUP PROCESS

The Task Force examined how cleanup requirements under RCRA and CERCLA and procedural requirements under NEPA could best be expedited and integrated without changing existing law. In addition, the Base Closure Act applies NEPA to certain aspects of base closure relating to disposal and reuse of property. The Task Force explored ways to consolidate duplicative requirements of the various statutes and other ways of expediting the process.

MAKING RCRA AND CERCLA PROCESSES SIMILAR

The roles and responsibilities of state environmental regulatory agencies and EPA vary depending on whether a closing base is on the NPL or not; whether facilities on the base have TSDF status or not; and, if it is a TSDF, whether the RCRA/HSWA corrective action program is federal or state. The Task Force found that each of these situations has an impact on the cleanup process and each provides distinct opportunities for consolidating and streamlining the cleanup process. In particular, procedures for determining the cleanup standards for an NPL site are likely to differ from procedures for determining the cleanup standards for a TSDF regulated by a state that has received RCRA corrective action authorization from EPA. Similarly, the procedures for implementing a remedial action at an NPL site differ from the procedures for carrying out a corrective action at a TSDF in a state that has a fully authorized RCRA/HSWA hazardous waste regulatory program. Moreover, the procedures for determining and implementing cleanup decisions at sites which are neither on the NPL nor regulated under RCRA may differ from both of these systems.

Section 121 of CERCLA is the primary statutory authority for determining cleanup standards at all NPL sites. Section 121 describes the process and criteria for choosing the remedy and requires that it protect human health and the environment. It also provides that more stringent state standards may apply in determining the proper level of cleanup if they are legally applicable or relevant and appropriate. Procedures for choosing the remedy, along with

detailed rules governing responses to releases of hazardous substances, are contained in the National Contingency Plan (NCP).[13]

As already noted, Section 120 of CERCLA specifically addresses the responsibilities of federal agencies for cleanup of hazardous substances. Section 120(a) requires federally owned facilities to comply with CERCLA to the same extent as nongovernmental entities. Section 120(e)(2) mandates a significant EPA role in remedy selection for federal sites that are listed on the NPL. The section directs the federal agency concerned to enter into an Interagency Agreement (IAG) with EPA for the "expeditious completion . . . of all necessary remedial action" at the facility. Executive Order 12580 allocates the President's CERCLA responsibilities among the federal agencies and specifies procedures to be followed by the various federal agencies prior to the selection of the remedy.[14]

For federal sites not on the NPL, Section 120(a)(4) of CERCLA mandates that state laws concerning response actions apply. Arguably, all of the procedures contained in the NCP may apply even to federal sites not on the NPL.

Section 120(i) of CERCLA states that nothing in Section 120 "shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." Section 120(i) states only that RCRA requirements apply generally to federal facilities; it does not specify the manner in which these requirements will apply through the CERCLA ARAR process.

Cleanup Standards: The Task Force considered whether the differences in practices, policies, and procedures for determining cleanup standards under CERCLA, RCRA, and other applicable federal and state laws could be minimized. Section 3004(u) of RCRA requires all TSDFs seeking permits to take corrective action for all releases of hazardous waste or constituents from any solid waste management unit at the facility. That section does not specify any criteria for determining when corrective action has been successful. Section 3004(v) of RCRA requires facility owners and operators to take corrective action beyond the facility boundaries where necessary to "protect human health and the environment," except in limited circumstances. In the absence of a corrective action rule the states are without promulgated guidance on how to implement corrective action. Many states authorized by EPA to issue RCRA permits and administer the corrective action program have simply adopted EPA's rules as their own and are thus determining RCRA cleanup standards on a case-by-case basis. The states and EPA also set specific cleanup standards for remedial actions under CERCLA on a

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[13]40 CFR Part 300.

[14]Executive Order 12580, §10, 52 Fed. Reg. 2923, 2928 (1987).

case-by-case basis, but these standards must meet the general standards and criteria, including protecting human health and the environment, set out in Section 121 of CERCLA and in the NCP. In order to minimize the differences in determining cleanup standards, the Task Force recommends that EPA, to the extent possible, recognizing that RCRA cleanups are undertaken in the context of permits and CERCLA cleanups are not, promulgate regulations that make the cleanup standards under RCRA and CERCLA consistent.[15]

Cleanup Execution: The Task Force also considered whether differences in executing cleanups under RCRA, CERCLA, and other laws could be minimized. As is the case with setting cleanup standards, Sections 3004(u) and (v) of RCRA do not specify procedures for executing corrective action. Because EPA has not yet promulgated a final rule implementing the corrective action provisions of these sections, EPA and state procedures for executing corrective actions under RCRA are currently established on a case-by-case basis. The NCP contains general procedures for executing cleanups under CERCLA that allow each site to be treated individually. In order to minimize the differences in cleaning up sites, the Task Force recommends that, to the extent possible, EPA promulgate regulations that make the procedures for executing cleanups under RCRA and CERCLA consistent.

FFAs May Need to be Amended: There may be a need to amend Federal Facility Agreements (FFAs) or similar cleanup agreements between the regulatory agencies and DoD as soon as possible to address base closure related issues, because these agreements were negotiated and finalized before transfer and reuse of base property became an issue. The Task Force believed that these FFAs may need to be amended to resolve the potentially conflicting cleanup schedules, priorities, and policies created by base closure.

GENERIC CLEANUPS

DoD has traditionally studied and selected remedies for sites under the jurisdiction of CERCLA on a case-by-case basis, treating each site as if it were the first time DoD had encountered contamination. The NCP and the EPA guidance create only an extremely broad framework for the Remedial Investigation/Feasibility Study (RI/FS) and for the remedy selection process for Superfund sites, and the NCP framework does not dictate anything more specific than a detailed and in-depth study for each Superfund site on a case-by-case basis. Such a study, however, may not be the best use of limited resources.

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[15]See also. Memorandum from Don Clay, Assistant Administrator, Office of Solid Waste and Emergency Response, USEPA, Requirements for Cleanup of Final NPL Sites under RCRA, (June 11, 1990).

EPA has been examining ways to accelerate the rate of cleanups at Superfund sites. One of the options under consideration is to standardize the remedial planning and remedy selection process, as far as possible, given the variety of site conditions. This option could involve the development of regulations, standards and guidelines. It is expected that this option, if implemented, could yield significant long-term benefits through efficiencies of standardization. However, the Task Force also noted that federal facilities provide an important opportunity to develop innovative technology and concluded that this factor should be part of the remedy selection process.

The Task Force considered whether the process of determining cleanup standards could be expedited through the use of standard or generic responses to recurring types of contamination, although it recognized that environmental restoration must be tailored to the specific circumstances of each site, including the types and sources of contamination. Nevertheless, some types of contamination, such as petroleum spills, are common to many sites, and experience has demonstrated that certain cleanup actions are effective for those types of problems. Once it is demonstrated that the contamination is an unexceptional case of a common problem for which there is a standard, effective remedy, consideration of alternatives should focus on evaluating the proven alternatives and their adaptation to the specific site.

Two recent attempts to develop generic approaches to cleanup studies, one by EPA and one by the Minnesota Pollution Control Agency, are described in Appendix H. The Task Force found that these two efforts are promising approaches to streamlining the process of cleaning up hazardous substances.

The Task Force also found that DoD could expedite cleanup of contamination in some circumstances by using procedures and standards appropriate to the source and extent of contamination. For example, leaking underground storage tanks (UST) are common sources of contamination on closing bases. As with privately owned leaking tanks, leaking USTs on closing bases should be cleaned up in accordance with the rules promulgated under Subtitle I of RCRA. As another example, EPA often uses removal actions authorized by CERCLA, which are generally surface cleanups limited in scope and duration, to clean up sources of contamination such as leaking barrels containing hazardous substances. The Task Force recommends that DoD also use removal actions in appropriate situations.

COMBINING NEPA, CLEANUP STUDIES, AND LAND USE PLANNING

Although land use planning, environmental impact analysis, and remedial investigation at closing bases all serve different specific purposes, and require different types of information, their shared purpose is to inform decision-makers. In many instances the information developed

for one of the studies will also be useful in the others. Coordinating and conducting them contemporaneously can improve the potential for such cost-saving cross-fertilization. In particular, the Task Force found that the NEPA scoping process can be used in the early stages of planning for base closure on an installation-wide basis to determine when and where coordinated studies would be appropriate. The Task Force recommends that DoD use the NEPA scoping, tiering, and review processes to ensure that the environmental impact analysis is appropriate to the action under consideration and to improve the land use planning and RI/FS processes.

FINDINGS AND RECOMMENDATIONS

Integration of RCRA and CERCLA

The Task Force found that the potential exists to consolidate and streamline the practices, policies and procedures of EPA and the state environmental regulatory agencies by promulgating regulations implementing RCRA/HSWA corrective action authority that are consistent with CERCLA. In order to streamline procedures for the purposes of expediting the environmental restoration of military bases, the Task Force believes that EPA needs to consider integrating the CERCLA cleanup process with the RCRA requirements. Integration of CERCLA cleanup process and RCRA substantive requirements should be done by agreement between the regulatory agencies and DoD. In addition, EPA should promulgate a final corrective action rule implementing Sections 3004(u) and (v) of RCRA that is, to the extent possible under RCRA, consistent with the NCP. Under either approach EPA should also provide for input by states.

Standardized Studies and Cleanup Technologies

The Task Force found that well-known and effective remedies exist for a number of commonly recurring types of contaminated sites, and that using standardized studies and cleanup technologies at such sites could streamline and expedite the cleanup process. EPA, in consultation with appropriate state and federal agencies, should develop criteria for determining the types of circumstances and contamination for which standard or generic approaches to cleanup would be appropriate. DoD, EPA, and state regulatory agencies should develop and use generic approaches where possible. DoD, in consultation with EPA and state regulatory agencies, should also develop a policy concerning the use of cleanup methods, procedures, and standards that are appropriate to the source and site of contamination.

Environmental Studies

When the alternative actions DoD is considering are interdependent, such as when the proposed new land use at a closing base and the final remedy chosen for a contaminated site are interrelated, DoD should conduct all environmental studies at the same time or coordinate their timing to eliminate delays caused by one study needing the results of another that is not completed. DoD, in consultation with appropriate agencies, should develop guidance for determining the circumstances when combined or coordinated environmental studies are appropriate and develop guidance for coordinating such studies.

CHAPTER 3: CONTRACTING

Because most environmental restoration work is accomplished through contracting, successful expedient cleanup of contaminated sites will depend largely on how well the Military Services manage their restoration contracts. Each service has its own acquisition strategy for awarding environmental restoration contracts. Those strategies have evolved on the basis of the size of the environmental programs and the types of cleanup projects identified for contract work. Such factors have changed significantly in recent years. The size of environmental restoration programs has grown dramatically, outstripping the Services' ability to manage and execute them in-house. Sometimes the Services lagged behind in building in-house capability to properly manage them even when they are contracted out. Also, environmental restoration projects have become extremely varied, now ranging in type from simple site investigations to multiple-phase cleanups using new, exotic technologies.

Recognizing these changes, the Services are changing their acquisition strategies. To meet the challenges of increased magnitude and complexity, the Services are placing priority on expanding contracting capacity at environmental contracting centers. For the Army, these are U.S. Army Corps of Engineers (USACE) district offices; for the Navy, these are Naval Facilities Engineering Command (NAVFAC) engineering field divisions and the Naval Energy and Environmental Support Activity; and for the Air Force, these are Human Systems Division (HSD) and the Department of Energy contract laboratory services such as the Hazardous Waste Remedial Action Program. The Air Force also uses USACE and NAVFAC for environmental restoration work.

The environmental contracting centers tend to use those contract types with which they have had the most experience. There is a natural bias toward using familiar contract types rather than exploring less familiar alternatives. For instance, USACE district offices have been successfully using firm-fixed-price contracts for their military construction projects, where the scope of work and, therefore, reasonable prices can be clearly defined at the time of contract award. The Corps recognized this and does emphasize consideration of all available contract types during the acquisition planning phase of its projects. Similarly, at HSD, where cost-reimbursement contracts to support research and development (R&D) efforts have traditionally been used, most of its environmental restoration projects are also conducted under cost-reimbursement contracts.

As DoD environmental program managers have gained more experience and become more familiar with the nature and scope of environmental restoration work, they have come to recognize that no one contracting method can do the job alone. Past attempts to rigidly manage environmental restoration work through a single type of contract have led to cumbersome and unnecessary administrative problems. Innovative, flexible contracting strategy is needed to explore various contract types so that contracting centers can select the most appropriate type (or types) for a particular environmental restoration project. Since different environmental restoration activities require different contract types and even a single project may need to use more than one, the DoD environmental contracting centers must develop a capability to use various contract types.

In exploring ways to expedite the contracting process, the Task Force identified the following specific issues for review: contractor pools, types of contracts, contracting models and methods, the turnkey approach, contracting strategies, and third-party liability indemnification and construction bonds.

CONTRACTOR POOLS

The Task Force explored the kinds of contractor pools (see glossary) the Services need and how the DoD contracting centers should handle them. The concept of using a pool of contractors is not new to DoD environmental contracting centers. USACE and NAVFAC have long been using pools of architect-engineer (A-E) contractors for traditional engineering design and construction work. USACE has expanded its use of large indefinite-delivery type of A-E service contracts both for conducting RI/FS projects and for performing remedial cleanup actions. NAVFAC has developed a so-called CLEAN contract with a pool of contractors that can be used for each phase of the environmental restoration process. HSD has a pool of contractors that can perform RI/FS but not remedial design/remedial action (RD/RA), but the Air Force plans to expand HSD's capability to contract for RD/RA.

Once a contract is placed with a pool of contractors, completing delivery order contracting actions to mobilize a contractor can take as little as four to six weeks. The use of contractor pools allows the contracting officer to accomplish time consuming long-lead administrative items such as the requirements of the Miller Act, Davis-Bacon Act, or Service Contract Act. Without a pool of contractors, the normal process of mobilizing a contractor can take six months to one year. Contractors would still be required to compete for the task order awarded pursuant to indefinite delivery contracts, if necessary. Having dedicated procurement cells could improve responsiveness to customers by further reducing the contracting time.

There are three options for establishing pools of contractors to cover all of the phases of environmental restoration work. The first option is to establish a pool for each phase, i.e., one pool for preliminary assessment/site investigation (PA/SI), one for RI/FS, one for RD, and one for RA. The DoD contracting centers are familiar with this option and are using indefinite-delivery contracts to create such pools. The second option is to create a single contractor pool that can perform all phases of the environmental restoration process from PA/SI to RA and the subsequent operations and maintenance work. Very few of DoD's contracting centers have these pools. The last option is a hybrid of the other two options.

The DoD environmental contracting centers need to explore ways to establish hybrid contracting pools, offering the best features of the first two options and providing more contract management flexibility. A well-designed pool can ensure healthy secondary competition among contractors who have been selected through a full and open competition. Geographic monopoly within a pool should be avoided. Care must be taken to ensure that some overarching control is placed on the contracting effort so that contract capacity is managed to avoid non-productive expenditures. The contracting officer should assign new work to contractors on the basis of how well they have performed previous assignments. Also, contract options should be reviewed annually on the basis of performance. Failure to perform satisfactorily should be grounds for disqualification from the pool. Using such mechanisms will give contracting officers leverage to keep contractors competitive.

TYPES OF CONTRACTS

The Task Force examined the two fundamental contract types the DoD contracting centers might use: firm-fixed-price and cost-reimbursement. Each type has several suboptions, and there are pros and cons for using each type. Traditionally, the DoD construction agents have used firm-fixed-price contracting, since the scope of work and reasonable prices can be defined at the time of contract award for construction work. On the other hand, the R&D community has primarily used cost-reimbursement contracts, since the scope of work is usually uncertain in R&D and thus reasonable prices usually cannot be defined at the time of contract award for major system development and similar R&D.

Since environmental restoration activities require contracts of both types, DoD environmental restoration contracting centers must develop a capability to use various contracting methods. The hybrid contractor pool process can incorporate various contract types so that contracting officers can pick the most suitable type for a particular environmental restoration project. Training of contracting officers to use both types of contracts is critical for successful implementation.

CONTRACTING MODELS

The Task Force found that two contracting models are appropriate for environmental restoration work: the construction model and the service model. Distinctions between them are based on various contracting laws and the Federal Acquisition Regulation (FAR). A major difference between the two is that under the construction model, the Services generally change contractors between stages of the work, while under the service model, changing the contractor is not required. The construction model generally forces a separation between design and construction work.

Because most DoD contracting centers have extensive experience with the construction model, they tend to use it more often. But restoration actions requiring the use of process-oriented cleanup technology might be better managed under the service model, which holds potential for acquisition time savings in comparison with the construction model and offers more flexibility for adapting to changes.

The decision regarding which model to use depends largely on how the contracting officer classifies a particular environmental restoration effort. Many contracts combine several work elements, such as soil removal, bioremediation, sampling analysis, and well-monitoring. Some elements clearly are of a construction nature, whereas others clearly are of a service nature. When a remedial effort contains combinations of these work elements, the contracting officer must make the decision as to which contracting model is most appropriate.

The Wage and Hour Division of the Department of Labor (DoL) has the authority to determine which labor rate (construction versus service) should be applied to each work element. Because DoL's ruling becomes the basis for interpreting which rate applies, DoL rules on currently known environmental remediation work and on new elements based on emerging technologies will significantly affect the DoD environmental contracting center's classification of its contracts as either construction or service. Recognizing its important role, the Services should maintain a liaison with DoL.

TURNKEY APPROACH

The Task Force considered how the turnkey approach, which allows one contractor to manage a site from start to finish, might be applied to environmental restoration work. The idea is to package all possible requirements up front, so that potential contractors can bid on the whole procurement. This approach may reduce the number of contractors competing since only a limited number of large companies possess the full range of skills to perform the work. This shortcoming could be alleviated by allowing smaller companies to team up. The turnkey

approach may prove useful for contracting for RAs primarily involving process-oriented technology where its application requires continual monitoring of site condition and measuring progress toward established performance goals. Such technology may include bioremediation, chemical precipitation, oxidation processes, and solvent extraction.

The turnkey concept may be used in connection with a pool of contractors that can perform all phases of the environmental restoration process. Contractors lacking a full-service capability cannot qualify for a turnkey contract. DoD should increase the use of the turnkey approach to combine design and construction under one contract. A properly designed and implemented turnkey concept could allow DoD to expedite the pace of cleanup.

CONTRACTING STRATEGY

In examining contracting strategy options for expediting the cleanup process, the Task Force concluded that all DoD contracting centers should have the authority and various tools to contract for all phases of the environmental restoration process, provided that adequate technical oversight is available. Granting this authority to those contracting centers that do not have the full contracting capability will allow them to establish hybrid contracts incorporating solicitation provisions and contract clauses covering all phases of environmental restoration activities and using various contracting types. When requirements develop, contracting officers can use delivery order contracting to fulfill them expeditiously.

DoD should particularly consider adopting the turnkey approach for work requiring process-oriented technology provided that they have the capability to monitor and oversee the work effectively. The primary approach to contracting for cleanup efforts currently follows the construction model and consists of three separate phases: study, design, and construction. Fully achieving the benefits of a turnkey approach may require changing the orientation of contracting personnel and developing an experienced, specialized contracting force for remedial projects. DoD should focus on establishing contracts that allow for quick reactions to emerging mission requirements, so that work requires only a task order or statement of work, price, and schedule to be negotiated. To open the competitive process for the various engineering specialties and cleanup technologies, it may be necessary to encourage or require joint ventures and/or teaming arrangements.

Having a capability to form dedicated procurement cells at DoD contract centers could improve responsiveness to customers. The cell would consist of environmental engineers, contracting officers, and auditors. This is not currently the case; HSD contracting officers belong to a different organization. Also, DoD contracting centers must now rely on the Defense Contract Audit Agency to perform audits on contractors' general, administrative, and hourly

rates. To establish a dedicated procurement cell staff from program management, contracting, and audit functions, the personnel should be located within the same organization and have the contracting authority to award contracts without higher headquarters approval. Establishing this arrangement does not necessarily mean complete reorganization of procurement staff. USACE and NAVFAC field offices already have a similar arrangement which encourages a close coordination among various acquisition staff.

THIRD PARTY ISSUES

Attracting more contractors from the environmental cleanup industry and thus achieving better competition requires accommodation to assist contractors in sharing the risk associated with the absolute liability imposed by several environmental statutes. Indemnification available to DoD contractors for environmental liabilities and compliance costs is based on statute and on the FAR. Public Law 85-804[16] allows the President to authorize agencies exercising functions related to the national defense to grant certain kinds of extraordinary contractual relief, including indemnity to contractors.[17] Such indemnity is not subject to the Anti-Deficiency Act[18], which usually prohibits open-ended provisions in U.S. Government contracts. A contract clause implementing Public Law 85-804[19] states, "this indemnification applies only to the extent that the claim, loss, or damage (1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear and (2) is not compensated for by insurance or otherwise." This clause could be used if defined carefully so that certain environmental liabilities could be covered for U.S. Government cleanup contractors. DoD should review its indemnification procedure but in no circumstances should it indemnify contractors above the standard provided in Section 119 of CERCLA.

Another factor that increases procurement leadtime and reportedly impedes competition is the Miller Act bonding requirements for construction contracting. It should be noted that the Miller Act[20] includes authority to waive the bonding requirements for cost-reimbursement contracts, an option that has been exercised by DoD. In addition, the bonding requirements for

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[16]50 U.S.C. §§1431-1435; Executive Order 10789, 14 Nov., 1958, as amended.

[17]DoD guidance implementing the statute is at PART 50. OFARS, Extraordinary Contractual Actions. 10 U.S.C. §2354 also authorizes indemnification in instances where the work performed constitutes R&D work.

[18]31 U.S.C. §§1341 et seq.

[19]FAR §52.250-1.

[20]40 U.S.C. §270(e).

fixed-price contracts need to be reevaluated to ensure that they realistically reflect the U.S. Government interest.

FINDINGS AND RECOMMENDATIONS

Contracting Strategy

DoD or the Services should give its contracting centers authority to contract for the performance of all phases of environmental restoration work if they do not already have that authority. The Task Force recognizes many USACE and NAVFAC field offices already have this authority. Contracting centers that now lack the authority to contract for the RD and RA phases of environmental restoration work are forced to terminate their site cleanup efforts at a certain point and hand over responsibility to another contracting center.

Contractor Pools

The environmental contracting centers should establish a hybrid (construction/services) contract format utilizing a pool of contractors and allow DoD acquisition managers flexibility by allowing for issuance of task orders under these contracts. This would involve establishing large dollar value, indefinite delivery contracts in the environmental area. Such contracting flexibility would also allow DoD contracting officers to pick the most appropriate contract type or types and contracting model for each task.

DoD environmental contracting centers should expand the current pool of contractors, using cost-reimbursement contracts if appropriate to the extent commensurate with their ability to provide close oversight. Since close supervision and technical oversight is a must for administering cost-reimbursement contracts, DoD contracting centers should not award such contracts unless they have the capacity to provide that supervision and oversight.

Dedicated Procurement Cells

DoD acquisition regulations allow the establishment of dedicated procurement cells and the Services should consider establishing a dedicated procurement cell at their environmental contracting center to support cleanup efforts at the installations identified for closure. Additional personnel are needed to establish a procurement cell. Quick reaction is critical because very often the Services are forced to respond to court approved consent decrees that contain strict schedules. Establishing contractor pools can save significant contract administrative lead time which normally takes six months to a year. Using dedicated procurement cells could reduce reaction time from four to six weeks to one to two weeks once a hybrid basic agreement is

placed with a pool of contractors. Closer teamwork between members of the DoD acquisition staff would avoid unnecessary confusion and deter exploitation by contractors. This arrangement should not dilute the authority of the contracting officer whose warrant issued pursuant to law and regulations gives him or her certain decision-making powers.

Training

The environmental contracting centers should enhance training so that acquisition managers are well equipped to use contracts of various types. While we recognize a good amount of training is underway such as the Navy's "cradle-to-grave" philosophy in construction, most contracting officers at DoD contracting centers tend to specialize in one contract type, and this situation often encourages environmental contracting centers to become biased toward a single contract type, whether or not it is the one most appropriate for the task at hand. A comprehensive cross-training program can alleviate this problem.

Recruitment

In recruiting and cross-training contracting officers, the environmental contracting centers should concentrate on bringing on board contracting officers experienced in using various types of contracts. These contracting centers should establish teams of contracting officers, so that their collective expertise will allow them to use all types of contracts. Close teamwork will also allow contracting officers to train each other.

Liaison with the Department of Labor

The contracting centers should establish a close liaison and formal coordination process with the Department of Labor (DoL) with regard to determining the wage classification for positions of personnel dealing with emerging remedial technologies. DoL's labor-rate rulings on environmental restoration work elements affect the Services' flexibility to classify individual remedial action projects.

CHAPTER 4: REGULATORY RESPONSIBILITIES

Under the current statutory and regulatory structure, EPA and the states may have overlapping regulatory authority at federal facilities. EPA and the state regulatory agencies each have key roles and responsibilities in base cleanup and closure. The overlapping authority has, however, led to confusion, conflict, and delay in timely cleanup of military bases. The Task Force examined problems in the base closure process created by overlapping or duplicative state and federal regulatory responsibilities under RCRA, CERCLA, and other statutes and explored the potential for expediting base closure and cleanup by delegating or consolidating regulatory authority.

STATUTORY BARRIERS

Some of the barriers to consolidating in a single environmental agency the regulatory responsibility for all hazardous substance cleanups at closing bases are statutory; others are policy or administrative in nature. RCRA/HSWA allows EPA to authorize states to conduct equivalent and consistent state programs with the primary responsibility for corrective action at military installations with TSDF permits. EPA does not have similar authority under CERCLA to authorize states to take over oversight responsibility for remedial actions at NPL sites. The Task Force noted that the potential for authorization of state programs with corrective action oversight under RCRA is largely unrealized, since few states have met EPA's criteria for authorization. Although states may be authorized to administer the RCRA hazardous waste regulatory program, the Congress clearly provided that EPA would retain authority to enforce the statute.

Although CERCLA does not provide for "delegation" of responsibility to individual states, Section 121(f) of CERCLA calls for "substantial and meaningful involvement by each state in initiation, development, and selection of remedial actions to be undertaken in that state." Many states take an active role in cleanups of federal facility NPL sites. Many states also now operate their own cleanup programs for remediating non-NPL, non-RCRA sites.

ADMINISTRATIVE MECHANISMS TO REDUCE DELAY

Interagency agreements, Federal Facility Agreements (FFAs), and Defense and State Memorandums of Agreement (DSMOAs) are administrative mechanisms designed to reduce the delays and confusion that can result from multiple agencies having a role in cleanup decisions. For example, California is in the process of negotiating a series of IAGs at non-NPL installations within the state. One attractive feature of these agreements is that they designate either the California Department of Toxic Substances Control or the Regional Water Quality Board as the state's "lead oversight" agency on a facility-by-facility basis. Under a Memorandum of Understanding between the state agencies, disputes between the Department of Toxic Substances Control and the Regional Water Quality Control Board, for instance, must be resolved between the state agencies. Under this arrangement, DoD should receive non-conflicting regulatory guidance from the state and should need to resort to only one dispute resolution mechanism.

Many FFAs attempt to reconcile CERCLA and RCRA and federal and state requirements.[21] At some locations, this has allowed for rapid response to releases from UST systems at NPL sites by applying the RCRA cleanup regulations for USTs, rather than the CERCLA response requirements. At other locations, the state has agreed to observe the cleanup actions at NPL sites and determine if progress and scope are satisfactory, reserving the right to take legal action to direct necessary cleanup actions if it finds the progress or scope unacceptable.

Another effective way to avoid delay is for DoD to involve EPA and state regulatory agencies, as appropriate, as early as possible in the process of investigating and cleaning up contaminated sites. Early review by the regulatory agencies can ensure that all parties agree that the investigations and studies are sufficient and thus avoid delays associated with the need to conduct investigations of items not identified by DoD. One technique for accomplishing this is the Technical Review Committee used at Tinker and McClellan Air Force Bases and elsewhere (See Appendix I for a discussion of the use of the Technical Review Committee at Tinker Air Force Base).

Centralized processes can also help expedite cleanup under RCRA and CERCLA at military bases. As an example, the State of California and EPA's Region IX are establishing a base closure committee made up of the two lead regulatory agencies, the DoD environmental and reuse offices, and other involved parties. The objectives of the committee are: (1) to facilitate cleanup and redevelopment of closing bases within the framework of existing laws and

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[21] See also, Memorandum from Don Clay, Assistant Administrator Office of Solid Waste and Emergency Response, USEPA, Requirements for Cleanup of Final NPL sites Under RCRA, (June 11, 1990).

FFAs, (2) to accelerate existing FFA schedules, (3) to provide a forum for improved communication and mutual understanding of issues and constraints, and (4) to help resolve issues affecting the base closure process efficiently.

EPA's Federal Facilities Listing Policy (FFLP) addresses the application of RCRA and CERCLA authorities at federal facilities on the NPL. This policy provides for a three-party IAG which would identify discrete elements of the facility where cleanup would be supervised by the state where that makes sense technically and administratively, as long as the action required by the state is not inconsistent with EPA's CERCLA approach. Application of this policy in appropriate circumstances may promote expeditious cleanups and reduce the potential for conflicts between the state and the federal government. This policy contemplates close coordination among EPA, the states, and DoD in all phrases of the cleanup of closing bases.

EPA is in the process of developing regulations that describe how the NCP applies at federal facilities. One purpose of this rule is to resolve some of the confusion about how the NCP applies to federal, non-NPL cleanup actions. States and federal agencies have encouraged EPA to state in the rule that states have lead regulatory authority at non-NPL sites in order to clear the way for federal agencies and states to work confidently and aggressively towards cleanup.

The Task Force recommends that other states consider adopting a process recently agreed to by California and DoD addressing the restoration and reuse of non-NPL military bases. This agreement between California and DoD is tailored closely after the standard FFAs. Under this agreement, DoD is required to comply with the NCP, CERCLA, RCRA, and other applicable federal and state laws regarding the cleanup of the base property. If the particular base later becomes an NPL site, this agreement would provide a smooth transition from state regulatory activities to joint federal and state regulatory activities, since DoD is already complying with the NCP, CERCLA, RCRA and other applicable federal and state laws. The Task Force believed that the use of such an agreement would help avoid potential conflicts between federal law and state law, and between federal regulatory agency and state regulatory agency, if the base later becomes an NPL site.

The Task Force recommends that EPA, upon the state's request, consider letting the state keep the "lead regulatory agency" role after the non-NPL base becomes an NPL site, on a case-by-case basis, in order to maintain consistency throughout the cleanup process.

FINDINGS AND RECOMMENDATIONS

Avoidance of RCRA/CERCLA Overlap

The Task Force found that EPA's Federal Facilities Listing Policy (FFLP) addresses the application of RCRA and CERCLA authorities at federal facilities on the NPL. Application of this policy in appropriate circumstances may promote expeditious cleanups and reduce the potential for conflicts between the state and federal government.

Use of IAGs

The Task Force found that state environmental regulatory agencies and EPA play key roles in base cleanup and closure and that formal agreements between the parties are useful for improving communication and coordination and reducing the confusion and delay that can result from multiple agencies having a role in cleanup decisions. The Task Force also found that, regardless of whether all parties have signed a formal agreement, early involvement of the EPA and state regulatory agency in the process of investigating potential contamination can expedite the entire process leading to final cleanup.

DoD, EPA, and the state environmental agencies should make better use of FFAs and DSMOAs. All parties must make significant efforts to implement such agreements effectively in order to speed the process of cleanup. Regulatory agencies must have the authority and compliance tools to ensure that DoD will meet its obligation under these agreements. DoD, EPA and state regulatory agencies must also provide sufficient staff and other resources to implement these agreements and expedite cleanups. Towards this end, effective implementation of agreements should be a key element of the job descriptions and performance evaluations of the individuals in each agency with specific cleanup responsibilities.

States with closing bases, EPA, DoD and other interested parties should also create a centralized process, such as the base closure committee the State of California and EPA's Region IX are establishing, to facilitate cleanup and redevelopment of closing bases, accelerate cleanup schedules; provide a forum for improved communication and help resolve issues affecting the base closure process.

States should consider adopting a process recently agreed to by California and DoD addressing the environmental restoration and the reuse of non-NPL military bases. EPA should also, upon the state's request, consider letting the state keep the "lead regulatory agency" role after the non-NPL base is listed on the NPL, on a case-by-case basis, in order to maintain consistency throughout the cleanup process.

CHAPTER 5: RESOURCES AND FUNDING

ADEQUACY OF CLEANUP RESOURCES

A principal finding of the "Forum on Our Nation's Defense and the Environment," a conference attended by a broad range of DoD, EPA, and environmental organization personnel and sponsored by the DoD in September 1990, was that there were deficiencies in both the number and training of DoD environmental personnel.[22] Similar statements have been made regarding personnel in EPA's Superfund and the U.S. Department of Energy's (DOE's) cleanup program.[23] In addition, the Office of Technology Assessment, the General Accounting Office, the DOE, and other organizations have repeatedly voiced concerns that the existing pool of trained agency and contractor environmental professionals may not be sufficient to staff the combined cleanup programs of DoD, DOE, EPA, the states, and the private sector.[24] Sharing these concerns, the Task Force reviewed data on the adequacy of DoD resources for planned environmental restoration activities.

At the present time, the environmental restoration program personnel needs are unknown. To address this question, the Office of the Assistant Secretary of Defense for Force Management and Personnel is currently undertaking a study to determine the personnel needs of DoD's environmental restoration program. The study will be completed in 1992.

DoD faces formidable challenges in recruiting, retaining, and training qualified personnel to meet environmental program needs. DoD must compete with the expanding program needs of other federal and state agencies and the private sector for a limited pool of environmental professionals. The Task Force anticipates that acceleration of the restoration program resulting from base closures will stress the already strained DoD environmental personnel resources,

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[22] *The Defense and Environmental Initiative*, Department of Defense, DASD(E), "The Report of the Forum on Our Nation's Defense and the Environment," September 6-7, 1990.

[23] See, for example, the Office of Technology Assessment, Congress of the United States, "Assessing Contractor Use in Superfund," January 1989; the U.S. General Accounting Office, "Superfund: Improvements Needed in Workforce Management", October, 1987, GAO/RCED-88-1, and the U.S. Department of Energy, the "Five-Year Plan for Environmental Restoration and Waste Management," July 1990.

[24] Ibid.

especially when the competing demands of other cleanup programs are considered. The Task Force believes that acceleration of the program will also strain resources and expertise available from contractors.

The Task Force recommends that the Congress and the administration ensure that adequate resources are available to DoD, EPA and the states for environmental restoration and oversight at closing bases. In addition, the Military Services should expand environmental education programs to retrain engineers, scientists and contracting specialists who have been displaced from other job assignments due to base closures and realignments.

Base closure activities may result in regulatory agency (i.e., EPA and the states) oversight activities that are in addition to their existing cleanup oversight responsibilities. The Task Force recommends that the existing DSMOAs be reviewed as soon as possible to ensure that the states will be fully reimbursed for their oversight activities. The additional oversight activities may require amendment of DSMOAs.

USE OF PROCEEDS FROM PROPERTY TRANSACTIONS TO FUND CLEANUPS

The 1988 Base Closure Act[25] authorized closures to begin in January 1990 and end by October 1995, and allows DoD to use the proceeds from the sale of land at a closing base to offset the costs of such closing if the sale occurs by October 1995.

The Task Force projected that cleanup of many closing bases will take more than five years and that final transfer of some portions of those bases may therefore not occur until after the five-year deadline. Moreover, funds currently budgeted for cleanup of contaminated sites at closing bases are insufficient to clean up all such sites. Until FY 1991, cleanup of contaminated sites at bases slated for closure was funded primarily under the Defense Environmental Restoration Account (DERA), DoD's overall account for environmental restoration at all bases. DERA had $1.1 billion authorized for FY 1991. In the National Defense Authorization Act for FY 1991,[26] the Congress moved all funding for cleanup activities at closing bases from the Defense Environmental Restoration Account to the Base Closure Account, which was provided with $100 million to fund the cost of cleanup at the bases on the 1988 closure list. The Congress took this action so that cleanup at closing bases would

[25]P.L. No. 100-526.

[26]P.L. 101-510.

not have to compete for DERA funds with cleanup activities at active bases for DERA funds under DoD's worst-first priority system.

TRUST FUND CONCEPT

Applying the proceeds from the property transactions to the cleanup of other contaminated sites would supplement the funds appropriated for cleanup and expedite cleanup of such sites. For example, a trust account created with the proceeds from the lease or other transfer of land at a site might be used to pay the costs of long-term operation and maintenance of a groundwater pumping and treatment system. Use of this mechanism might recapture from the purchaser some of the future value of the property after the cleanup.

Remedial and Custodial Trusts: Case Example

An example of a trust mechanism for funding future cleanup activities is provided in the consent decree entered in connection with *United States of America v. Stauffer Chemical Company, et al..*[27] Pursuant to the consent decree, the parties allocated responsibility for conducting and paying for cleanup activities at a site in Massachusetts and agreed to the establishment of two trust mechanisms and an escrow account through which past and future cleanup activities would be financed.

In this case, the defendants responsible for conducting future agreed-upon cleanup activities on the site agreed to establish a trust (the "Remedial Trust") and to provide the trust with the money necessary to ensure the uninterrupted progress and timely completion of the required cleanup work. These defendants will remain jointly and severally liable for any failure of the Remedial Trust to comply with the terms of the consent decree.

The defendants also agreed to establish a second trust (the "Custodial Trust") and to receive and hold title to approximately half of the site, which was owned by a defendant that had no other assets. Under the terms of the consent decree, the Custodial Trust is responsible for managing the property, which includes:

- implementing land use restrictions that would maintain the integrity and prevent the unauthorized disturbance of structures that are to be constructed at the site as part of the cleanup process,

- permitting access to the site for cleanup activities,

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[27]Civil Action No. 89-0195-Mc, (D. Mass.).

- subdividing the property and locating potential purchasers,
- negotiating and executing the sale or transfer of the property, and
- arranging for the sale or transfer proceeds to be delivered to the escrow account established by the consent decree (the "Escrow").

If any property included in this site is unsalable, the Custodial Trust is to establish a further trust to hold and operate the property in accordance with a plan developed by EPA in consultation with the Commonwealth of Massachusetts. The Custodial Trust is not to sell any real property included in the site until after completion of the remedial action has been certified, except in limited circumstances where future cleanup and control of the property has otherwise been ensured by EPA and the Commonwealth. This arrangement is similar to, but potentially and significantly distinct from, the covenant requirement in Section 120(h)(3)(b)(ii) of CERCLA.

The bulk of the proceeds in the Escrow are to be applied to reimburse the United States for response costs incurred prior to the entry of the consent decree and to reimburse the defendants responsible for conducting future cleanup activity for their respective costs. The defendants responsible for conducting and paying for future cleanup activity are also jointly and severally responsible for any failure by the Custodial Trust, any further trust established pursuant to the consent decree, or the representative of the Escrow to comply with the terms of the consent decree. For liability purposes, the Custodial Trust and its trustees are not to be considered owners or operators of the site property solely because of the Custodial Trust's ownership and disposition of such property, so long as the Custodial Trust does not conduct or allow others to conduct activities on the property other than those permitted by the consent decree.

FINDINGS AND RECOMMENDATIONS

Ensure Adequacy of Resources

The Task Force recommends that the Congress and the Administration ensure that adequate resources are available to DoD, EPA, and the states for environmental restoration and oversight at closing bases. Where possible, the Military Services should expand environmental education programs to retrain engineers, scientists, and contracting specialists who have been displaced from other job assignments due to base closures and realignments.

Personnel Study

In addition, the Task Force recommends that existing DSMOAs be reviewed as soon as possible to ensure that states will be fully reimbursed for their oversight activities. These additional oversight activities may require amendment of DSMOAs. The Task Force also recommends that DoD expand the current personnel study or initiate a new study to assess DoD personnel needs of an accelerated restoration program. This will enable DoD to identify and address potential shortages within DoD.

Custodial Trust

The Task Force also recommends that DoD investigate the feasibility of using a custodial or other type of trust funded by the proceeds from land transfers to fund long-term cleanup activities at closing bases.

APPENDIX A

SECTION 2923 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1991 (PUBLIC LAW 101-510)

SECTION 2923 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1991
Source of Funds for Environmental Restoration at Closing Installations

(a) **Authorization of Appropriations**--There is hereby authorized to be appropriated to the Department of Defense Base Closure Account for fiscal year 1991, in addition to any other funds authorized to be appropriated to that account for that fiscal year, the sum of $100,000,000. Amounts appropriated to that account pursuant to the preceding sentence shall be available only for activities for the purpose of environmental restoration at military installations closed or realigned under title II of Public Law 100-526, as authorized under section 204(a)(3) of that title.

(b) **Exclusive Source of Funding**--(1) Section 207 of Public Law 100-526 is amended by adding at the end the following:

> "(b) Base Closure Account to be Exclusive Source of Funds for Environmental Restoration Projects--No funds appropriated to the Department of Defense may be used for purposes described in Section 204(a)(3) except funds that have been authorized for and appropriated to the Account. The prohibition in the preceding sentence expires upon the termination of the authority of the Secretary to carry out a closure or realignment under this title."

(2) The amendment made by paragraph (1) does not apply with respect to the availability of funds appropriated before the date of the enactment of this Act.

(c) **Task Force Report**--(1) Not later than 12 months after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress a report containing the findings and recommendations of the task force established under paragraph (2) concerning:

> (A) ways to improve interagency coordination, within existing laws, regulations, and administrative policies, of environmental response actions at military installations (or portions of installations) that are being closed, or are scheduled to be closed, pursuant to title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526); and
>
> (B) ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously.

(2) There is hereby established an environmental response task force to make the findings and recommendations, and to prepare the report, required by paragraph (1). The task force shall consist of the following or their designees:

(A) The Secretary of Defense, who shall be chairman of the task force.
(B) The Attorney General.
(C) The Administrator of the General Services Administration.
(D) The Administrator of the Environmental Protection Agency.
(E) The Chief of Engineers, Department of the Army.
(F) A representative of a State environmental protection agency, appointed by the head of the National Governors Association.
(G) A representative of a State attorney general's office, appointed by the head of the National Association of Attorney Generals.
(H) A representative of a public-interest environmental organization, appointed by the Speaker of the House of Representatives.

APPENDIX B
CHARTER OF THE DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

CHARTER
DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

In accordance with the provisions of the National Defense Authorization Act for Fiscal Year 1991, Section 2923, a Defense Environmental Response Task Force is hereby ordered as follows:

I. Establishment

There is established the Defense Environmental Response Task Force. The Task Force shall be composed of the following (or their designees):

A. The Secretary of Defense, who shall be chairman of the task force

B. The Attorney General

C. The Administrator of the General Services Administration

D. The Administrator of the Environmental Protection Agency

E. The Chief of Engineers, Department of the Army

F. A representative of a State environmental protection agency, appointed by the head of the National Governors Association.

G. A representative of a State attorney general's office, appointed by the head of the National Association of Attorney Generals.

H. A representative of a public-interest environmental organization, appointed by the Speaker of the House of Representatives.

II. Functions

The Task Force shall study and provide a report to the Secretary of Defense for transmittal to the Congress on the findings and recommendations concerning environmental restoration at military installations closed or realigned under Title II of Public Law 100-526, as authorized under Section 204(a)(3) of that title. The primary objectives of the Task Force shall be to:

1. Determine ways to improve interagency coordination, within existing laws, regulations, and administrative policies, of environmental response actions at military installations (or portions of installations) that are being closed, or are scheduled to be closed, pursuant to Title II

of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526); and

2. Determine ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously.

The Task Force may also make recommendations regarding changes to existing laws, regulations and administrative policies.

III. Administration

All Task Force members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the government service (5 U.S.C. 5701-5707), to the full extent funds are available. The expenses of the Task Force are estimated to be $500,000 and shall be paid from such funds as may be available to the Secretary of Defense. Man-year requirements are estimated to be three. The proponent official is the Assistant Secretary of Defense (Production and Logistics) who will provide administrative support through the Office of the Deputy Assistant Secretary of Defense (Environment).

The Task Force shall be in place as soon as possible and meet as often as necessary (estimate is four meetings). The Task Force's final report shall include findings and recommendations concerning the environmental response actions at military installations closed or realigned under Title II of Public Law 100-526, as authorized under Section 204(a)(3). The Task Force should complete its work by October 5, 1991, and will terminate on November 5, 1991.

17 April 1991

APPENDIX C
TASK FORCE MEMBERS

TASK FORCE MEMBERS

Department of Defense:

Chairman

Thomas E. Baca
Deputy Assistant Secretary of Defense (Environment)

Department of Justice:

Anne Shields
Chief of the Policy, Legislation and Special Litigation Section
Environment and Natural Resources Division

General Services Administration:

Earl E. Jones
Commissioner, Federal Property Resources Service

U.S. Environmental Protection Agency:

Gordon Davidson
Director, Office of Federal Facilities Enforcement

U.S. Army Corps of Engineers:

P.J. Offringa
Major General
Assistant Chief of Engineers

National Governors Association:

James Strock
Secretary for Environmental Protection
California Office of Environmental Protection

National Association of Attorneys General:

Samuel W. Goodhope
Special Assistant Attorney General
Office of Attorney General Dan Morales
State of Texas

Speaker of the House of Representatives:

Don Gray
Senior Fellow and Water Resources Program Director
Environmental and Energy Study Institute

APPENDIX D
TASK FORCE WITNESSES

TASK FORCE WITNESSES

Mr. Terry Ayers
Director
Federal Sites Management Unit
Illinois Environmental Protection Agency

Mr. Robert Cheney
Associate Attorney General
State of New Hampshire

Mr. Jim Ferguson
President
Technology Marketing, Inc.

Colonel Louis Jackson, USA
Commander
U.S. Army Toxic and Hazardous
Materials Agency

Ms. Susan Jones
Environmental Protection Specialist
State and Regional Program Branch
U.S. Environmental Protection Agency

Mr. Dave MacKinnon
Senior Project Manager
Office of Economic Adjustment
Department of Defense

Mr. John J. Mahon
Senior Counsel for Environmental Restoration
U.S. Army Corps of Engineers

The Honorable Peggy Rubach
Mayor
City of Mesa, Arizona

Mr. Salvatore Torrisi
Director, Base Closure Division
U.S. Army Toxic and Hazardous Materials
Agency

Colonel Peter Walsh, USAF
Director of Environmental Quality
Office of the Civil Engineer
U.S. Air Force

Dr. Michael A. West
Professional Staff Member
Committee on Armed Services
U.S. House of Representatives

Mr. George Wyeth
Staff Attorney
Office of General Counsel
U.S. Environmental Protection Agency

WRITTEN SUBMISSIONS

Mr. Greer C. Tidwell
Regional Administrator
U.S. Environmental Protection Agency
Region IV

Mr. Michael K. Yates
President
Hazardous Waste Action Coalition
American Consulting Engineers
Council

Mr. Lenny Siegel
Director
Pacific Studies Center
Chief Researcher
Military Toxics Project of the
National Toxics Campaign Fund

APPENDIX E
ISSUES EXAMINED BY THE TASK FORCE

ISSUES EXAMINED BY THE TASK FORCE

I. LAND USE AND TRANSFER

a) To what extent may facilities on closing bases be used by non-military users while cleanup investigations or other cleanup activities are being undertaken by the Department of Defense (DoD)?

b) To what extent may DoD transfer a base in parcels that exclude areas where ongoing remediation is necessary? How should such parcels be delineated?

c) To what extent may existing or proposed land uses be a factor in cleanup decisions:

i. if the site is on the National Priorities List (NPL)?
ii. if the site is regulated under the Resource Conservation and Recovery Act (RCRA)? or
iii. if the site is not on the NPL and is not regulated under RCRA?

d) To what extent may the practices, policies and procedures for determining allowable uses of the land during and after the completion of remedial action be consolidated and streamlined:

i. if the site is on the NPL?
ii. if the site is regulated under RCRA or
iii. if the site is not on the NPL and is not regulated under RCRA?

II. CLEANUP PROCESS

a) To what extent may the practices, policies, and procedures for determining cleanup standards be consolidated and streamlined:

i. if the site is on the NPL?
ii. if the site is regulated under RCRA or
iii. if the site is not on the NPL and is not regulated under RCRA?

b) To what extent may the practices, policies, and procedures for executing the cleanup be consolidated and streamlined:

i. if the site is on the NPL?
ii. if the site is regulated under RCRA or
iii. if the site is not on the NPL and is not regulated under RCRA?

III. REGULATORY RESPONSIBILITIES

To what extent can overlapping or duplicative regulatory responsibilities and functions be combined or delegated to a single regulatory authority?

IV. FUNDING

To what extent may proceeds from property transactions be used to fund cleanups?

APPENDIX F
FEDERAL PROPERTY MANAGEMENT LAWS AND REGULATIONS

FEDERAL PROPERTY MANAGEMENT LAWS AND REGULATIONS

The discussion below summarizes, in general terms, certain federal statutory and regulatory mandates affecting the transfer of interests in real property located on bases to be closed or realigned. This discussion provides general background information pertinent to the evaluation of various land use planning and transfer alternatives with respect to base property. The Constitution provides that the Department of Defense (DoD) may dispose of property or rights of the U.S. only as expressly or implicitly authorized by the Congress.[1] Any proposal for disposition or other transfer of interests in real property on closed bases must satisfy the requirements of the Federal Property and Administrative Services Act of 1949 (FPASA),[2] and the Federal Property Management Regulations,[3] as modified by the Congress with respect to transactions associated with base closures.

Through the FPASA, the Congress has delegated its power to control utilization of "excess property" and to dispose of "surplus" property of the U.S. to the General Services Administration (GSA)[4]. The Defense Authorization Amendments and Base Closure and Realignment Act (1988 Base Closure Act)[5] and the Defense Base Closure and Realignment Act of 1990,[6] (the "1990 Base Closure Act"), require the Administrator of GSA to delegate this authority, as well as the authority to determine that surplus property shall be transferred for use as a public airport[7] and to determine the availability of excess or surplus real property for wildlife conservation purposes pursuant to 16 United States Code (U.S.C.) § 667b, to the Secretary of Defense. The Secretary of Defense must exercise the authority delegated in accordance with all applicable regulations dealing with the utilization of excess property and the disposal of surplus property under the FPASA as in effect on November 5, 1990.

"Excess property" is defined under the FPASA as "any property under the control of any federal agency which is not required for its needs and the discharge of its responsibilities, as

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[1]U.S. Const., art. IV, § 3, cl. 2 (placing power to dispose of property of the U.S., and to prescribe related rules and regulations, in Congress, subject to Congressional delegation); Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).

[2]40 U.S.C. § 471 et seq.

[3]41 C.F.R. § 101-47.

[4]40 U.S.C. §§ 483, 484.

[5]Pub. L. 100-526.

[6]Pub.L. 101-510.

[7]50 USCA app §1622(g).

determined by the head thereof.[8]" "Surplus property" is any excess property not required for the needs and the discharge of the responsibilities of all federal agencies, as determined by the Administrator of the GSA.[9] "Property" is defined as "any interest in property," with the exception of the public domain, national park and forest lands, and certain other specified property.[10]

Section 204(b) of the 1990 Base Closure Act also requires the Secretary of the Military Department contemplating a property transfer to consult with the Governor of the State and the heads of local governments concerned to consider any plan for the use of the property by the local community. DoD may not take any action with respect to disposing of surplus property at a base to be closed prior to consulting with the state and local governments.[11]

General Priorities for DoD Land Transfers

a. **Transfer Within DoD.** Section 204(b)(3) of the Base Closure Act requires that, before any transfer or disposal of any real property or facility at a base to be closed or realigned, other military services and agencies of DoD must be notified and given the opportunity to acquire property prior to any determination that the property is "excess" or "surplus," with priority to be given to DoD departments or instrumentalities that agree to pay fair market value. Since section 120(h)(3) of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) applies only to the transfer of fee simple ownership of contaminated parcels "by the United States to any other person or entity," it would not apply to an intra-DoD transfer.

b. **Transfer to Another Federal Agency.** DoD property that is determined to be "excess" must be offered to other federal agencies before it can be offered for sale or other disposition to third parties as surplus property.[12] DoD will continue to have responsibilities with respect to contaminated property on closed or realigned bases under Section 120 of CERCLA until remedial action is completed, and thus contaminated property on which remedial action has not been taken may not be "excess." Any interest in contaminated property that the Secretary of Defense determines is not required for the discharge of these responsibilities or otherwise needed to meet DoD's mission, however, may be considered "excess" and can be

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[8]40 U.S.C. § 472(e).

[9]40 U.S.C. § 472(g).

[10]40 U.S.C. § 472(d).

[11]Pub. L. 100-526, §2905(b)(2).

[12]40 U.S.C. § 483; 41 C.F.R. § 101-47.203.

transferred to another federal agency for fair market value or as otherwise authorized. Transfers among federal departments or bureaus are not a sale and are not subject to the Constitutional provision that prohibits disposition of public property without Congressional authorization.[13] Under the 1990 Base Closure Act and the FPASA, a federal agency receiving property from another federal agency must pay the estimated fair market value for available facilities.[14] Exceptions to this general rule are allowed for intra-DoD transfers of real property and if the Administrator of GSA and the Director of the Office of Management and Budget both agree.[15]

As with intra-DoD transfers, section 120(h)(3) of CERCLA does not apply to transfers of real property interests between federal agencies or departments. DoD thus may be able to transfer real property, or interests therein, on which remedial action has not been taken, to other federal agencies as long as such transfers would not affect the ultimate responsibility to complete remedial action.

c. **Disposal of Surplus Property.** Excess DoD property determined not to be required for the needs and discharge of responsibilities of all federal agencies generally must be disposed of as surplus property in accordance with the requirements of the FPASA and the Federal Property Management Regulations, as modified by federal base closure legislation.[16] The authority to determine that excess base closure property is "surplus" has been delegated by Administrator of GSA to the Secretary of Defense. States and local governments are generally given priority over private individuals in acquiring surplus federal property.[17] After all of the priorities are satisfied, all other surplus property is disposed of by public sale.

Once base property in urban areas is determined to be surplus, Section 803 of the FPASA and the Federal Property Management Regulations require that the local governmental units having jurisdiction over zoning and land use regulations be afforded the opportunity to zone the property in accordance with local comprehensive land use planning.[18] Although zoning is solely within the purview of the local government, DoD may make suggestions as to zoning of

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[13]32 Op. U.S. Att. Gen. 511.

[14]See 40 U.S.C. §571 et seq.; Section 204(b) of the 1988 Base Closure Act, Pub. L. 100-526, 102 Stat. 2627; 41 CFR §§101-42 to -49.

[15]41 C.F.R. §101-47.203-7.

[16]See 40 U.S.C. §483, 484; 41 CFR § 101-47.

[17]41 C.F.R. §101-47.203-7.

[18]See 41 C.F.R. §§ 101-47 303-2a -47 4906a-b.

surplus base real property as part of the state and local consultation required under the 1990 Base Closure Act prior to disposal of any surplus property.[19]

The U.S. Attorney General must be given notice and opportunity to review any transfer to a private party of surplus property with an estimated fair market value of $3 million or more to ensure that the transfer will not result in antitrust law violations.[20]

d. **Public Benefit Transfers.** The Federal Property Management Regulations, and various other federal statutes authorize the conveyance of surplus real property for various public purposes to state and local governmental units and eligible non-profit, institutions where federal requirements have been satisfied. These public purposes include education, public health (including homelessness), public parks and recreation, historic monuments, public housing, correctional facilities, wildlife conservation, public airports, and federal aid and other highways.[21]

The Secretary of Defense has been delegated the authority to determine whether excess property on bases being closed is to be transferred for wildlife conservation purposes, to state wildlife agencies or to the Secretary of the Interior.[22] Section 667b of title 10 (U.S.C.), authorizes such transfers without monetary consideration, if the property is valuable for management by state agencies for the conservation of wildlife other than migratory birds, or by the Secretary of the Interior for carrying out the national migratory bird management program.

Transfers pursuant to Section 667b, unless to the U.S., must be made subject to: (1) the reservation by the U.S. of all oil, gas, and mineral rights and (2) the condition that the property shall continue to be used for wildlife conservation, and that title shall revert to the U.S. in the event it is no longer needed for such purposes or is needed for the national defense.

The Secretary of Defense has been delegated the authority to transfer to a state, political subdivision, municipality, or tax-supported institution without consideration surplus real property that the Administrator of the Federal Aviation determines is essential, suitable, or desirable for

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[19]See Pub. L.101-510 §2905(b)(2)(requiring consideration of any local community plans for use of surplus base property).

[20]41 C.F.R. § 101-47.301-2.

[21]See 40 U.S.C. §§ 483, 484. See also 16 U.S.C. § 667b-d; 42 U.S.C. § 11411; 23 U.S.C. §§ 107, 317; 50 U.S.C. app §§ 1622d, 1622(g); 41 CFR §§ 101-47, 203-5, 203-7, 47.301-3, 47.303-2, 47.308, 47.4905.

[22]See Pub. L. 101-510, § 2905.

the development, improvement, operation, or maintenance of a public airport subject to certain conditions, restrictions, and reservations of rights in the U.S. Government.[23]

[23]See 50 U.S.C. app. 1622(g) Pub. L. 100-526 § 204.

APPENDIX G
PROTECTION OF NATURAL AND HISTORIC AREAS

PROTECTION OF NATURAL AND HISTORIC AREAS

This appendix presents a staff analysis of options that may be useful in protecting areas on closing bases that have special ecological, scenic, recreational or other natural or historic value. These options would protect such areas after the land is transferred.

I. CONSERVATION EASEMENTS

A. **Potential Alternatives.** The Department of Defense (DoD) may grant conservation easements on portions of base real property that have special ecological, scenic, or recreational value. Such easements could be granted to another federal department or agency, such as the U.S. Fish and Wildlife Service, to state or local governments or agencies, or to non-profit conservation organizations.

A conservation easement is a partial interest in real property, normally transferred by deed. Conservation easements may either be "appurtenant" to adjacent land or stand along "in gross." "Easements appurtenant" are attached to and for the benefit of adjacent land, which becomes the dominant estate. Unlike this traditional type of easement, an "easement in gross" is independent of other real property and may be held by an organization or other party as a separate interest in the subject property. Easements in gross must be specifically authorized by state law, and at least 45 states have enacted such legislation. Grant of a conservation easement on base property would not affect DoD's ownership of the land and improvements thereon, which could be retained by DoD or transferred to third parties and used for any purpose not inconsistent with the conservation restrictions.

Conservation restrictions can be tailored to fit the ecological and physical features of particular pieces of real property and to accommodate the needs and desires of DoD and the grantee agency or organization. For example, conservation restrictions can prohibit all activities altering the natural condition or they can permit agricultural or forestry enterprises and/or limited development. Conservation easements may include, in addition to negative restrictions, the right to enter the servient property to inspect for compliance with the restrictions and the right of public access for recreation.[1]

In concept, conservation easements can be limited or unlimited in duration, although marketable-title statutes in a significant number of states provide for the automatic extinguishment of all restrictions on real property after a specified number of years. At least

[1] See Bruce & Ely, The Law of Easements and Licenses in Land (West 1988 & Cum. Supp.); Diehl & Barrett, The Conservation Easement Handbook (The Land Trust Exchange & The Trust for Public Land 1988).

some of these states, however, provide special statutory exemptions for qualifying conservation easements.[2]

B. Related Requirements and Limitations. Because a conservation easement generally is conveyed by deed, Section 120(h) of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) could be read to prohibit the grant of a conservation easement on contaminated property to a person or entity not part of the U.S. government prior to completion of remedial action. The provision appears to be inapplicable to grants of easements to another federal agency or department, such as the U.S. Fish and Wildlife Service.

Although the Base Closure Acts of 1988 and 1990 authorize DoD to transfer land to state agencies or the Department of the Interior for wildlife conservation without consideration, pursuant to 16 United States Code (U.S.C.) 667b, no federal legislation expressly authorizes no-cost transfers by DoD of conservation easements that do not meet the criteria of section 667b. These might include easements for recreation or open space purposes, or easements granted to conservation groups.

Section 319 of title 40, U.S.C., may provide the necessary authorization in some situations to the Secretary of Defense to grant easements on base real property to state or local governments or agencies, or to non-profit organizations, or to other federal agencies, even without a determination that such interests are excess or surplus property.[3] Section 319 authorizes the head of an executive agency having control of real property, upon application by a state any person for an easement for any purpose with respect to such real property, to grant such easement as he determines will not be adverse to the interests of the United States. The head of the agency may make such easement subject to whatever "reservations, exceptions, limitations, benefits, burdens, terms, or conditions," as he "deems necessary to protect the interests of the United States."[4]

Section 319 states that grants of easements pursuant to the provision "may be made without consideration, or with monetary or other consideration, including any interest in real

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[2]See Diehl & Barrett, supra at 132.

[3]But see S. Rep. No. 1364, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Admin. News 3870 (providing no indication that Congress specifically contemplated that the provision would be applicable to easements for conservation purposes); see also Letter from Administrator of GSA to the Speaker of the House (June 12, 1961, reprinted in 1962 U.S.Code Cong. & Admin. News 3873-74 (recommending the enactment of Section 319, partially to avoid the FPASA requirement that easements in real property be excess and surplus property in order to be granted, and noting that, in the opinion of GSA, such enactment would not affect the budgetary requirements of GSA or any other executive agency)).

[4]Cf. 10 U.S.C. §§ 2668, 2669 (authorizing the Secretary of a Military Department to grant easements for rights-of-way for certain specified purposes and "for any other purpose that he considers advisable").

property.[5]" The Federal Property Management Regulations require, however, that DoD obtain consideration equal to the amount by which an easement decreases the value of the property.[6]

The following executive orders and statutes may provide a basis for the grant of easements or restrictive covenants with respect to real property on bases to be closed or realigned:

1) Wetlands. Executive Order 11990 requires in part, with respect to the lease, grant easement or right-of-way, or disposal of any federally-owned property, that the federal agency responsible for these activities: (a) refer in the conveyance to "those uses which are restricted under identified Federal, State, or local wetlands regulations;" (b) "attach other appropriate restrictions to the uses of the property by the grantee or purchaser or any successor, except where prohibited by law" or (c) "withhold such properties from disposal." The Executive Order also requires each federal agency to take action to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out its responsibilities for, among other activities, the disposal of federal lands and facilities.

2) Floodplain. Executive Order (E.O.) 11988, as amended, imposes obligations and limitations similar to those imposed with respect to wetlands by E.O. 11990 on federal agencies involved in financial transactions relating to areas located in floodplain.

3) Endangered Species/Critical Habitats. The Endangered Species Act of 1973, as amended,[7] prohibits any DoD action that would jeopardize endangered species or critical habitats as determined by the Secretary of Interior and requires that DoD "further the Purposes of the Act by carrying out programs for the conservation of" these species and habitats.

4) Designated/Proposed Wilderness Areas. The Wilderness Act of 1964, as amended,[8] requires that DoD "be responsible for preserving the wilderness character" of any areas on military installations that are within the boundaries of

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[5]40 U.S.C. § 319.

[6]41 C.F.R. § 101.

[7]16 U.S.C. §§ 1531-1543.

[8]16 U.S.C. §§ 1131-1136.

wilderness areas designated by the Congress [or proposed for such designation] pursuant to the Act.

5) Designated/Proposed Wild and Scenic Rivers. The Wild and Scenic Rivers Act of 1968, as amended,[9] authorizes the protection of designated rivers and adjacent property and requires DoD to take action necessary to further the purposes of the Act with respect to properties, if any, under its jurisdiction "which include, border upon, or are adjacent to, any river included" within a designated river system.

6) Coastal Barriers. The Coastal Barrier Resources Act of 1982,[10] places strict requirements on any DoD program that would affect the coastal barrier system.

7) Natural Landmarks. Various federal acts, including the National Environmental Policy Act (NEPA) and the National Historic Preservation Act, indicate that DoD should protect natural landmarks.[11]

8) Aquifer Recharge Areas. The Safe Drinking Water Act forbids the use of federal financial assistance for any project endangering a designated sole source aquifer recharge area.

Since the FPASA regulations require fair market value consideration for easements, it is not clear that easements to ensure compliance with the above provisions can be granted to non-federal agencies or to non-governmental organizations without consideration.[12] The authority to grant an easement to another federal agency also needs to be clarified.

II. HISTORIC PRESERVATION EASEMENTS

DoD may grant an historic preservation easement to protect any building or other structure of historical importance on a base to be closed or realigned. Following the grant of an historical easement, DoD or a successor landowner could continue to use the burdened real

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[9]16 U.S.C. §§ 1271-1287.

[10]16 U.S.C. §§ 3501-3510.

[11]See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (requiring that "irretrievable" resources be protected); National Historic Preservation Act (requiring federal agencies to minimize possible harm to any landmark attributable to their undertakings); see also P.L. 94-58 (directing the Secretary of Interior to investigate property that exhibits "qualities of national significance" for possible inclusion in the National Park System or on the Registry of National Landmarks).

[12]See 41 C.F.R. § 101-47.313-2.

property for any purpose and in any manner not inconsistent with the restrictions included in the deed granting the easement. Historic preservation easements, although different in purpose, are similar in nature to conservation easements and the federal, state and local legal requirements and limitations noted above with respect to the authority of DoD to grant conservation easements and the enforceability of such easement may also affect the ability to grant and enforce historic preservation easements.

The Archaeologic and Historic Preservation Act of 1974 and the National Historic Preservation Act of 1966 may place certain requirements on DoD to the extent that its undertakings may have an impact on archaeologically or historically significant property.

III. TRANSFER OF FEE SIMPLE OWNERSHIP

In some circumstances, the ecological or other natural features of DoD property may be so significant that the only viable way to protect the ecological, scenic, recreational, or other value of the property will be to impose restrictions on the property preventing any change from its natural state. In such cases, it may be advisable to transfer ownership of the land to the U.S. Fish and Wildlife Service, to an appropriate state agency, or to a non-profit conservation organization for management, perhaps after imposition of restrictive deed covenants or easements to ensure that the property will remain in its natural state following any future sale. No-cost transfers to state agencies or to the Department of the Interior are authorized under 16 U.S.C. § 667b, if their purpose is wildlife conservation.

IV. DEED RESTRICTIONS AND COVENANTS

A. **Potential Alternatives.** Rather than granting a conservation or historic preservation easement on base property to another agency or entity to protect its special natural or historic attributes, DoD might place a restriction or "real covenant" in the deeds for such property.

Mutual covenants may be imposed by a common vendor or original owner of a subdivided parcel to control features of adjoining lots pursuant to a common development or subdivision plan. DoD might encourage the use of such covenants by a developer who purchases base property for subdivision and development and consider the utility of such covenants in developing land use plans for base property.

B. **Related Restrictions and Limitations.** The term of deed restrictions and covenants may be limited by state marketable title statutes or other law and such restrictions may need to be re-recorded to remain enforceable, although exceptions for restrictions for public or charitable purposes may be applicable. In addition, dependent on local law, deed restrictions and covenants may not be considered to "run with the land" and thus may not be enforceable against future owners of the property. Affirmative covenants are not enforceable in many

jurisdictions. Also, deed restrictions and covenants, even if enforceable, may only be enforceable by DoD, thus placing a burden on the DoD to monitor compliance with the terms of the restrictions and covenants. Thus, in some cases, the grant of a conservation easement may be preferable to the use of restrictive covenants or restrictions in deeds.

V. TRANSFERABLE DEVELOPMENT RIGHTS

Transferable Development Rights (TDRs) may be useful tools in some cases to channel development away from environmentally sensitive areas and toward areas designated for growth.[13] TDR programs typically involve designation by zoning laws of some lands in a particular region as preservation areas, where only minimal development, if any, is allowed, and designation of other lands as growth areas, where high density residential or commercial development may be allowed. The local land use authority grants TDR's to owners of property in the preservation areas, which they can sell or transfer for use with respect to lots in the growth areas. The zoning structure for designated growth areas is two-tiered, including both a base zoning density and a higher density level permitted only if owners of property obtain TDR's.

DoD might participate in a TDR program by reserving TDR's on certain environmentally sensitive land that it transferred and by selling these TDR's to purchasers of base property that was earmarked for higher density growth. The feasibility of such a program and its prospects for success as a mechanism to protect environmentally sensitive land in some parts of a base and promote growth would depend upon development of a comprehensive land use plan that was integrated with the land use plans and zoning ordinances of the municipalities with jurisdiction over the property following closure of the base. It also would require the cooperation of local authorities to manage the program. The design of a TDR program could be part of the state and local consultation process required under the 1990 Base Closure Act. The consultation regarding local land use plans and zoning could readily accommodate development of a TDR program.

VI. LEASES FOR RECREATIONAL PURPOSES

Property that becomes excess as a result of base closure may be leased to state or local governments for use as parkland or for other recreational purposes pending its ultimate disposition if the lease arrangement can satisfy the requirements of Section 2667(f) of title 10, U.S.C.

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[13]See Institutional Guidelines for Designing Successful Transferable Rights Programs, 6 Yale J. on Reg. 369, 372-73.

APPENDIX H
EXAMPLES OF GENERIC APPROACHES TO CLEANUP

EXAMPLES OF GENERIC APPROACHES TO CLEANUP

In a recently released report called "Conducting Remedial Investigation and Feasibility Study (RI/FS) for Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Municipal Landfill Sites," Environmental Protection Agency's (EPA's) Office of Emergency and Remedial Response has begun to streamline the National Contingency Plan (NCP) framework for specific sites with similar characteristics. The principle on which this process is based is simple: sites that share similar characteristics lend themselves to remediation by similar technologies and processes. By identifying these similarities and exploiting them to develop generic protocols for cleaning up National Priority List (NPL) or other contaminated sites, the limited resources could be used more efficiently without sacrificing the quality of the results. This method could lead to excellent results as repeated use of pre-defined protocols could allow for fine-tuning of specific procedures.

Municipal landfills are a good target for this streamlining process because they share many significant features, and because they are amenable to a relatively small number of remediation processes. Most municipal landfills are remediated by one of a limited number of containment strategies. Containment has been identified as the most likely response mechanism because (1) municipal landfills are composed primarily of non-hazardous, and to a lesser extent hazardous wastes; therefore, they often pose a low-level threat rather than a principle threat; and (2) the volume and diversity of wastes within municipal landfills often make treatment impractical.

The EPA's study of municipal landfill sites was the first federal attempt to streamline the RI/FS and remedy selection process. The goals of the study included (1) developing tools to assist in scoping the RI/FS for municipal landfill sites, (2) defining strategies for characterizing municipal landfill sites that are on the NPL, and (3) identifying practicable remedial action alternatives for addressing these types of sites. The study breaks new ground by streamlining the NCP into specific areas that define a procedural protocol for cleaning up municipal landfills. The resulting procedure, however, is only the first step towards weaving the NCP into general procedural guidelines for municipal landfills as well as other CERCLA sites.

Section 6 of the report, Development and Evaluation of Alternatives for an Example Site, is a good example of how alternatives can be developed by using various combinations of technology that are evaluated on a specific pre-determined set of criteria.

The Minnesota Pollution Control Agency is also attempting to develop generic protocols for the cleanup of hazardous and municipal wastes. The state agency has begun developing a set of generic documents for Requests for Response Action (RFRA), the basic

document that controls a cleanup by a responsible party, as well as a standardized study for establishing soil cleanup levels.

The documents that the state agency is currently reviewing would greatly simplify the paperwork involved in conducting a Superfund cleanup. The state agency could employ these documents, in a form modified to reflect the specific details of each site, begin the RI process, set up a schedule for remediation and notify the responsible party of the state's specific concerns and regulations.

The Minnesota procedures for establishing soil studies will attempt to establish a consistent matrix for establishing cleanup levels on a site by site basis. Generally, it is difficult to assign specific numerical standards for soil cleanups that are applicable to all sites. The complexity of soils themselves usually renders such standards unusable. However, the state hopes that by evaluating the routes of exposure, the potential future uses of the area, and the risks from exposure to both the environment and human health, it can design an approach that will avoid the problems of specific standards, but not necessitate extensive study and analysis of each site.

Because both of these documents are still under review in Minnesota, it is not yet clear exactly how each will be used to streamline the remediation process. These steps, along with the EPA study, are some of the first attempts to generalize and simplify a process that has been defined and implemented on a case-by-case basis. While in the future, such documents will definitely become even more general, these two will provide models to work from as the process of streamlining and simplification continues.

APPENDIX I

U. S. GENERAL ACCOUNTING OFFICE REPORT, "HAZARDOUS WASTE: TINKER AIR FORCE BASE IS MAKING PROGRESS IN CLEANING UP ABANDONED SITES"

United States General Accounting Office

GAO

Briefing Report to the Chairman, Subcommittee on Environment, Energy and Natural Resources, Committee on Government Operations, House of Representatives

July 1987

HAZARDOUS WASTE

Tinker Air Force Base Is Making Progress in Cleaning Up Abandoned Sites

GAO

United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-213706

July 10, 1987

The Honorable Mike Synar
Chairman, Subcommittee on Environment,
Energy and Natural Resources
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

In June 1984, you requested that we review the Department of Defense's efforts to dispose of hazardous waste at Tinker Air Force Base, Oklahoma, a major generator of hazardous waste. Problems with the generation, storage, and disposal of hazardous waste have resulted in the contamination of several sites on base. In December 1984, your Subcommittee held hearings and we testified on the results of our review. We subsequently issued our report, Hazardous Waste Management at Tinker Air Force Base--Problems Noted, Improvements Needed (GAO/NSIAD-85-91, July 19, 1985).

On May 14, 1986, you requested that we review the Air Force's actions to identify and clean up abandoned hazardous waste sites at Tinker and to correct problems we found relating to the generation, storage, and disposal of hazardous waste. This briefing report presents the results of our work on actions taken on abandoned sites.

In 1981, the Air Force started implementing the Department of Defense's Installation Restoration Program to identify and clean up contaminated sites at Tinker. Actions taken after your Subcommittee hearings were as follows:

-- In January 1985, Tinker created the Installation Restoration Program Technical Review Committee, which directly involved environmental experts of state and federal regulatory agencies in resolving Installation Restoration Program problems in a more timely and effective manner.

-- In February 1985, Tinker established an Environmental Action Group to increase its responsiveness to hazardous waste issues and to act as a clearinghouse for all environmental actions. The group's weekly meetings are attended by representatives from all base activities that handle hazardous material.

-- In August 1985, Tinker created a Technical Working Group staffed with technical experts to assist the Technical Review Committee. This group meets, prior to scheduled quarterly meetings of the Committee, to establish agenda items for the Committee covering questions and technical issues concerning Tinker's Installation Restoration Program, such as possible cleanup alternatives.

-- In October 1985, Tinker established a single point of contact for environmental issues by creating a new Environmental Management Directorate. This action raised the visibility level of environmental problems and enhanced the working relationship with regulatory agencies.

-- In March 1986, Tinker contracted with the Army Corps of Engineers for completing the Installation Restoration Program on a cost-reimbursement basis. This action eliminated the need for private contractors and the time-consuming need to amend a contract each time requirements change. The Corps also compressed parts of two phases of the Installation Restoration Program into one study which should reduce the time needed to begin site cleanup work.

Tinker officials are addressing deficiencies in the hazardous waste management structure. By centralizing the organization and decision-making process, Tinker should be able to better manage the restoration program. Officials of federal and state regulatory agencies generally agree that the Air Force is on the right track in identifying and cleaning up contaminated sites on Tinker. Appendix I provides more details on the organizations responsible for the Installation Restoration Program activities.

While the Air Force has taken actions to restore hazardous waste sites on Tinker, much still needs to be done. Seventeen sites (including four streams on base which are considered one site by Tinker) were identified as contaminated. Eleven of the 17 sites have contamination problems with a high or moderate potential for migrating to other areas. The only remedial actions taken so far are the removal of contaminated sediment from one of the streams and a connecting drainage ditch and the placing of a clay cap over landfill number 6. However, regulatory officials have stated that the source of the stream's contamination must be stopped or it will have to be cleaned up again. Appendix II contains details of the various work being performed.

Appendix III provides the status of each of the 17 contaminated sites. Besides dealing with each contaminated site, the Air Force has directed the Corps of Engineers to conduct groundwater assessments to ensure that contamination has not moved off base. The Air Force is also testing the base's water supply wells quarterly for signs of contamination.

We discussed the issues in this briefing report with officials responsible for managing the Installation Restoration Program and included their comments where appropriate. As you requested, we did not obtain official agency comments. Appendix IV describes the objective, scope, and methodology of our work.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of its issuance. At that time, we will send copies to the chairmen of other concerned committees; the Secretary of Defense; the Secretaries of the Army, the Navy, and the Air Force; the Director, Office of Management and Budget; and other interested parties upon request.

Sincerely yours,

Harry R. Finley

Harry R. Finley
Senior Associate Director

Contents

ABBREVIATIONS

AFB	Air Force Base
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
COE	Corps of Engineers
DOD	Department of Defense
EPA	Environmental Protection Agency
HARM	Hazard Assessment Rating Method
IRP	Installation Restoration Program
OEHL	Occupational & Environmental Health Laboratory
ppb	parts per billion
TCE	trichloroethylene

APPENDIX I

ORGANIZATIONAL RESPONSIBILITIES FOR THE INSTALLATION RESTORATION PROGRAM AT TINKER AIR FORCE BASE

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 U.S.C. 9601) and the 1986 amendments, commonly known as Superfund, were enacted to provide for cleanup of the nation's hazardous waste[1] sites. The law provides that federal agencies must comply with CERCLA's requirements to the same extent as private entities must comply.

The Department of Defense's Installation Restoration Program (IRP) is an expansion of a program the Army started in 1975 to (1) identify and evaluate suspected problems associated with past hazardous waste disposal sites located on Department of Defense (DOD) installations and (2) control the migration of hazardous waste contamination from these sites. These requirements were later stipulated in CERCLA.

The Air Force formulated its initial IRP policy guidance in December 1980 and started its program in January 1981. The Office of the Deputy for Environment, Safety, and Occupational Health in the Office of the Deputy Assistant Secretary of the Air Force for Installations, Environment, and Safety sets the overall policy for the Air Force's IRP.

The IRP consists of four phases. During Phase I, the installation assessment is made, including site inspections and records searches, to identify bases with closed, potentially hazardous waste sites. During Phase II, the existence of contaminants affecting the environment is confirmed. During Phase III, technology, if needed, is developed or advanced to solve some of the problems. During Phase IV, remedial action is designed and executed.

PROGRAM ORGANIZATIONAL STRUCTURE AND ROLES

The following is a brief description of the offices or activities involved in the IRP and the responsibilities of each.

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[1]Hazardous waste is defined as waste which, because of its quantity; concentration; or physical, chemical, or infectious characteristics, may cause or contribute to an increase in mortality or pose a substantial hazard to human health or the environment when improperly treated, stored, transported, or disposed of.

Headquarters and major commands

The Directorate of Engineering and Services, Air Force Headquarters, Washington, D.C., has overall management responsibility for the Air Force's IRP; but major commands, such as the Air Force Logistics Command at Wright-Patterson Air Force Base (AFB), Ohio, are the IRP managers for bases in their commands. The Logistics Command expects its bases to manage their own programs, with the Command responsible for program oversight and approval.

Air Force Engineering and Services Center

The Air Force Engineering and Services Center at Tyndall AFB, Florida, is a technical support organization of the Air Force's Directorate of Engineering and Services, providing support to the major commands upon request. This support has included providing contractors for most of the Phase I studies to date.

Occupational and Environmental Health Laboratory

The Air Force Occupational and Environmental Health Laboratory (OEHL) at Brooks AFB, Texas, is under the command of the Air Force Systems Command. OEHL, the Air Force's technical manager for Phase II, initiates work on a base when requested by a major command. OEHL monitors Phase II studies performed by contractors awarded contracts by the Air Force Systems Command's Aeronautical Systems Division at Wright-Patterson AFB, Ohio.

Base level

Generally, Air Force base-level IRP responsibility rests with the base's civil engineer. However, Tinker has given this responsibility to the newly created Environmental Management Directorate.

ORGANIZATIONS CREATED TO AID TINKER'S IMPLEMENTATION OF THE INSTALLATION RESTORATION PROGRAM

Tinker reorganized its hazardous waste management structure to centralize responsibility for all environmental matters, including the IRP, and to respond to oversight reviews by the Subcommittee on Environment, Energy and Natural Resources, House Committee on Government Operations; state and federal regulatory agencies; and cognizant Air Force organizations.

Technical Review Committee

The Technical Review Committee consists of designated representatives from the parties required to approve IRP plans, including the Air Force, Environmental Protection Agency (EPA), and the State of Oklahoma. The Committee was created on January 15, 1985, to expedite remedial actions by eliminating the delay associated with the normal review process. This face-to-face forum provides the Air Force with the expertise of the regulatory agencies in the decision-making process.

Tinker, including the Air Logistics Center, is represented by the Director of the Environmental Management Directorate, and the State of Oklahoma is represented by officials from the Oklahoma State Department of Health. EPA Region VI officials represent EPA on the Technical Review Committee. Officials from other agencies, such as the Oklahoma Water Resources Board, the Association of Central Oklahoma Governments, the Garber Wellington Aquifer Association (represents towns and cities using the aquifer), the Army Corps of Engineers, and the Oklahoma Geological Survey, may attend and comment on matters before the Committee.

The Committee members meet quarterly to discuss all IRP proposals and to reach a consensus on the specific IRP actions to be taken.

Environmental Action Group

The Environmental Action Group was established in February 1985 to increase Tinker's responsiveness to hazardous waste issues and to act as a clearinghouse for all on-base activities' environmental actions. The group is responsible for IRP problems and other issues such as hazardous waste removal, unpermitted discharges, industrial waste treatment plant discharge, and hazardous waste storage. This group assists Air Force management in measuring the progress being made in each area and in ensuring that issues are being dealt with in a timely manner.

The group, which meets weekly, consists of representatives from all base activities that handle hazardous material. Representatives from other organizations may be asked to attend when their technical assistance is required. Each representative is authorized by his or her staff office to act on decisions made during the meetings.

Technical Working Group

Established in August 1985, the Technical Working Group supports the Technical Review Committee with technical representatives from the same agencies. The Technical Working Group meets one

month prior to the Committee meetings to study proposed IRP actions and establish agenda items for the Committee. These meetings cover questions and the technical aspects concerning Tinker's IRP, such as possible cleanup alternatives.

Environmental Management Directorate

The Environmental Management Directorate was established in October 1985 as the sole point of contact for outside agencies on all environmental issues. This Directorate consolidates functions of the Director of Engineering and the Surgeon General on environmental matters. The Directorate, staffed with 45 to 50 people, reports directly to the command section of the Air Logistics Center.

ROLE OF THE CORPS OF ENGINEERS

Before Phase II was complete, Tinker officials discontinued using OEHL as program manager and contracted directly with the Army's Corps of Engineers in an effort to complete the IRP in a more timely manner. According to Corps officials, they reviewed the work performed in Phase II and used it where applicable. The Corps' investigation, which began in March 1986, is scheduled for completion in fiscal year 1988.

The members of the Corps' project team are environmental specialists with backgrounds in civil engineering and geology. The Corps' duties as Tinker's IRP project manager include investigating and identifying the sites on base contaminated by hazardous waste, developing the processes to be used for remedial action, and preparing the plans and specifications to enable a contractor to clean up the sites.

According to Corps officials, individual IRP projects can be completed in a more timely and effective manner by combining Phase II with the first part of Phase IV. In the past, Phase IV work could not begin until a final Phase II report had been issued. Under the Corps' approach, the time frame for implementing the IRP is reduced by eliminating the report and by collecting the data necessary to design a remedial action plan (Phase IV) while obtaining data needed to quantify the contamination at a site (Phase II).

In addition, it is no longer necessary to amend a contract each time the scope of work changes because the Corps staff perform the work themselves on a cost-reimbursement basis. Previously, OEHL had to modify contracts with private environmental firms on a stage-by-stage basis.

APPENDIX I

The Corps staff prepare a work plan for each contaminated site after discussion with the Technical Working Group and present the plan to the Technical Review Committee for approval. The statement of work must be approved in writing by the State of Oklahoma and the EPA.

IMPLEMENTATION OF THE

INSTALLATION RESTORATION PROGRAM

Tinker AFB is one of the largest military industrial installations in the world. Tinker, which was activated in March 1942 and covers 4,775 acres in central Oklahoma (southeast of Oklahoma City), hosts about 40 tenant organizations, including the Oklahoma City Air Logistics Center. The Air Logistics Center, under the Air Force Logistics Command, operates a maintenance depot on Tinker. This depot, which overhauls or modifies more jet engines than any facility in the free world, serves as a repair depot for several aircraft and weapons. The repair and overhaul processes require the use of large quantities of hazardous materials and result in Tinker's status as the largest hazardous waste generator in the Air Force.

Problems in the past with the generation, storage, and disposal of this hazardous waste have caused contamination of several sites and the groundwater at Tinker AFB. Tinker lies directly over the known recharge area for the Garber Wellington aquifer from which Tinker and several cities near Oklahoma City obtain their drinking water. Tinker is currently implementing the IRP to identify and clean up these contaminated sites. EPA has identified two sites to be included on its National Priorities List[2]--building 3001 and Soldier Creek (one of the base streams).

PHASE I

The Air Force Engineering and Services Center at Tyndall AFB prepared the statement of work[3] for Phase I of Tinker's IRP and coordinated it with the Air Force Logistics Command. The Air Force Engineering and Services Center obtained a private contractor, Engineering-Science, to conduct the IRP Phase I study for Tinker. Engineering-Science began the Phase I study in July 1981 by reviewing records and files, conducting field inspections, and interviewing officials from Tinker and the applicable regulatory agencies to identify current and past areas of hazardous waste generation and disposal as well as disposal methods. The final report was issued in April 1982. The completed study cost $45,900.

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[2]The National Priorities List identifies those sites deemed to pose the greatest potential for long-term threat to human health and the environment.

[3]The statement of work describes tasks, establishes a schedule for conducting the tasks, lists all expected deliverables, and presents a cost estimate.

Study findings

Engineering-Science's Phase I final report identified 14 sites on Tinker as having potential environmental contamination. Using the Air Force's Hazard Assessment Rating Method (HARM), a system to set priorities for the sites that is similar to the system used by EPA, the contractor scored each site on a scale of 0 to 100 (worst case being 100) based on the following considerations:

-- characteristics of the waste at the site,

-- possible sites for contaminant migration,

-- potential pathways for contaminant migration, and

-- current efforts to contain the contamination.

Based on these HARM scores, the contractor then classified each site as having high, moderate, or low potential for migration of contaminants to other areas. Areas having HARM scores greater than 64 were of primary concern and were considered by the contractor to have high potential for contaminant migration. These sites required further investigation in Phase II. The contractor concluded that 3 of the 14 sites at Tinker fell into this category: two landfills and an industrial waste pit.

Sites with HARM scores of 50 to 64 indicated moderate potential for contaminant migration and were recommended for further investigation in Phase II. Six of the Tinker sites--three landfills, an industrial waste pit, a radioactive waste disposal site, and a fire training area--fell into this category.

The five remaining sites had HARM scores lower than 50, which indicated low potential for contaminant migration. They were therefore not recommended for Phase II investigation. These included one landfill, three radioactive waste disposal sites, and a fire training area. Although these sites were not recommended for further investigation, three were investigated in Phase II. The Corps of Engineers included the three sites in its Phase II work because it felt that not enough work had been done in Phase I. For detailed descriptions, HARM scores, and recommendations for each site, see appendix III.

Surface and groundwater testing

Water quality data from the U.S. Geological Survey, the Bioenvironmental Engineering Officer's monitoring program, and sediment samples taken by the Oklahoma Water Resources Board helped Engineering-Science determine that the surface drainage systems on base had been sources of contaminant migration since

base operations began in 1942. The potential exists for the contaminants in the streams to migrate through the sediment, leaching into the local surface waters and into the groundwater system. For this reason, Engineering-Science recommended sampling the streams and some of Tinker's water supply wells.

Regulatory agency involvement

As part of the Phase I study, Engineering-Science interviewed federal, state, and local agencies' officials to obtain environmental data pertinent to the base. These agencies included the Oklahoma Geological Survey, the U.S. Geological Survey, the Oklahoma Water Resources Board, EPA, and Oklahoma University's Health Sciences Center.

PHASE II

The purpose of Phase II is to determine if environmental contamination has resulted from hazardous waste disposal practices. This phase includes an estimate of the extent of contamination, identification of the environmental consequences of migrating pollutants, and recommendations for additional investigations for sites identified in Phase I.

OEHL, the program manager for Phase II, drafted a statement of work for Phase II efforts. OEHL's Director of Technical Services Division and the Air Force Logistics Command Headquarters approved the statement of work.

OEHL contracted with Radian Corporation to do a portion of the Phase II investigation. The contractor made the initial Phase II site visit on September 29, 1983, with subsequent field work performed between November 1983 and October 1984. Radian issued its final report in October 1985. Its efforts under Phase II cost $657,300. OEHL's technical contract monitoring activities included comparing detailed monthly status reports with the statement of work, verifying Radian's analysis methods, and visiting the contractor at Tinker at least once.

Study findings

Radian's Phase II investigation included 12 sites: 10 of the 14 sites identified in Phase I, building 3001 (including water supply wells 18 and 19), and four base streams grouped as one site. The 10 sites included 6 landfills, 2 industrial waste pits, and 2 of the 4 radioactive waste disposal sites identified in Phase II. All of these sites (except for the radioactive waste disposal sites and landfill number 1) had received high or moderate HARM scores. The four sites identified in Phase I but not included by Radian in Phase II were fire training area 1 and

radioactive disposal site 1030W, which had moderate HARM scores, and fire training area 2 and radioactive disposal site 62598, which had low HARM scores.

An Air Force monitoring program found the Garber Wellington Aquifer to be contaminated when it discovered trichloroethylene (TCE) in water supply wells 18 and 19 located in building 3001. Radian's investigation of well 18 revealed TCE as high as 4,600 parts per billion (compared to EPA's proposed standard of 5 parts per billion). The TCE contamination level in well 19 was 8.7 parts per billion.

These findings followed a study by the Oklahoma State Department of Health that revealed a TCE contamination level of 5.6 parts per billion in Tinker's drinking water. The samples used in the state study were taken from the base's central water supply where the water from all wells was mixed, thus diluting the contamination from well 18. Because it was possible for some people to drink the water from well 18 before it was mixed with water from the other wells, Tinker decided to stop using well 18 as a source of drinking water.

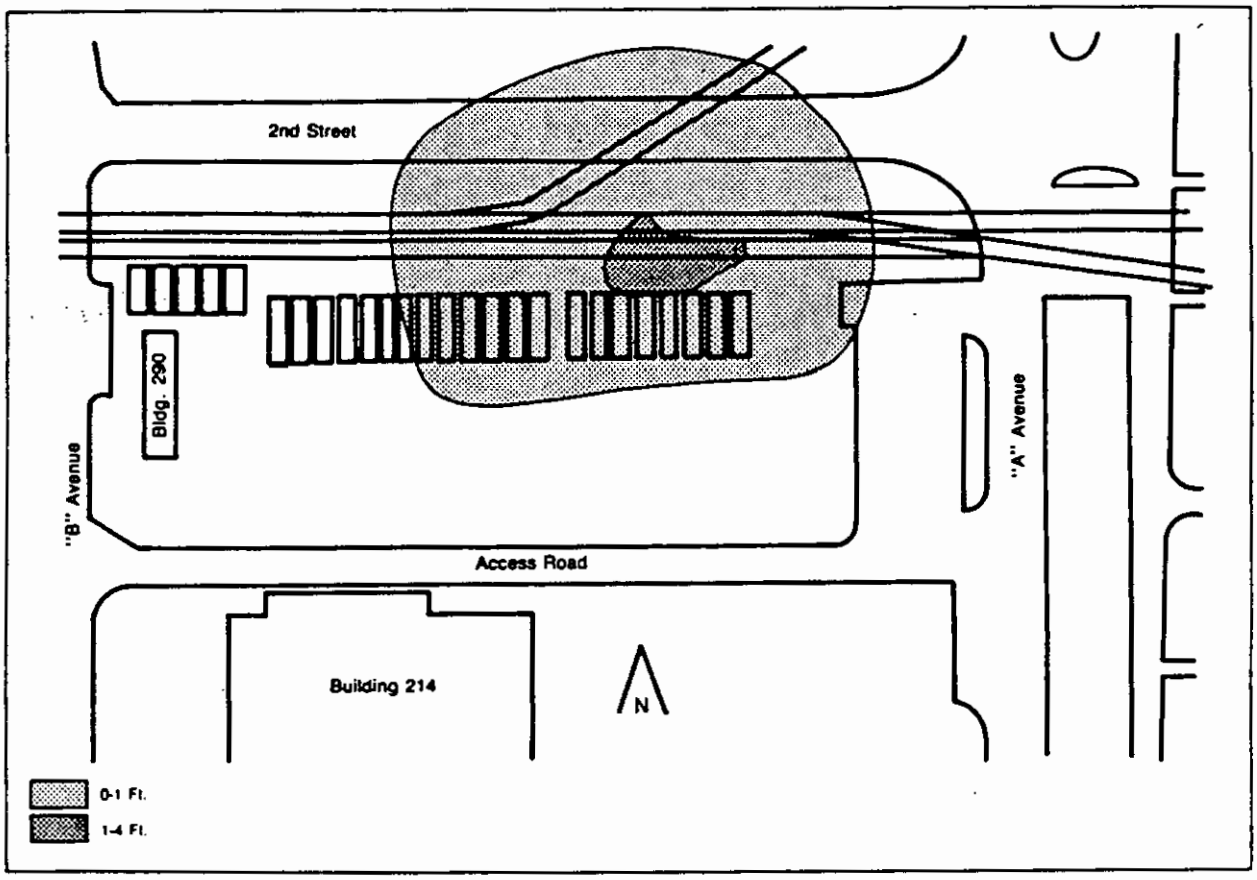
Radian recommended further investigations at landfill 5 and the buried pits and tanks below building 3001, which may be the source of the TCE contamination in wells 18 and 19. Radian also recommended monitoring programs for landfills 1 through 4. To ensure that TCE was not contaminating other base water supply wells, Radian also recommended that all drinking water wells be monitored.

Remedial actions were recommended for landfill 6 and water wells 18 and 19. However, Radian believed that no further investigations were necessary for the industrial waste pits, base streams, and the radioactive waste disposal sites.

Corps of Engineers

The number of sites with possible contamination has grown from 14 identified in Phase I to 17, including the base streams (grouped as 1 site) as identified by the Corps of Engineers. The base streams and building 3001 were added to the investigations in Phase II. The Corps has now added a new site, the fuel farm area, which is an underground fuel storage area. Due to leaking fuel tanks, the aquifer beneath the site is contaminated with fuel and other petroleum products. The groundwater contamination under the fuel farm area, shown in figure II.1, is estimated to be up to 4 feet deep, contain 40,000 to 50,000 gallons of fuel, and cover 150,000 square feet.

Figure II.1: Groundwater Contamination Under the Fuel Farm Area



Remedial actions to pump out the fuel have been designed and will be performed soon.

In addition, the Corps has completed a base-wide groundwater assessment, including off-base wells, which indicated that no contamination is now moving off base. The Air Force continues to test the base's water supply wells for contamination on a quarterly basis.

The Corps is investigating the six landfills, building 3001, and the fuel farm area. Investigations have been scheduled for the base streams, two fire training areas, and radioactive disposal sites 1030W and 201S. Due to Radian's findings, the Corps does not plan to investigate the two industrial waste pits and radioactive waste disposal sites 1022E and 62598.

Regulatory agency involvement

State and federal regulatory agencies reviewed the Air Force's statement of work, and Air Force officials told us that their comments had been incorporated as necessary before the Phase II investigation began in 1983. The regulatory agencies continued their involvement during Phase II activities through participation in the Technical Review Committee and Technical Working Group meetings at Tinker.

EPA has identified two Tinker sites to be included on its National Priorities List--building 3001 and the Soldier Creek portion of the base streams.

PHASE III

The Air Force Engineering and Services Center is cooperating with EPA in a research effort to develop a biological treatment for TCE. The Center is currently contracting out the on-site demonstration project at Tinker to demonstrate this technology using the TCE-contaminated groundwater under building 3001.

PHASE IV

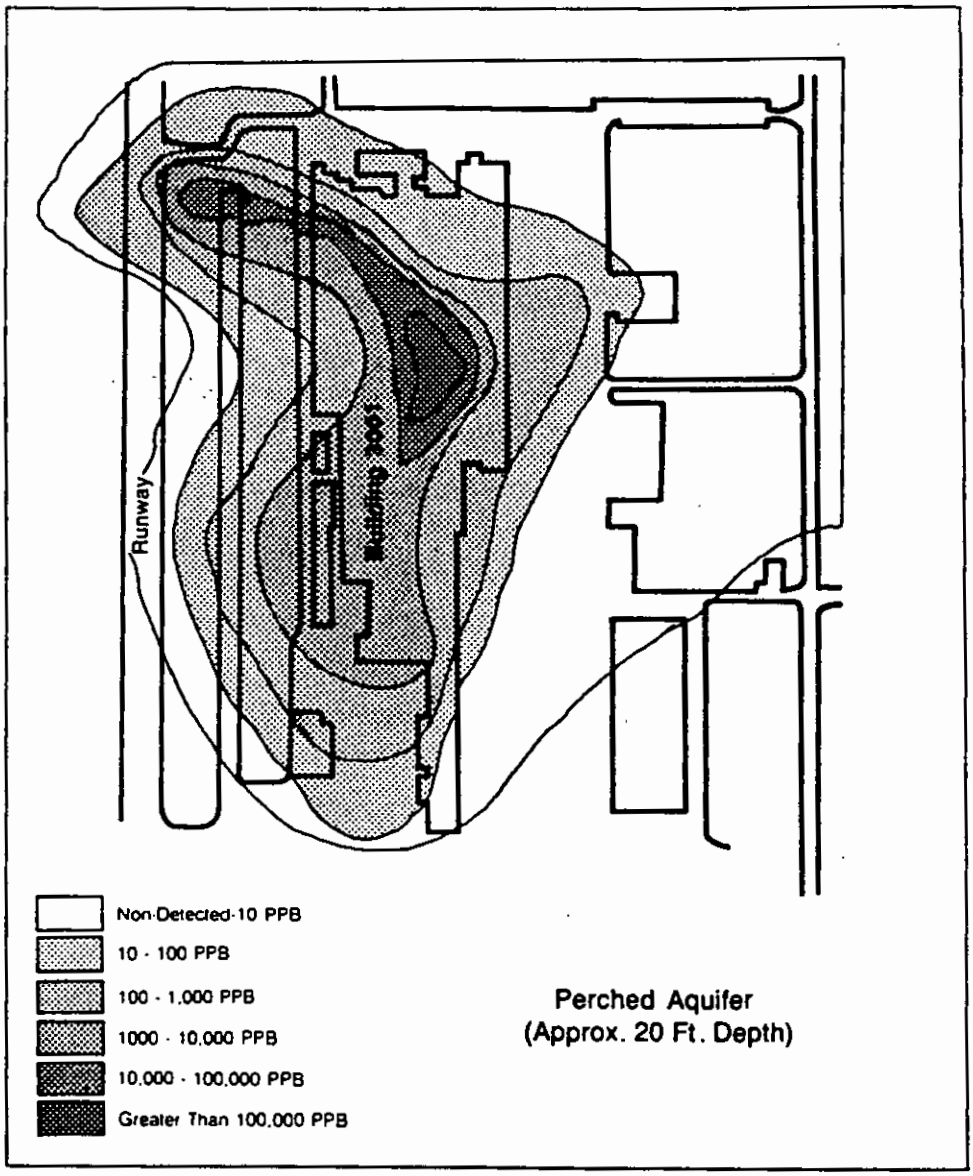
Tinker has undertaken cleanup actions at several sites on base including the Soldier Creek Lagoon, the drainage ditch west of building 3001, landfill 6, and former water supply wells 18 and 19 in building 3001.

The perched aquifer, a portion of the Garber Wellington Aquifer under building 3001, has been contaminated with TCE and other synthetic organic chemicals. This contamination is the result of an accumulation of wastes from 30 years of industrial operations. The contamination is primarily confined to the upper levels, which are not used for drinking water. However, water supply wells 18 and 19 in building 3001 served as conduits, allowing the TCE to enter the lower levels of the aquifer from which Tinker's drinking water is obtained.

Water supply wells 18 and 19 were taken out of service in the latter part of 1983 and permanently plugged in September 1986 to prevent further contamination to the aquifer. Sample results, as depicted in figure II.2, indicate severe contamination in the upper levels of the aquifer, as high as 330,000 parts of TCE per billion. As stated earlier, EPA's proposed standard for drinking water is 5 parts per billion. The Corps of Engineers is currently designing the plans and specifications to remove the contaminated groundwater.

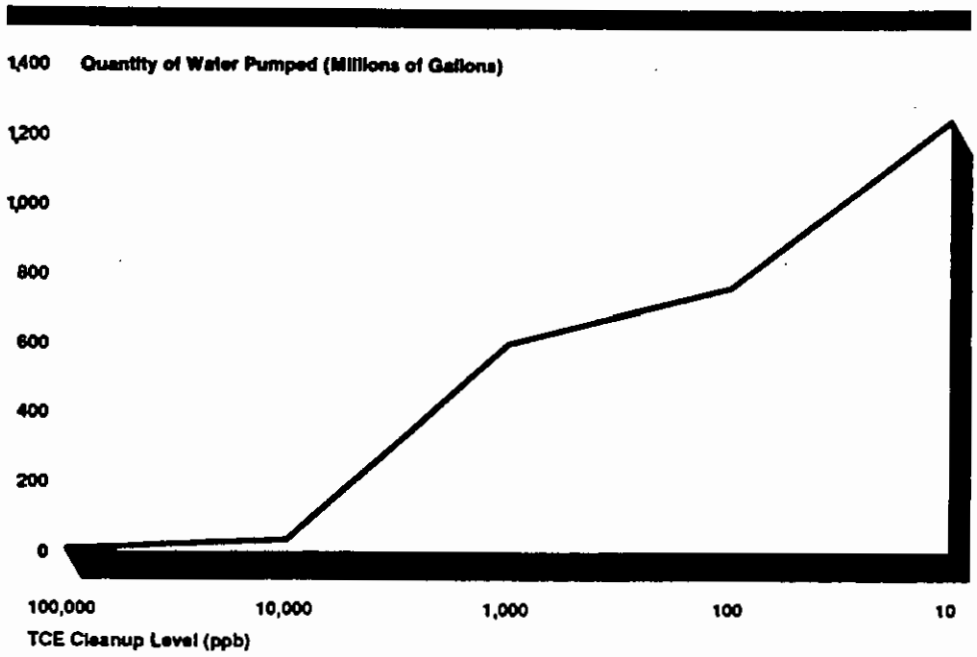
APPENDIX II

Figure II.2: Trichloroethylene Contamination Under Building 3001



The cost of removing TCE from the groundwater increases dramatically as target cleanup levels of TCE decrease. Figure II.3 shows the number of gallons required to be pumped out, treated, and returned to the aquifer to reduce TCE contamination to various levels. The Garber Wellington aquifer covers over 2,200 square miles and contains 22.8 trillion gallons of water. The desired level of TCE contamination has yet to be determined by the Technical Review Committee.

Figure II.3: Quantity of Trichloroethylene-Contaminated Water to Be Pumped at Various Cleanup Levels



In 1983, the Oklahoma State Department of Health found that a private well was contaminated with synthetic organic chemicals and, because of landfill 6's location, it was considered a possible source of contamination. To help prevent possible contaminant migration, the landfill was capped with 18 inches of clay and 10 inches of topsoil. Also, four additional monitoring wells were installed to detect contaminant migration away from the landfill. As part of the base-wide groundwater assessment, the Army Corps of Engineers took samples in July 1986, which showed no organic contaminants in the private well where they had been detected previously.

DISPOSAL OF WASTE FROM
A REMEDIAL ACTION PROJECT

Between November 1985 and May 1986, in response to Oklahoma Water Resources Board concerns, Tinker dredged 9,254.5 cubic yards of contaminated sediment from Soldier Creek and the drainage ditch west of building 3001. The portion of Soldier Creek dredged included Soldier Creek Lagoon. Soldier Creek Lagoon is a sediment pond created by a low-water dam above the discharge points from the waste water treatment plants. Water from Soldier Creek Lagoon is diverted through an oil and grease trap known as Prices Pond.

EPA requires disposal sites receiving hazardous waste from sites being cleaned up in accordance with CERCLA to meet stricter standards than sites complying with the Resource Conservation and Recovery Act. Tinker's records indicate that 2,579 cubic yards of contaminated sediment dredged from Soldier Creek was disposed of at Rollins Environmental Services' landfill near Houston, Texas. Rollins Environmental Services' landfill did not meet these stricter standards because of groundwater contamination problems. In July 1986, subsequent to Tinker's disposal of the sediment at Rollins, DOD verbally agreed with EPA that hazardous waste removed during IRP cleanup projects would be disposed of at CERCLA-approved sites.

FUTURE PROJECTS PLANNED

The Corps of Engineers plans to perform a complete investigation of the streams on base, and according to Oklahoma Water Resources Board officials, it is very important that the source of contamination in these streams be cleaned up before any further cleanup actions are taken. If the contamination going to the streams is not stopped, the streams might have to be cleaned more than once. For example, the cost of dredging the visible contamination from a relatively small area in Soldier Creek was $2.3 million, but core samples taken after the dredging continue to show high levels of heavy metals. The heavy metal found in these core samples, taken to a depth of 24-inches, did not diminish with depth.

The high cost of this type of cleanup has resulted in consideration of alternatives to dredging, such as using microbes to treat the contamination. Water samples taken from base streams by EPA and the Oklahoma Water Resources Board continue to indicate that streams are receiving contamination. Tinker's personnel have corrected hundreds of misconnected drains that feed these streams and expect to continue finding problems of this nature.

APPENDIX III

STATUS OF INSTALLATION RESTORATION

PROGRAM SITES AT TINKER AIR FORCE BASE

Site/Area	HARM Score	Phase I	Phase II	Current status
Landfill 1	45	Low potential for contaminant migration. Landfill used for disposal of general refuse burned to reduce volume. Only small amounts of chemicals and industrial wastes were disposed of here. No furtber monitoring recommended.	Waste trenches have settled, collecting rainwater. Monitoring wells were installed and sampled. Samples indicate a limited impact on groundwater quality. Recommend quarterly sampling for 1 year to verify and quantify seasonal variation.	Soil and vegetation now cover the landfill. The Corps of Engineers (COE) has sampled selected trenches and monitoring wells. A draft remedial action plan is scheduled to be published by January 1988.
Landfill 2	65	High potential for contaminant migration as a pond is located nearby. General refuse and small amounts of industrial waste were disposed of here. A small pond was built over the landfill. Recommend a geophysical survey and groundwater monitoring. Sample and analyze leachate streams and drain the pond to reduce possible contaminant migration.	Trenches have settled, collecting rainwater. Water overflows into a nearby pond and eventually enters Crutcho Creek. Samples taken from monitoring wells indicate only limited impact on groundwater quality. Samples taken from the pond did not show any elevated levels of contamination. Recommend quarterly sampling for 1 year to verify and quantify seasonal variations.	Soil and vegetation cover the landfill, and the pond has been breached to remove the water. COE has sampled selected trenches and monitoring wells. A draft remedial action plan is scheduled to be published by January 1988.
Landfill 3	60	Moderate potential for contaminant migration. General refuse and small quantities of industrial wastes were disposed of here. Recommend geophysical survey to define boundaries and geology under the landfill. Recommend additional groundwater monitoring and enalysis of any leachate plumes.	Monitoring wells installed and sampled. Samples indicate a limited impact on groundwater quality. Recommend quarterly sampling for 1 year to verify and quantify seasonal variation.	Topsoil now covers the landfill. COE has sampled selected trenches and monitoring wells. A draft remedial action plan is scheduled to be published by January 1988.
Landfill 4	70	High potential for contaminant migration. Leechate observed containing mercury, phenols, oil, and grease. Recommend geophysical survey and groundwater monitoring. Also, sample and analyze leachate streams.	Surface runoff flows into Crutcho Creek. Leachate and monitoring well samples indicate a limited impact on groundwater quality. Recommend quarterly sampling for 1 year to verify and quantify seasonal variation.	Soil and partial vegetation cover the landfill. COE has sampled selected trenches and monitoring wells. A draft remedial action plan is scheduled to be published by January 1988.
Landfill 5	51	Moderate potential for contaminant migration. Small seepage streams were observed. Recommend geophysical survey to define boundaries and geology under the landfill. Also recommend groundwater monitoring and sampling of leachate streams.	Surface depressions are holding rainwater. A monitoring well was installed and sampled. Data collected does not provide evidence of groundwater contamination. Surface of landfill has been disrupted by current construction activities. Recommend continuing review when construction is completed.	Soil and vegetation now cover the site. COE has sampled selected trenches for waste characterization and selected other trenches will also be sampled. The COE has also installed and sampled 9 monitoring wells. Currently awaiting results. If nothing shows up on the test results, this investigation will be complete. A clay cap will be placed on the landfill by early 1988.
Landfill 6	56	Moderate potential for contaminant migration. General refuse and small quantity of industrial waste materials were disposed of here. Recommend geophysical survey to define boundaries and geology under the landfill. Also, recommend additional groundwater monitoring.	Monitoring well samples confirm presence of chlorinated organic compounds. As a result, it is a possible source of contamination of a private, off-base well. Additional monitoring wells were installed and sampled, indicating the landfill is releasing synthetic organic chemicals. Recommend additional monitoring wells be installed to test impact on the aquifer.	Landfill was capped with clay and topsoil. COE recently found six uncapped trenches and sampled them for waste characterization. The COE has also installed and sampled 19 monitoring wells. If nothing shows up on the test results, investigation will be complete. A contract to complete the clay cap will be awarded in September 1987.

APPENDIX III

Site/Area	HARM Score	Phase I	Phase II	Current Status
Industrial waste pit 1	61	Moderate potential for contaminant migration. Recommend sampling and analysis program that includes obtaining soil borings in and around waste pit. Also, recommend a geophysical survey to define the site boundaries and identify any leachate plumes.	Performed geophysical survey, soil sampling, and monitoring well sampling. Results show little or no migration of waste contaminants away from the site. No additional work required.	A "No Action" plan has been submitted to the state, but no response to date. Oklahoma Water Resources Board officials say it is likely the contaminants disposed of in this pit seeped into Elm Creek; thus only trace contamination remains at the site.
Industrial waste pit 2	68	High potential for contaminant migration. Did not have an impermeable liner while in operation. Recommend a sampling and analysis program to obtain soil borings in and around the waste pit and a geophysical survey.	Performed geophysical survey, soil sampling, and monitoring well sampling. Results indicate the waste is not migrating from the site. Unless surface is disturbed or disrupted, significant contaminant migration is unlikely. No further work is considered necessary.	A "No Action" plan has been submitted to the state, but no response to date. Oklahoma Water Resources Board officials say it is likely that contaminants from this pit seeped into Elm Creek; thus only a trace of contamination remains at the site.
Fire training area 1	55	Moderate potential for contaminant migration. While in operation this pit was unlined. Recommend sampling and analysis program that includes obtaining soil borings in and around the area. Also conduct geophysical survey to define boundaries and identify any leachate plumes.	Not included in Phase II.	No investigation to date. COE plans to install 2 monitoring wells and take 3 to 4 soil borings by July 1987.
Fire training area 2	47	Low potential for contaminant migration. This site was used infrequently as a temporary training area. No further monitoring.	Not included in Phase II.	COE made six borings and found no contamination. Nothing further will be done.
Radioactive waste disposal site 1029W	59	Moderate potential for contaminant migration. Site is believed to be located in the pond over landfill 2. Low-level radioactive material disposed of here may have been removed in 1955. Recommend draining the pond and sampling and analyzing water and surface area for radiation levels.	Not included in Phase II.	No investigations have been performed to date. However, records were found that indicate the site had been cleaned up in the early 1950's.
Radioactive waste disposal site 1022E	49	Low potential for contaminant migration. Site was used to dispose of containers of low-level radioactive material. Recent studies show no harmful levels of radioactivity. No further monitoring.	Geophysical survey was performed to locate and identify the site. The area was marked with metal stakes. No further investigation.	No further investigations planned.
Radioactive waste disposal site 62598	37	Low potential for contaminant migration. Contains low-level radioactive material. It is believed the material may have been removed. No increased radioactivity near the site. No further monitoring.	Geophysical survey found no indication of the location of the site. It is very probable the material was removed. No follow-on investigations are recommended.	No further investigations planned.

APPENDIX III

Site/Area	HARM Score	Phase I	Phase II	Current status
Radioactive waste disposal site 2015	35	Low potential for contaminant migration. Site used for the burial of low-level radioactive material. Recent radiological monitoring has not identified any increased radioactivity near the site. No further monitoring.	Not included in Phase II.	No investigation to date. The State of Oklahoma has indicated that it will not approve any type of site remediation short of removal and disposal at an approved site. Records indicate the presence of a "still" buried at the site and surface radioactivity measurements confirm this. A contract through Brooks AFB to remove and dispose of the still as well as test adjacent soil is scheduled to be initiated in October 1987.
Base streams	--	Recommend a comprehensive sediment sampling program on base streams to characterize sediments and define any pollutant migration. Also, recommend water quality sampling in the streams.	Collected and analyzed 27 samples from 24 sediment sampling stations. The analysis showed no evidence of elevated levels of industrial contaminants. No follow-on action deemed necessary.	A section of East Soldier Creek has been dredged, removing 8,481 cubic yards of sediment. COE plans to sample and test Crutcho, Khulman, and Elm Creeks by March 1988.
Building 3001	--	Not included in Phase I study.	Limited contaminant leakage moving downward in vicinity of wells 18 and 19. Seven monitoring wells were installed and sampled with two showing high levels of TCE. The contamination is not a single, defined source but is confined to the shallow levels of the aquifer, indicating other wells in the vicinity are clean. An inspection of active and inactive underground storage tanks and pits was made because they were considered possible sources of the contamination under the building. Recommended remedial action is to pump and treat the contamination. Also recommend entering, inspecting, and sampling selected pits and tanks for solvents.	Base water supply wells 18 and 19 were plugged in September 1986. COE has installed and sampled 81 monitoring wells in and around building 3001, but the extent of the contamination plume has not been defined. Two additional monitoring wells have recently been installed and sampled, and COE is awaiting the results. Abandoned pit locations have been located in the south part of the building, and 4 pits have been recommended for removal. COE should complete the action plan design by August 1987.
Fuel farm	--	Not included in Phase I study.	Not included in Phase II study.	The perched aquifer beneath the fuel farm area is contaminated with fuel from underground fuel tanks. The fuel plume is a maximum of 4 feet thick and contains 40,000 to 50,000 gallons of fuel. A plume of benzene, toluene, and xylene surrounds the fuel. Immediate measures are being taken to remove the contaminants. Two recovery wells have been installed to pump out the fuel and water separately. Procurement of a pump is in process. About 500 gallons of water and 150 gallons of fuel will be pumped daily. The remedial action report is due by July 1987.

APPENDIX IV

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this review was to evaluate the actions the Air Force has taken at Tinker AFB to identify abandoned hazardous waste sites and to clean them up where necessary.

We reviewed the reports of the Phase I and Phase II investigations at Tinker. These investigations began in 1981 and continue to date. To further evaluate Tinker's program, we interviewed officials at the Environmental Management Directorate, Tinker; Environmental Protection Agency; Oklahoma State Department of Health; Oklahoma Water Resources Board; Garber Wellington Aquifer Association, made up of users of the aquifer; Occupational and Environmental Health Laboratories; Air Force Engineering and Services Center; and the U.S. Army Corps of Engineers. We also toured the facilities at Tinker and observed several IRP sites. We attended and obtained minutes from the Technical Review Committee and Technical Working Group meetings.

Much of our work for this report was based on work we had previously done at Tinker Air Force Base and discussed in our report entitled Hazardous Waste Management at Tinker Air Force Base--Problems Noted, Improvements Needed, GAO/NSIAD-85-91, July 19, 1985.

Our work was performed in accordance with generally accepted government auditing standards.

(392244)

APPENDIX J
GLOSSARY OF TERMS

GLOSSARY OF TERMS

Applicable or Relevant and Appropriate Requirement (ARAR). Requirements, including cleanup standards, standards of control, and other substantive environmental protection requirements and criteria for hazardous substances as specified under federal and state law and regulations, that must be met when complying with CERCLA.

Contaminated. As used in this report "contaminated" generally refers to land on which any hazardous substance was stored for one year or more, known to have been disposed of, or released, and to land where there are indications that these conditions may exist.

Contractor pool. A pool of contractors who are awarded indefinite delivery contracts under a full and open competition. Prior to selection, contractors are required to submit contract proposals outlining technical and managerial capability, past experience, past performance, and, when appropriate, rates for labor and materials. After contractors are selected through full and open competition, they may be required to compete for task orders which define the scope of effort required.

Dedicated procurement cell. An acquisition team whose members at least consist of program/project managers, contracting officers/contract negotiators, and contract auditors/price analysts. This team is responsible for awarding, administering, and monitoring environmental restoration contracts, and expediting the contracting process for cleaning up contaminated sites at bases identified for closure.

Defense and State Memorandum of Agreement (DSMOA). An agreement between DoD and a state that addresses state agency support and oversight and provides reimbursement to the state for these activities at non-NPL sites. The DSMOA also provides a process for DoD and the state to resolve any technical disputes before judicial remedies are sought.

Environmental contracting center. An organization designated by the Military Services which possesses environmental expertise along with other necessary specialists to support and manage the installation environmental programs. They develop environmental contracting documents such as requests for proposals, statements of work, etc. necessary to award environmental work. They also help administer environmental contracts on behalf of installations and other commands. These centers do not necessarily possess contracting officers with authority to award contracts, but the contracting office should be able to award resultant contracts.

Interagency Agreement (IAG). A formal document in which two or more federal agencies agree to cooperate. States are also often parties to these agreements.

Lead regulatory agency. As used in the this report, "lead regulatory agency" means the agency taking primary responsibility for regulatory oversight of cleanups.

Areas of concern. As used in this report, "areas of concern" is intended to mean any area of contamination or potential contamination on a closing military base. It includes any areas where there is any indication that any hazardous substance was stored for one year or more, known to have been released, or disposed of.

National Contingency Plan (NCP). The basic policy directive that contains the federal regulations governing response to release of oil and hazardous substances, including those concerning removal and remedial action under CERCLA.

National Priorities List (NPL). The formal listing of the nation's highest priority hazardous waste sites as established by CERCLA.

Preliminary Assessment/Site Investigation (PA/SI). The initial study, site sampling, and analysis under the CERCLA remedial action process which form the basis for determining whether a potential threat exists at a site and merits listing on the NPL.

Remedial Investigation/Feasibility Study (RI/FS). The Remedial Investigation is the CERCLA process of determining the nature, extent and significance of contamination at a site. The Feasibility Study, which is conducted concurrently with the RI, is the evaluation of remedial action alternatives for the site.

Transfer. As used in this report "transfer" is intended, except where restrictive or qualifying terms are used in conjunction with it, to refer broadly to any method used to change rights to possess, use, or exercise control over real property. For example, it includes, sales, deed conveyances, leases, licenses and permits. Except where specifically noted, it is not intended to be limited to conveyances between federal agencies as it is under the FPASA.

Uncontaminated. As used in this report "uncontaminated" generally refers to land for which a determination has been made, based on criteria that the Task Force recommends be developed, that no hazardous substances were stored on a parcel for one year or more, known to have been disposed of, released, or were likely to migrate to the land.

ADDITIONAL VIEWS

ADDITIONAL VIEWS
OF GORDON M. DAVIDSON

NPL Site Description

EPA believes that the recommendation that it reevaluate the NPL listing of Federal facilities, and the manner in which such facilities are described, focuses attention on the formal listing process rather than addressing the needs of the interested parties for better information concerning conditions at the closing installations.

Establishing a process including standards for identifying areas which are uncontaminated and thus outside of the scope of 120(h) is perhaps the most critical element of the planning process. In addition to the sources of information identified in the Task Force report, criteria must be established for (a) levels of contamination which require further analysis or impose restrictions on transfer and (b) statistically valid parameters for the quantity of data required to make such a determination. Obtaining sufficient information and disseminating the results of the investigations in a timely fashion should be the primary emphasis, rather than the NPL listing regulatory process.

The listing process is not intended to define or reflect the "boundaries" of releases. The NPL is a list of releases which are often difficult if not impossible to delineate with precision at the time of listing. The process of identifying all of the releases or contaminated areas at an installation, and the extent of contamination at those areas, goes on throughout the remedial investigation/feasibility study process and may in some cases extend into the remedial design/remedial action phase.

State and EPA Roles

The report recommends that where a state agency has been exercising regulatory control of a response action at a non-NPL federal facility the state should be allowed to maintain that role after the federal facility is listed on the NPL. Although EPA could establish a cooperative agreement under which the state would perform oversight of the federal agency activity, the statute does not allow EPA to delegate the selection of a CERCLA remedy at a federal facility NPL site. However there may be instances where it would make sense, technically and administratively to apply EPA's Federal Facility Listing Policy which would allow the state to proceed under its RCRA authority as long as the objective was consistent with EPA's CERCLA approach.

Resources

EPA believes that it is essential the Congress recognize that environmental considerations associated with scheduled base closure will demand additional resources. The magnitude of the demand on EPA will depend on the rate at which closure and reuse decisions are implemented as well as the level of EPA's involvement in the process of identifying parcels to be transferred at non-NPL sites.

Although the statute currently places on DoD the obligation to make the covenant that all necessary remedial action has been taken with respect to a parcel to be transferred, State regulators and the public have stated that EPA should have a role in such determinations and EPA must be provided with the resources required to meet that expectation. EPA and State regulatory agencies should not be expected to redistribute existing resources to address those areas on a closing base earmarked for redevelopment which may not be priority sites from an environmental perspective. EPA anticipates, based on experience at Pease Air Force Base, that potential users of the site, as well as the Agency transferring the property, will also seek EPA's involvement in making determinations about such areas.

Gordon M. Davidson

ADDITIONAL VIEWS
OF JAMES M. STROCK

On behalf of the National Governors Association (NGA), I have reviewed the October 1, 1991 Report of the Defense Environmental Response Task Force and have the following additional views to include in the Report to be submitted to Congress on November 5, 1991. We appreciate the opportunity to provide additional comments on this Report. We are very pleased that the October 1 draft incorporates all of the proposed amendments that were approved by the Task Force at its September 27 meeting, and it represents a substantial improvement over the August and September drafts.

First, the Task Force Report should contain language strongly urging that EPA revise its National Priorities List (NPL) listing policy under CERCLA so that only the contaminated parcels of the base property are listed or remain listed on the NPL, instead of the entire base. This issue is of critical importance to local communities and redevelopment entities, which need to be assured that a base parcel determined to be "clean" will not have the cloud of potential Superfund liability left hanging over its head. EPA clearly has the ability to expedite regulatory NPL delistings. If EPA is unwilling to make this commitment, the States may need to seek relief in Congress.

Second, the Report needs to further address the mechanisms for State and Federal regulatory agencies to enforce land use restrictions on closing bases and to monitor compliance with such land use restrictions. Normally, regulatory agencies are not parties to any deed, lease or other document evidencing a transfer of the base property. Therefore, we recommend that the Federal Facility Agreements (FFAs) for closing bases require DoD to notify the regulatory agencies of any proposed transfer, and to provide the regulatory agencies with a copy of the transfer document before and after the transfer takes effect. The FFA's should also provide that DoD agrees to comply with all land use restrictions required by the regulatory agencies. We understand that similar requirements are contained in the FFA for Pease Air Force Base in New Hampshire.

Finally, the Report needs to provide strict target dates or schedules for rapid implementation of the findings and recommendations in the Report. These findings and recommendations should be implemented as soon as possible by DoD, EPA, the states, and other agencies represented on the Task Force. In particular, more specific transfer criteria need to be developed quickly to flesh out the general transfer guidelines set forth in the Report. I believe this concern is also reflected in additional comments submitted by the representative of the National Association of Attorneys General. We would be willing to

work with DoD, U.S. EPA, the Attorneys General and other State and federal agencies and to agree on strict implementation schedules in the near future.

James M. Strock

ADDITIONAL VIEWS
OF DAN MORALES

In January 1990, the National Governors' Association and the NAAG published *From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities*, which presented recommendations for improving the federal facility cleanup process. The recommendations are most germane in the closed base context and I strongly urge the Department of Defense to carefully consider them in the coming years as it attempts to clean up Defense facilities.

I. The Task Force report points to overlapping jurisdiction, conflicting standards, and litigation as causes of confusion and delay in the remediation process. This leaves the impression, which I believe to be misleading, that regulatory authorities might facilitate cleanups by simplifying environmental standards and/or reducing their enforcement efforts. The report would be more balanced in my opinion if it stressed, instead, the absolute importance of cooperation among state and federal regulatory authorities, public involvement at all stages, and strict compliance with environmental standards. These measures are most likely to reduce confusion and avoid delay.

II. The report, moreover, unfortunately does not provide much specific guidance to decision-makers at three critical stages:

(1) The transfer of property believed to be uncontaminated;

(2) The transfer by deed of property known to have been contaminated but since cleaned up; and

(3) The transfer by lease or other arrangement of property still known to be contaminated.

While the transfer criteria stated in the report are valid and may be useful generally, the decision-makers will need specific guidelines, criteria and procedures at each of these steps. It was suggested during one of our hearings, I believe, that the Department of Defense should develop a "due diligence" manual (akin to that found in the private sector) for its base commanders or base closure officers. The manual would provide much-needed specific guidance for base officers facing a complex array of environmental issues. The development and use of such a manual is, I believe, a critical element for efficiently and effectively transferring defense facilities to local communities.

III. Unequivocally, issues regarding budgeting and the funding of cleanups must be resolved. The Task Force barely touched upon these issues, although I concede that they

were probably outside the charge of the Task Force. Nonetheless, I note my concerns for the record:

(1) The Department of Defense will be competing with other agencies throughout the federal government in order to obtain a pool of funds for the cleanup of closing bases. At some point during the budgeting and appropriations process, Congress and the Administration will agree on a funding level and the Department of Defense will have a finite pool of remediation funds for closing bases.

(2) It appears that, sooner or later, the services and/or the closing bases will have to vigorously compete with each other for the finite pool of remediation funds.

(3) Meanwhile, interagency agreements, of whatever form, between the Defense services and the state environmental agencies (or the Environmental Protection Agency ("EPA")) will be premised on the availability of funds to accomplish the cleanups.

(4) At some point, assuming that Congress does not provide sufficient funding in any one year to begin and/or maintain the cleanup of all the closing bases at the same time, it will be impossible for the Defense services to meet their commitments at each and every closing base.

(5) No provision of any agreement, however, can be interpreted to require obligation or payment of funds in violation of the federal Anti-Deficiency Act. Thus, the communities attempting to redevelop the bases and the state environmental agencies seeking the clean up of closed bases will have no recourse or means of ensuring that the Defense Department will comply with its cleanup obligations in a timely manner.

I therefore believe that Congress needs to closely examine the budgeting and funding mechanisms for closing base cleanups--especially the role of the Office of Management and Budget. How will cleanup funding priorities be established in the coming years? How much money will be needed to cleanup the bases? Will the Anti-Deficiency Act cause communities and states to avoid entering into agreements with the Defense services? If agreements to clean up closed bases may be found to be futile (because of the Anti-Deficiency Act and the lack of complete funding for every base), why should states and communities enter into and possibly rely to their detriment on them?

IV. The EPA has long recognized that enforcement activities must stop current violations, as well as deter future ones. In a recent evaluation of the Resource Conservation and Recovery Act ("RCRA"), EPA stated:

"While informal enforcement actions can be effective in bringing facilities into compliance...such actions do not materially contribute to general, long-term deterrence. An enforcement program aimed only at bringing facilities into compliance and not at deterring future violations and encouraging voluntary compliance will be unsuccessful in the long run."[1]

Yet, at federal facilities, EPA has been unable to fully enforce its programs because of the so-called "theory of the unitary Executive." This theory, according to the Department of Justice, holds that one agency of the federal government cannot issue a unilateral order to, or bring suit against, a sister agency.

While I have no reason to doubt that the Department of Defense has every intention of complying with all applicable cleanup laws, regulations, and agreements, I am concerned that misunderstandings and less-than-perfect agreement among all the parties involved with any one cleanup may result in the need for legal action to be taken by the EPA against the Department of Defense. However, Department of Justice's "unitary executive" theory, practically speaking, prevents the EPA from using the courts to fully enforce cleanup obligations against the Department of Defense.

I believe that Congress needs to examine the ramifications of the "unitary Executive" theory on ensuring quick, efficient and full compliance by the Department of Defense with all cleanup laws, regulations, agreements and understandings. Such examination is especially needed in light of the theory of sovereign immunity which prevents states from fully enforcing applicable state and federal laws against the federal government.

V. Courts and federal agencies generally agree that federal facilities are subject to the same cleanup requirements as private facilities. Nonetheless, they do not generally believe that states can impose civil penalties on federal facilities that violate these requirements. Consequently, many state officials complain that they cannot deter federal facilities from RCRA violations or gain credibility as legitimate regulators in the federal facility cleanup processes.

The problem lies in the continued application of the theory of sovereign immunity. While one state (Ohio) has been successful at the Court of Appeals level in having its civil penalties against a federal agency upheld, I note that the United States has requested and was granted certiorari on the issue of whether a state can impose RCRA-based civil penalties on a federal agency. I believe that Congress must examine the ramifications of the Department of Justice's sovereign immunity arguments on an efficient and effective RCRA enforcement program.

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[1] USEPA, Office of Solid Waste and Emergency Response, "The Nation's Hazardous Waste Management Program at a Crossroads--The RCRA Implementation Study" (20s-00001), July 1990, p.60.

VI. Lastly, the Task Force report should go much further in emphasizing the critical role of the state environmental regulatory agencies in the cleanup of contaminated federal facilities. As I believe will become much clearer in the next few years, state agency participation will be essential, at least where a part of the closing base is contaminated but does not rank as an NPL site. Such a critical role for states should not be ill-perceived by the federal government. State regulatory agencies will have, without a doubt, a great stake in quickly facilitating the redevelopment of closed bases in order to ensure that their respective communities will not long suffer the unfortunate economic consequences inherent in the closing of defense bases. State environmental agencies should be perceived as partners in the remediation process--partners with both the Defense bases being closed, as well as partners with the EPA.

Dan Morales

ADDITIONAL VIEWS
OF DON GRAY

The charge given to the Task Force in the enabling legislation was to make findings and recommendations concerning ways, within existing law and regulations, to improve interagency coordination of environmental response actions at closing military installations and to consolidate and streamline the practices, policies and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously. However, in reviewing the work of the Task Force, it is clear that far more emphasis was placed upon, and far more effort was devoted to, finding ways to expedite transfer of the use of, it not the title to, the properties before cleanup was completed than was devoted to finding ways to expedite the actual cleanups.

I would have preferred that the Task Force expend more time and effort in seeking ways to expedite the clean-up process. In this connection, the early discussions and draft focused largely on delays supposedly caused by EPA and state regulatory procedures. I was happy that the Task Force accepted my suggestion that DoD involve EPA, state and other regulatory officials at the early planning stages of the environmental assessment work, using technical review committees or similar devices, in order to reduce the potential for disagreements and prevent duplication and delay later in the process.

However, based on my previous experience in this area I believe that the greatest potential for delay arises out of the Justice Department's unitary executive theory and policy, which prevents EPA from initiating enforcement action against DoD and other federal facilities, and the use of sovereign immunity to prevent states from levying fines or other penalties against such facilities. In my opinion, the absence of this kind of leverage, which would be available in dealing with non-federal entities, is not conducive to rapid resolution of disagreements between the regulatory agencies and DoD regarding facility cleanup plans.

Although some members of the Task Force expressed interest in exploring the extent to which this issue was causing undue delays in the clean-up of closing DoD facilities, it was ruled out of order because of the Task Force's mandate to make findings and recommendations within existing laws and regulations and the fact that legislation on this matter is currently pending before the Congress. However, I believe that the issue could be resolved administratively without the need for legislation, and certainly the Task Force could have looked into whether these policies are causing undue delays in cleanups without making a legislative recommendation on the subject.

In reviewing the final report I suddenly realized that although the Task Force had made many useful recommendations for expediting the cleanup and reuse of closing DoD installations, we had failed to recommend the establishment of any kind of monitoring mechanism to determine whether they would be implemented in an expeditious and effective

manner. To accomplish this purpose, I would recommend that the life of the Task Force be extended for at least another year in order to monitor progress towards implementation of the recommendations, to evaluate whether they are achieving the objectives for which the Task Force was established, and to make recommendations for changes or additions as needed.

Don Gray

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

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PUBLIC FORUM

Friday,
September 27, 1991

The Task Force met in the Kimball Conference Center, 1616 P Street, N.W., Washington, D.C. at 9:00 a.m.

TASK FORCE MEMBERS PRESENT:

MR. THOMAS E. BACA, Chairman
MS. ANNE SHIELDS
Mr. EARL E. JONES
MR. GORDON DAVIDSON
MAJOR GENERAL P.J. OFFRINGA
MR. BRIAN RUNKEL
MR. SAMUEL W. GOODHOPE
MR. DON GRAY

ALSO PRESENT:

MR. KEVIN DOXEY
MR. ORCHID KWEI
MR. THOMAS EDWARD
COLONEL LARRY HOURCLE
MR. J. PENDERGRASS
MR. MARK ETHRIDGE
MR. BOB CARR
MS. LUCY McCRILLIS
MR. PETE KUSHNER
MR. SONNY OH
MR. JOHN CIUCCI

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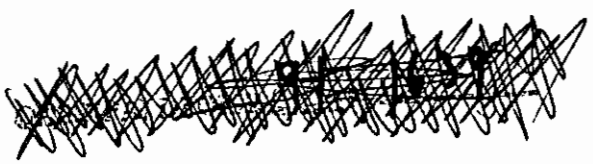

P-R-O-C-E-E-D-I-N-G-S

9:10 a.m.

CHAIRMAN BACA: The task force will now come to order.

I want to welcome the Task Force members. I know many of you have had to juggle your schedule. General Offringa, I know, has taken on a new assignment and we appreciate your being here. This is probably your day off, isn't it?

MAJOR GENERAL OFFRINGA: It was the one day between assignments, but I'll spend it here.

CHAIRMAN BACA: Well, good. We appreciate it.

Gordon, you've been designated as the official member from the Environmental Protection Agency and we're glad to have you here.

MR. DAVIDSON: Thank you, Tom. Appreciate it.

CHAIRMAN BACA: And Brian is representing the NGA and we appreciate your being here.

MR. RUNKEL: Thank you.

CHAIRMAN BACA: I know you have to travel

a long way and it's not easy to go through the time changes and so forth.

And I welcome the other staff members.

One point of order. I do have a meeting with the Assistant Secretary this afternoon. For the period that I'll be gone, if it's necessary to go later in the afternoon, I will designate Anne Shields as the chairman. But we'll discuss that as we get into it.

I would like to welcome the audience.

This is our fourth day of meetings. I have called this meeting to work out the final details of the report that we'll submit to Secretary Cheney and ultimately to the Congress. We have made a great deal of progress in the last few months, and I believe today that with the progress we've made we should be able to finalize the report and list recommendations that will help us expedite the transfer of bases.

The draft report now in front of us is the result of an iterative process that began in June when the Task Force met and agreed to an outline of issues that we felt were appropriate under our charter and

for which we felt we could make some constructive suggestions.

I'm going through written statements because I want to cover a few points before we get started.

The outline was sent to members for review following the meeting. A transcript of the meeting, edited by members, was also provided. At our meeting in July the staff briefed us on the results of the research and the Task Force added and deleted recommendations to that presentation. Following the July meeting, the amended staff presentation was mailed to each of your offices, along with the verbatim transcript of our decisions. As I promised, on August the 12th, I sent you by Federal Express a draft compiled by our staff based on the amended staff briefings and the transcript as edited by the members. We requested your comments on this draft by August the 23rd and they were compiled by staff with responses based on the July 17th, 18th transcripts and our previous agreements on the areas of consideration.

This compilation was mailed to you for

your review and on the basis of your responses to that compilation I have called this meeting to finalize the report. I do appreciate your rapid responses. They've been great. You've been very responsive.

I hope that we can come to an agreement on the remaining issues of wording. I know some of you have concern with wording in the report, but I recognize that all of us may not agree on particular language. If we reach a point where there is disagreement, I will call for a formal vote. My hope is that the meeting today will provide all members a chance to express their views and include in the Task Force report all recommendations approved by the Task Force under the rules.

There may be special points of view to be expressed by individual members and so I ask you to keep in mind other possible vehicles to transmit those differences.

I propose that we go through the report page by page, chapter by chapter and through that approach entertain any recommendations, suggestions, concerns that you might have. I'll stop here before

I get into the approach I'm going to use. I would ask for any comments by individual members before we get started.

MS. SHIELDS: Are these your comments? These are Sam's. I brought a letter with a few -- is there a Xerox machine around here?

CHAIRMAN BACA: We'll get those copied.

MR. DAVIDSON: Tom, we have some copies we'd like to submit as well.

CHAIRMAN BACA: Do you have enough copies for the members, Gordon?

MR. DAVIDSON: Yes.

CHAIRMAN BACA: Okay. Why don't we just distribute comments to each of the members.

MR. RUNKEL: I'd like to say, Tom, that we have some comments too in a letter to you.

CHAIRMAN BACA: Okay. Brian, do you want to circulate them?

MR. RUNKEL: Yes. That's what you're getting right now. This is an original.

MR. GOODHOPE: Mr. Chairman, I'd like to introduce Thomas Edwards, an Assistant Attorney

General for the State of Texas. He's put a lot of work into the efforts that you'll see from our state.

MR. RUNKEL: I'd like to introduce Orchid Kwei from our State Toxic Control Program who has done a lot of excellent work for us too on this.

CHAIRMAN BACA: Thomas and Orchid, we welcome you.

MR. DAVIDSON: One thing, Tom. I forgot to put that -- well, we're circulating here a two paragraph proposal regarding NPL site boundaries. But it is from EPA. I forgot to put EPA at the top.

CHAIRMAN BACA: Okay. We'll let the record reflect that it is from EPA.

MR. DAVIDSON: Thanks.

CHAIRMAN BACA: Any other members like to make any statements at this time?

MR. DAVIDSON: I'd like to -- I appreciate DoD's responsiveness in putting the report together and willingness to convene another meeting. I do feel comfortable that we can come to resolution on this report today. I would like to introduce Bob Carr and Linda Rutsch of my staff who have been doing the

lion's share of the policy work within the agency on base closure issues.

CHAIRMAN BACA: We've had Bob here before and we welcome you and Linda, glad to have you with us.

Any other members have comments?

MR. GRAY: Well, Mr. Chairman, I just want to express my appreciation to you for scheduling this meeting so that the members of the task force have an opportunity for give and take on the proposed changes.

CHAIRMAN BACA: I think it's important and we appreciate your pushing us to that end.

Well, let's begin. I would like to start out by reading the charge to the Task Force. This is the congressional charge. If we can keep this in mind, I think we can make progress. The task force report, A, is to identify ways to improve interagency coordination within existing laws, regulations and administrative policy of environmental response actions at military installations or portions of installations that are being closed or are scheduled to be closed pursuant to Title II of the Defense

Authorization Amendments in Base Closure and Realignment Act, Public Law 100-526.

Secondly, ways to consolidate and streamline within existing laws and regulations the practices, policies and administrative procedures of relevant federal and state agencies with respect to such environmental response actions so as to enable those actions to be carried out in a more expeditious manner.

That's the charge to us from Congress. As we go through the report, keep that in mind. We may reach or discuss an issue perhaps that is not being carried out by your agency or perhaps that your agency does not agree with. But if it's possible within the existing law to address that issue, I think it's in the purview of this committee to identify it as a possibility. The implementation, perhaps, is going to take that effort after we conclude our work.

So, if we as a committee have identified an issue that is implementable under existing law, whether it's being applied by existing agencies, this committee's charge is to identify them. We're to

identify ways of expediting cleanup within the existing law.

Okay. I believe you all have a booklet that's tabbed. If you go to Tab 8, draft report of the Defense Environmental Response Task Force. I'm going to not go through the Executive Summary. I would hope that you would trust staff to reflect in the executive summary what is stated in the text.

MR. GRAY: So the changes that we make in the text will be made in the summary automatically?

CHAIRMAN BACA: That's correct.

So, let's start with the introduction.

MR. GOODHOPE: Mr. Chairman, I'd like to read in the point that you just made. I would like to make some comments about the recommendations in the executive summary. Later on we can talk about the format.

CHAIRMAN BACA: Okay. Yes. Let's come back to that at the end, Sam, if we can.

MR. GOODHOPE: That's fine.

CHAIRMAN BACA: Executive summary should be just a reflection of the text.

MR. GOODHOPE: I agree.

CHAIRMAN BACA: Okay. Page 1, any concerns with page 1?

MR. JONES: Could you just put after "Federal Property Resources," put "Service" there, please, for GSA?

CHAIRMAN BACA: What paragraph?

MR. JONES: That's paragraph or item 4, Federal Property Resources Service. Service should show up everywhere in the report where you mention --

CHAIRMAN BACA: Okay. You make an excellent point. Whenever we make a correction, if there are other areas in the text where that same correction should be made, we'll do that.

MR. GRAY: Along the same lines, Mr. Chairman, on the next page --

CHAIRMAN BACA: Well, let's cover page 1. Anymore comments on page 1? Okay. Let's go to page 2. Go ahead, Don.

MR. GRAY: The organization I'm with is the Environmental and Energy Study Institute. I'd

like that to be reflected throughout.

CHAIRMAN BACA: Absolutely.

MR. GOODHOPE: I am, unfortunately, not the only special assistant, so it should be "a special assistant attorney general."

CHAIRMAN BACA: Okay. Good point. We thought you were the only one in Texas.

MR. DAVIDSON: And Tom, another thing in page 1, given the recent change in representation from EPA, that may or may not reflect my particular title. I'm not sure how formal you want to make that.

COURT REPORTER: I'm having a lot of trouble hearing Mr. Davidson. There's not a microphone close to you. So, I'm having trouble hearing you.

MR. DAVIDSON: What I said was on page 1, "The task force consists of the following," number 3 should more accurately reflect my title given that I'm the duly designated representative of EPA.

CHAIRMAN BACA: Okay. Let's go to page 3. If we proceed at this pace, we'll be through by 10:00.

MR. RUNKEL: Excuse me, Mr. Chairman. On page 2 --

CHAIRMAN BACA: You can't be going back, Brian.

MR. RUNKEL: Sorry. Sorry. I thought we were still -- they were going back to page 1.

On page 2, and I know this is one of the issues your staff had identified, although the law does clearly state that we're supposed to look at recommendations within existing law, your charter does provide for making recommendations, possible statutory changes. Although we understand the need to focus on existing law, I think there are a couple of discreet areas that we would later on want to make recommendations in terms of statutory changes. We think that within the spirit of the law, that that's allowable.

CHAIRMAN BACA: Well, let's talk about that, about those vehicles to transmit those concerns. This reflects the congressional charge.

MR. RUNKEL: I understand that. I just wanted to point that out.

CHAIRMAN BACA: Okay. Page 3?

MR. GRAY: I have a question, Mr. Chairman. At the end of the second paragraph, the sentence that says, "EPA interprets Section 120(a) to mean that the criteria for including federal facilities on the NPL should not be more exclusionary than those applicable to non-federal sites." I'm just not sure I quite understand what that means.

CHAIRMAN BACA: Okay. There's a citation. Do you want to explain that, Jay?

MR. PENDERGRASS: The citation is to the listing policy and it's part of a discussion where EPA was talking about not excluding from the list sites. In other words, that the federal facility sites should not be excluded that would not be excluded --

MS. SHIELDS: In other words, the same criteria should apply --

MR. PENDERGRASS: Well, it didn't say treated the same, it said that it should not be more exclusive. So, it didn't say exactly treated the same, it says that federal facility sites should not be excluded that would have been included if they were

private. If they were going to be included if they're private, then they should be included if they're a federal facility, but it didn't go the other way.

MR. GRAY: Maybe we could ask EPA. Is the current language acceptable to EPA or do they have an alternative?

MR. DAVIDSON: On this particular sentence that Don has brought up, no. I believe it accurately reflects our policy basically.

CHAIRMAN BACA: In order to save a little time in correcting omissions and misspellings and clerical errors, if you haven't received it, I have an errata sheet that lists those corrections.

Okay. Let's go to page 4.

MR. DAVIDSON: One minor point. On the third paragraph, in the middle, where the sentence starts, "Section 120(h)(3), CERCLA specifies that the U.S. government," we propose that the U.S. government be changed to say the transferring agency must provide a covenant.

CHAIRMAN BACA: Any objection to that? If not, we'll accept it.

COLONEL HOURCLE: Let me just suggest for clarity that those who might just pick up the report, transferring federal agency? Would that be acceptable? Instead of just transferring agency, transferring federal agency?

MR. DAVIDSON: Yes, that's what we're talking about.

CHAIRMAN BACA: Okay. Let's go to page 4. Let's go to page 5.

MS. SHIELDS: We had some comments on page 5, but I don't know what's happened to the letters being Xeroxed. So, I would have it --

MR. CARR: There's also a comment on 4. The first sentence in the second paragraph about the RCRA closure, I'm not sure that you want to use that same --

CHAIRMAN BACA: Point of order here. I would like the task force members to be the spokesperson. So, if you would deal through Gordon.

MR. CARR: Okay.

MR. DAVIDSON: That's fine. We might want to make a distinction here between RCRA closures and

base closures. It's just a point of clarification. I don't have language to offer, but it can be a little confusing here.

CHAIRMAN BACA: Counselor, do you have a suggestion?

COLONEL HOURCLE: Something like permitted facilities at these installations must be closed.

MR. PENDERGRASS: I think their concern is about the word "closure."

MR. DAVIDSON: I just don't want people to get confused with RCRA's closure as opposed to base closure.

MR. PENDERGRASS: Is there another term that's used in RCRA? Managed? That covers the broader situation. That probably works in this case here.

MR. DAVIDSON: Where is this now?

MR. PENDERGRASS: The first sentence in the second paragraph on page 4.

MR. DAVIDSON: Actually it's the second line.

MR. PENDERGRASS: "These facilities must

be --

COLONEL HOURCLE: Let me suggest that we read that sentence after the semicolon to be "these regulated facilities must be managed," so we focus back on the fact that they're actually regulated under a statutory regulatory scheme.

MR. DAVIDSON: That's fine with us.

CHAIRMAN BACA: So the new language is, "The regulated facilities must be managed in accordance with those statutes."

MR. GRAY: Just as a point of information, Mr. Chairman, I'd like to get an example of the kinds of conflicts you foresee arising under those circumstances. You say conflict may arise regarding a particular proposed remedial action.

MR. GOODHOPE: Is this the Rocky Mountain Arsenal case?

MR. PENDERGRASS: Potentially, yes, and it has been -- a lot of lawyers talk about the potential. The numbers of times that it's actually come up, I don't know that it has all that often.

MR. GOODHOPE: Well, I guess if we had a

description here of why the problem comes up or has come up, maybe a description of the -- I would recommend that you have a description in there on the Rocky Mountain Arsenal problem so that we understand a little bit better what the conflict is and why that conflict arises.

COLONEL HOURCLE: The basic confusion has resulted where you have a broad NPO listing and on that NPO listed site you have facilities which are also RCRA regulated units. The question then becomes, when you're doing the remediation, which statutory structure would apply.

MR. GOODHOPE: And which agency has the authority to get the facility cleaned up.

COLONEL HOURCLE: Which gets you into the ultimate question of who determines what the clean-up is going to be.

CHAIRMAN BACA: Don asked for an example.

Are you satisfied, then, with that example? Okay.

MR. GOODHOPE: The issue was raised for some reason and I think we need to figure out what the

source of the problem is, an analysis of why there is a problem and a potential for conflict. I think that's where we can get into -- not get into, but certainly a recommendation might flow from there that we try to figure out a way of resolving the conflict.

MR. GRAY: Since the question occurred to me, Mr. Chairman, I think it may occur to other people. I would think that if we could at least cite one example, and Rocky Mountain Arsenal is certainly the most prominent one, it would be helpful.

MR. DAVIDSON: Let me address that, Don, for a second. The Arsenal case, generally what we tried to do, and we've been successful at most NPO facilities, is to enter into three party agreements. These three party agreements lay out the process by which the state and EPA would work together on applying their various authorities.

I'm not sure that the Arsenal is the best case in that the Arsenal litigation was tied in to whether or not the timing of the listing of the facility and the litigation basically predated the development of any consent agreement of federal

facilities clean-up agreement there.

The issue really is one of how the different statutory authorities of the state or the state authorized authority in CERCLA ought to be applied. An example might be useful. You may just want to say that conflicts may arise in the application of how these authorities are to be applied in terms of selecting the remedy.

MR. GRAY: Well, from what you're saying, I assume that with the existence of the interagency agreements there's less of a problem maybe than it was in the case of Rocky Mountain Arsenal and I just wonder how much of a problem it is. I mean, is it basically a theoretical problem at this point?

MR. GOODHOPE: It seems to me it's not a theoretical problem if the Department of the Army doesn't want to comply with a -- with a state action or a state request under RCRA. We get into the same argument that they don't have to because it is a surplus site.

MR. DAVIDSON: That has not been -- in our existing IAGs, that issue has not yet been tested.

MS. SHIELDS: It was tested at Rocky Mountain.

MR. DAVIDSON: It was tested at the Arsenal.

MS. SHIELDS: And we do have a District Court decision that says his jurisdiction was ousted by the listing and that's what we've got.

MR. GOODHOPE: We should describe that outcome, then, I believe. I would recommend that we describe that outcome in this portion of the report.

CHAIRMAN BACA: Can we reference the Rocky Mountain Arsenal lawsuit?

COLONEL HOURCLE: Certainly the lawsuit and the process created the delay that we're concerned about trying to avoid, delay and confusion that we're concerned about avoiding or suggesting how to avoid through this report. So maybe -- I know Jay doesn't like footnotes --

MR. PENDERGRASS: This one could be long.

COLONEL HOURCLE: -- but maybe a footnote to -- you know, an example of delay being caused by this confusion has been the Marathon Rocky Mountain

Arsenal litigation, which is -- and then reference the judge's opinion, which I guess is now in appeal. I'm not sure if a formal appeal has been filed at this--

MR. GRAY: Is it on appeal?

MS. SHIELDS: I don't think it's been appealed yet. I don't believe the time has run yet. It just came down in August.

MR. DAVIDSON: Larry, the issue that you brought up there is one of delay. I think one can make a case that while this litigation was ongoing there was remediation underway. So in terms of the overall goal of trying to get clean-up, I'm not sure the litigation actually resulted in delay. It resulted in a lot of --

MS. SHIELDS: Confusion.

MR. DAVIDSON: -- discomfort and confusion on the legal side.

COLONEL HOURCLE: From my insider's perspective, I know that whenever the Army wanted to do anything there were more lawyers than engineers who got involved in whether this was a good thing to do. So, there is a lot of transaction cost when you're

trying to execute a clean-up when you're in the middle of litigation on the side of making sure every -- you know, there are a lot more checks and things that have to go along and that I think creates the delay that I was talking about.

MS. SHIELDS: I think you can say that, while at the same time making Gordon's point that there was a lot of remediation that was going on the entire time that the litigation was proceeding. Certainly that is true too.

MR. DAVIDSON: May I propose at the end of the sentence saying, "Conflicts may arise regarding particular proposed remedial action with respect to the application of RCRA and CERCLA authorities."

COLONEL HOURCLE: I think we might also have an example at Warner Robbins, where I understand a RCRA site was subsequently added to the NPO and then we got into the what do we do now. Congressman Ray had to come in and sort of get everybody together and try to figure out strategy for how we put it into an existing IAG and I think that as we look to taking sites which may be somewhere in the RCRA process and

listing them potentially as we get HRS2 and onto the end of the L, that may be another potential source of confusion which almost inevitably brings to light.

CHAIRMAN BACA: Gordon has suggested -- the language at the end, I guess, as an addition? "With respect to RCRA and CERCLA authority?"

MR. DAVIDSON: "With respect to the application of RCRA and CERCLA authority to the application."

MR. GOODHOPE: I'm sorry?

MR. DAVIDSON: I'm proposing, Sam, adding at the very end of the sentence, after "remedial action," it says --

CHAIRMAN BACA: Delete the period.

MS. SHIELDS: That's one way to go.

MR. DAVIDSON: Say, "Conflicts may arise regarding a particular proposed remedial action with respect to the application of RCRA and CERCLA --"

MR. GOODHOPE: Well, I would ask that a description of Rocky Mountain Arsenal be put in --

MS. SHIELDS: Didn't we agree to do that in a footnote? Didn't Jay consent to that?

MR. GOODHOPE: That's fine.

CHAIRMAN BACA: Yes, we'll do that.

MS. SHIELDS: In the spirit of cooperation, I made a suggestion for this paragraph, but I know everybody is going to compromise today, so I'll just offer to drop it.

CHAIRMAN BACA: Let me tell you the corrections we have now on page 4. Second paragraph, second line, "These regulated facilities must be managed in accordance with those statutes," and then the addition, "with respect to the application of RCRA and CERCLA authority." And then the footnote on Rocky Mountain.

Okay. Let's go on to page 5. Ann, you have the floor.

MS. SHIELDS: Right. You should have our letter there. It's number 4 on the letter. We have revised the third sentence of the first paragraph. We suggested the revision so that it conforms to the statutory language, I think it's better drafting when we've got statutory language that uses certain words and phrases that we stick with them. It would read,

"Section 120(h) of CERCLA, for example, applies in cases where any hazardous substance was stored for one year or more, known to have been released, or disposed of, and Section 204(c)... makes NEPA specifically applicable.

CHAIRMAN BACA: Okay. Does everyone understand the proposal? Is there any objection?

MS. SHIELDS: All we've done is use the statutory language instead of different language. So, I don't think this is one, Sam, where I've got a hidden agenda. I'll tell you that when we're getting to that.

MR. GRAY: That's Section 204(c) of CERCLA?

MS. SHIELDS: It's 204(c) of the Base Closure Act that applies NEPA specifically.

MR. GOODHOPE: Mr. Chairman, I'd like to ask permission for Thomas Edwards to speak.

MR. EDWARDS: I have a question.

CHAIRMAN BACA: Go ahead.

MR. EDWARDS: I wonder if you're taking into consideration the case of Idaho versus Hanna

Mining Company in which the State of Idaho sued a mining company under CERCLA for natural resources damages and the company claimed that the damage was expected and fully set forth in an environmental impact statement, therefore not subject to recovery. The court held, I think from this small note that I have, basically that CERCLA trumps NEPA.

MS. SHIELDS: I'm not and I wouldn't imagine that you would want to draw attention to that holding. All I'm saying is that it's the Base Closure Act that specifically applies NEPA in this instance and that if it didn't, we might argue about whether it applied. But since it specifically applies, we don't argue about it.

MR. DAVIDSON: Doesn't it apply in the way that -- with respect to future use and that sort of thing?

MS. SHIELDS: It applies to the whole base closure, not to just the CERCLA cleanup.

MR. DAVIDSON: I think that's fine. I just want to make sure everyone understands the clarification on what NEPA applies to actually. I

think it goes on in the report a little bit later on to discuss this, but my understanding is that the applicability of NEPA is to the formulation of land use plans and the process of deciding how this use is going to --

COLONEL HOURCLE: That's correct. It's a little bit different between the two base closure statutes, the '88 statute and the '91 statute, but it is a constrained application of NEPA and it is not directly related to the concept of you have to do NEPA on the CERCLA.

MS. SHIELDS: That's right. And we're not --

MR. GRAY: It's not the cleanup process that it applies to?

MS. SHIELDS: That's right.

COLONEL HOURCLE: That's right. It's the eventual use of the land.

CHAIRMAN BACA: Okay. We'll accept that language.

MS. SHIELDS: Let me just finish with page 5. In the second paragraph where it talks about

lessees, I think a better term would be users. We may be talking about people other than lessees.

CHAIRMAN BACA: Okay. That's good. That's a good clarification.

MS. SHIELDS: And in paragraph 2, the last line -- it's not paragraph 2.

MR. RUNKEL: It's page 7 actually. I found that.

MS. SHIELDS: Oh, okay. All right. Forget it then. I thought that was wrong.

On my letter, number 6 should say page 7 instead of page 5. So, we'll get to that.

CHAIRMAN BACA: Okay. Other comments on page 5?

MR. JONES: I have a general comment.

CHAIRMAN BACA: Go ahead, Earl.

MR. JONES: We have a glossary of abbreviations. I recommend including in the report a glossary of terms that are being used, such as uncontaminated, contaminated. We found that the term "transfer" is being used very loosely throughout this presentation. Transfers under CERCLA versus transfers

under the 49 Act. We thought you might want a glossary of terminology.

GENERAL OFFRINGA: I had the same comment.

MR. RUNKEL: So do we. In fact, we might want to try to agree on a definition of transfer because I think there may be a difference of opinion on whether that applies to non-deed situations.

MR. JONES: The way it's used in this presentation, transfers under CERCLA relate to just about every type of transaction, where as transfers under the Federal Property Act means from one Federal agency to another.

CHAIRMAN BACA: That's a good point.

MR. GRAY: One way of solving this problem, I think, Mr. Chairman, is to talk about transferring use or transferring the property. Transferring use is different from transferring the property, and if we could use that terminology throughout when we mean something less than a deed transfer, use "transfer use of the property" --

MR. PENDERGRASS: Except that I'm not sure that it solves the problem that Mr. Jones was talking

about of how transfer is used in federal property context. In the Federal Property Act it's transferred first to between agencies and we would still have the problem. If we're talking about transfer of property, you still would have the confusion about whether -- in here we were talking about a sale or other transfer that could be between the federal government and private parties.

MR. GRAY: You could still say "transfer of property," couldn't you, if you were talking about to another federal agency?

MR. JONES: I just thought you might be able to clarify the issue once and for all if there was a glossary right up front.

COLONEL HOURCLE: Is it possible in this one to continue to use the broader definition of transfer in the report and then talk about or try to be good about talking about transfer by deed in those circumstances where we're talking about 120(h)(3) limitations? Would that work for folks?

MR. RUNKEL: Well, of course, (h)(3) also says, "sale or other transfers." So that does get

into beyond deed situations. Right?

COLONEL HOURCLE: I was trying to get to that section that says what the warrant is, which seems to be a stumbling block on this where it's the warrant in the deed which we have -- staff has -- I guess our belief is that if it's a warrant in the deed it's a transfer by deed and if you don't have a transfer by deed, then the section about warrant and deed can't apply.

MR. RUNKEL: I see blank stares.

CHAIRMAN BACA: Well, let's get back to Earl's suggestion. Would it add to the report by having a glossary of standard terms?

MR. RUNKEL: Yes.

MS. SHIELDS: I think probably if you put transfer in it, you're going to have to describe the different ways that transfer is used in this statute. We can't change the statute, but we can point out that it's a word that's used in different contextual ways.

COLONEL HOURCLE: I think on behalf of the staff I'd solicit anyone else's recommendations about confusing terms that we might want to include in a

glossary. Suggestions?

CHAIRMAN BACA: Good, as we go through. Are you through, Brian?

MR. RUNKEL: So your staff will develop a definition for transfer?

CHAIRMAN BACA: Yes, and it will be as a result of discussions as you come up with terms.

COLONEL HOURCLE: My inclination is that the staff will have a very broad definition of transfer and then try to be good in the report about particularly saying if a transfer is pursuant to the Property Act or transfer by deed to indicate that we're deviating from the normal definition.

CHAIRMAN BACA: Okay.

MR. GRAY: I still have some concern where you're not transferring the property itself, but you're merely transferring the use of the property through a lease. That's not really a transfer. If it is a transfer, then I think it is subject to Section 120(h) of CERCLA.

MR. PENDERGRASS: I think in the report we had tried to identify those situations as transfer of

use or a lease. As we go through it today, we can try and make sure that we identify those because there is a distinction.

CHAIRMAN BACA: Yes. If that confusion arises, Don, point it out as we go through it.

MR. RUNKEL: The first area -- I just want to clarify here again, Mr. Chairman, the last sentence of page 5 is really where it first comes into play. The second part of the sentence, "or as land that could be transferred by deed under 120(h)(3) again," I just want to make sure that when that's rewritten, I assume it would be because 120(h)(3) says sale or other transfers. We don't want to make it look like 120(h)(3) is limited to transfers by deed only.

COLONEL HOURCLE: My recollection is --

MS. SHIELDS: It's (h)(1), I think, that talks about --

COLONEL HOURCLE: -- (h)(1) is sale or other transfer.

MR. RUNKEL: (h)(3) does not have that term?

MS. SHIELDS: (h)(3) is talking about the

contents of the deeds which -- so, we're talking about sales in (3). We're using it to cover more transactions in (h)(1).

CHAIRMAN BACA: Okay. Well, let's move on. Any other comments on page 5?

MR. GOODHOPE: We have some recommended language for a new paragraph after the second paragraph. I think what it does is collect in one place thoughts or conditions spread throughout the report. It's really nothing new, it just kind of puts in one spot what the conditions of transfer should be.

CHAIRMAN BACA: Okay. Can we all go to what you're looking at?

MR. GOODHOPE: Yes. It's page 6 of our --

MS. SHIELDS: Page 3 of your --

MR. GOODHOPE: Page 8 of our suggested amendments.

CHAIRMAN BACA: Okay. Page 8 of the larger handout.

MS. SHIELDS: This is no longer with us? We now have this?

MR. GOODHOPE: Yes. I think we just passed those out. We don't have a hidden agenda and two different formats.

MS. SHIELDS: The states have unlimited money, you know. They've got these Xerox machines that run on full tilt.

CHAIRMAN BACA: Okay. Do you want to read your amendment and explain it?

MR. GOODHOPE: It's rather lengthy. Should I go ahead and read it?

CHAIRMAN BACA: Yes, why don't you read it.

MR. GOODHOPE: "The task force recommends that tracts classified as areas of concern not be transferred unless all the following conditions are met."

CHAIRMAN BACA: If you have an acetate, why don't you put it up.

MR. GOODHOPE: Well, there is the language that we're suggesting, along with its rationale.

MR. GRAY: Where do you propose that?

MR. GOODHOPE: It should go after

paragraph 2 of page 5. Again, it just collects in one place things that are spread throughout the report.

MR. PENDERGRASS: I have a comment that I'm not sure that that exactly is where it goes. I think the overview was trying to give a sense of what issues -- what the concerns were and what the issues that the task force was looking at and the specifics about recommendations which this is were later in the report under the sections, "Uncontaminated Land" and "Contaminated Land." I think that it probably relates to a couple of places later on, but I'm not sure that it goes in the overview. I don't think the overview talks in terms of recommendations.

CHAIRMAN BACA: This really gets to recommendations, solutions.

MR. PENDERGRASS: So, I think that it probably belongs another place and I have been trying to note where those were. I think it's pages 9 and 13.

MR. GOODHOPE: Well, I don't care where it goes, I think. All we need is just for clarification. I would defer to the staff --

CHAIRMAN BACA: Let's pick it up when we get to the solutions.

MS. SHIELDS: I think it does restate things that are scattered throughout. So, I don't have any objection to its content.

MR. GOODHOPE: If it's worth saying once, it's worth saying two or three times.

CHAIRMAN BACA: Any other comments on page 5?

MR. GOODHOPE: No.

CHAIRMAN BACA: Brian?

MR. RUNKEL: Again, we can discuss it later since this goes to a criteria from the AG's. We'll be discussing recommendations, but there are a couple of additional criteria that we would add to that. I think what they have here is very good and we would just have a couple more. One would be that the states and the public be adequately notified. We pointed that out in previous comments.

Also, we'd like to have some kind of provision in there regarding indemnification. I guess this is one of the areas getting into recommendations

for statutory changes. As you pointed out, there's concern about that, although I note that Ms. Shields is wondering where that's coming from. So, we need to have a further discussion of indemnification.

CHAIRMAN BACA: Well, okay, but let's get to the overview on 5.

MR. GRAY: One further question, Mr. Chairman. In the last sentence where it says, "This report refers to these areas as cleaned up contaminated land or land that can be transferred by deed." Should we have, "transferred by deed with appropriate covenants," in there?

CHAIRMAN BACA: We could probably buy that. Any objections?

MR. GRAY: I think that's what the statute requires.

COLONEL HOURCLE: How about "any appropriate covenants?"

MR. GRAY: That's fine. I'm easy.

CHAIRMAN BACA: Let's make sure our recorder picked that up. Okay.

Any other comments on page 5 overview?

Okay. Let's move onto page 6. Any comments on 6?

MR. DAVIDSON: I've got one.

CHAIRMAN BACA: Gordon?

MR. DAVIDSON: The first sentence, third paragraph. "Contamination on many bases is limited to relatively small discreet areas." Some of the comments we received back from our regions was that that may not be totally accurate, that indeed many bases also include large areas of contamination. So, what I'd like to suggest is to put in some language that reflects that there is a range here, contamination of DoD bases ranges from being widespread to being limited to relatively small, discreet areas. I think that's more accurate from our view of what we have out there.

CHAIRMAN BACA: Let's resolve this. Any comments? Any problems? Counselor?

COLONEL HOURCLE: That's factual. There's so many differences in size of installations. You can have large contamination in some contexts but in the context of a 25 to 50 mile installation it still may be fairly small by comparison. I think the range is

an appropriate concept.

CHAIRMAN BACA: I agree.

Donald?

MR. GRAY: Yes. The last sentence in paragraph 2 causes me some concern, Mr. Chairman. It says, "If higher levels of residual contamination are allowed after cleanup because the planned use is industrial, for example, measures must be taken to ensure that future changes in land use do not expose the public to unacceptable risk."

I'm not aware that there's anything in the statute or in the National Contingency Plan that allows land use restrictions for industrial or other purposes to be a part -- to determine the cleanup level. The statute requires that they be permanent remedies to the maximum extent possible, and I think this implies an acceptance of the idea that land use restrictions can be a part of the cleanup remedy, which I'm not sure has been established. I would like to see that sentence deleted.

MR. GOODHOPE: I would agree. I think that was a good suggestion.

MR. DAVIDSON: We have also some concerns with the drafting of this paragraph with respect to the applicability of land use as it applies to CERCLA cleanup. I don't have a specific proposal, but maybe discuss what this means.

COLONEL HOURCLE: Caution the task force to think CERCLA, RCRA corrective action and state law as we try to grope through this morass because there are a whole bunch of different cleanup statutes which could pertain to this area.

MR. ETHRIDGE: This is the second paragraph that -- revisions of Mr. Goodhope and Mr. Edwards and it also addresses the same paragraph that Mr. Gray was talking about.

CHAIRMAN BACA: Can everybody see that?

MR. ETHRIDGE: It's sort of hard to show because it's on two different slides here. The line that you're talking about is at the end of -- right there, "If higher levels of residual contamination." They've crossed it out and added --

MR. GRAY: Well, the last part of that does what I proposed to do, so I'm satisfied.

MR. GOODHOPE: We would agree with you.

MR. ETHRIDGE: So they got it, "In order to assure compliance with applicable law, maintain public confidence, avoid the potential for future liability, DoD should plan on full compliance with all ARAR concerns," Section 121 of CERCLA. They've deleted that last sentence in paragraph 2 on page 9. Excuse me, page 6. Yes, page 6.

MR. GOODHOPE: There is also a deletion on the prospective land uses and cleanup levels which are related.

CHAIRMAN BACA: I think "assure" should probably be "ensure."

Okay. Discussion, counselors?

MR. PENDERGRASS: Well, I think to deal the sentence, "Prospective land uses and cleanup levels related," I do think they are related. For instance, if you have a cleanup of a municipal-type landfill where the cleanup is a cap, the land use will be determined by what the cleanup is. So, the land uses are related to the cleanups.

MS. SHIELDS: But I think, Jay, in the

rationale that they have, they've sort of explained that, that it will be in the context of the agreement that is reached among the agencies. I don't have any problem with this.

CHAIRMAN BACA: I think it still captures the idea that the ultimate use will determine the cleanup standard.

MR. GRAY: I think, Mr. Chairman, it's important to -- I don't have any problem with the idea that future use of the land may be restricted by the level of cleanup and the particular remedy selected, but I'm not sure that I would agree with the reverse -- it should be the level of cleanup that determines the future use, not the future use determining the level of cleanup.

MR. DAVIDSON: The EPA supports Mr. Gray's comments on that. It's an important distinction to make.

CHAIRMAN BACA: Let's resolve this issue. Can we accept the Texas amendment?

COLONEL HOURCLE: Let me suggest 121 does get a little bit tricky, that perhaps the pursuant to

121, that last line, ARAR is pursuant to Section 121 be changed to in accordance with 121. I think the concept of planning to ARARs, I'm comfortable with it, realizing that, in fact, it could go in different directions depending on whether we're cleaning up under state law or RCRA. But I think as a planning concept, it's probably a prudent planning concept.

CHAIRMAN BACA: Okay. Hearing no objection?

MR. PENDERGRASS: I have one other suggestion, that the first sentence of the change however -- it says, "However, CERCLA 121(d)(2) borrows." I would suggest changing "borrows" to "incorporates cleanup standards."

CHAIRMAN BACA: "Borrows" to "incorporates"?

MR. PENDERGRASS: Yes. And then that, "State law is more stringent than the" instead of federal standards, I think it should be CERCLA standards because it's incorporating other federal standards, for instance from RCRA or something and state law that is more stringent then -- it's CERCLA

standards, whatever, has been brought in through CERCLA.

MS. SHIELDS: I'm not sure that's right.

MR. PENDERGRASS: No?

MS. SHIELDS: For the state law to overcome the standard that's in the federal law, it has to be more stringent. The federal law sets the floor.

MR. PENDERGRASS: Right. And I'm just saying that you find it through CERCLA.

MS. SHIELDS: You find it through CERCLA?

MR. PENDERGRASS: Yes.

MS. SHIELDS: That's not the way this is stated. See, I think the way this is stated just states what state laws we would defer to now and they have to be more stringent than the underlying federal statute, which would not be CERCLA, it would be RCRA or the Clean Water Act or something else.

MR. EDWARDS: I have the statute here. May I, Mr. Chairman?

CHAIRMAN BACA: Go ahead.

MR. EDWARDS: It says, "Any promulgated

standard, requirement or criteria or limitation under a state environment or facility siting law that is more stringent than any federal standard."

MS. SHIELDS: Yes. I think this is a better way.

CHAIRMAN BACA: Okay. We'll stick to "federal". How about the inclusion "borrows to incorporate."

MS. SHIELDS: No, He's changing the word "borrows" to the word "incorporate."

CHAIRMAN BACA: Okay. Any problem with that change?

COLONEL HOURCLE: I think my question -- not to beat a dead horse, but I got confused by the term in that, "However, CERCLA 121(d) incorporates cleanup standards from other applicable federal law and state law," and then we go back to federal standards. I think the dual reference to federal is somewhat confusing. Having heard the provision again, I guess it incorporates state law. What we might do is drop the first federal or modify the second federal by saying federal CERCLA standards to direct the

readers that that's what we're trying to go to.

Does that clarify or confuse?

MR. GOODHOPE: Looking at the statute, I think you need to use both, keep both in.

COLONEL HOURCLE: Okay. In that case, would it be acceptable to say it's more stringent than federal CERCLA standards because we'll be incorporating other things which may not be normally CERCLA-like. Interior always says that endangered species isn't an ARAR, it's a separate statute, things like that.

MS. SHIELDS: I'm missing this. The problem is CERCLA doesn't have standards. CERCLA borrows standards from other sources, namely other federal laws and state laws that are more stringent. So, I think the way Sam has got it is right.

MR. GRAY: Well, I don't think it would hurt to add the word "relevant" in front of this federal standards the second time --

MS. SHIELDS: No, that's all right.

MR. GRAY: -- because then it wouldn't matter where they came from.

MS. SHIELDS: Does that give you some ease?

COLONEL HOURCLE: I think I was confused to the point of getting you all confused.

MS. SHIELDS: You did it.

CHAIRMAN BACA: Okay.

MR. ETHRIDGE: So, for the record, is "incorporates" still in there, "incorporates cleanup standards?"

MS. SHIELDS: Incorporates cleanup standards from other --

MR. ETHRIDGE: But there's no change on federal?

MS. SHIELDS: -- applicable federal law and state law that is more -- are we leaving it the way that it was except we're changing the word "borrows" to the word "incorporates?"

CHAIRMAN BACA: Somebody wanted "relevant federal standards."

MR. PENDERGRASS: We didn't agree.

MR. GRAY: Do you have a problem with putting relevant in there?

COLONEL HOURCLE: I think I heard the concern from this side of the table and I was still trying to get unconfused.

CHAIRMAN BACA: I don't have a problem with "relevant".

MR. GRAY: Because we're saying that that incorporates some other places in CERCLA.

CHAIRMAN BACA: Okay. Then we'll accept Texas --

COLONEL HOURCLE: We'll insert "relevant" before "federal standards."

MR. GRAY: That would be fine too.

CHAIRMAN BACA: Hold it, hold it. You need to recognize the chair. Our reporter is a little bit confused.

MS. SHIELDS: Why?

CHAIRMAN BACA: Here are the changes. Okay? "However, CERCLA 121(d)(2) incorporates cleanup standards from other applicable federal laws and state law that is more stringent than relevant federal standards."

Reporter, did you also get the change, "in

order to ensure" at the bottom?

THE COURT REPORTER: Would you mind repeating it, just to be certain?

CHAIRMAN BACA: Okay. We have a spelling change. Forth line from the bottom. "In order to ensure," instead of assure.

Okay. Let's to back to page 6. Any other comments?

MR. DAVIDSON: For the record, could I get a reading on the changes to the first line in the third paragraph on my point earlier about it was a range.

MR. ETHRIDGE: "Contamination on many bases ranges from widespread areas to relatively small discreet areas."

CHAIRMAN BACA: Does that do it for you?

MR. DAVIDSON: It does it for me.

CHAIRMAN BACA: Okay. Good. Let's go on to page 7. Any comments on page 7?

MS. SHIELDS: We just had a question and somebody else, I think, wanted to bring it up -- was that you, Brian, the indemnification stuff on page 7?

I just am confused by it. That was sort of news to me. "Since agencies cannot indemnify a purchaser without specific legislative authorization."

CHAIRMAN BACA: Jay?

MS. SHIELDS: Do you think there ought to be a cite or something if that's accurate?

COLONEL HOURCLE: We have no independent-- we have two areas that are related to indemnification which I guess you could call a kind of indemnification. That is, of course, there's the covenant in 120(h)(3) is statutory authority to go back and do any addition or remediation that might be required. That might be considered in the context of indemnification. Then individuals who are harmed in their person or property could also file a claim against the government under the Federal Court Claims Act which is in the nature of an indemnification. But the fiscal law principle would be that we wouldn't have money available to pay a claim unless we had a statutory authority to offer this up. It's the areas we get into with contractors and indemnification all the time. So, at this point, other than what we could

do is just --

MS. SHIELDS: Yes, I'm for it. I just wasn't sure if it was true.

CHAIRMAN BACA: Does that clarify the confusion?

MS. SHIELDS: I don't know. I guess if we can't cite to some authority for that, maybe we just ought to leave it out.

COLONEL HOURCLE: The Anti-Deficiency Act is absent the specific statutory authority to provide monies for these purposes. We can't --

MS. SHIELDS: But it requires you --

COLONEL HOURCLE: That would be a statutory authority to provide monies for the purpose of additional remediation. Federal Torte Claims Act would be statutory authority to --

MS. SHIELDS: Yes, but don't you think specific legislative authorization sounds like more than what's in (h)(3)?

MR. RUNKEL: I think, Mr. Chairman, we clearly have. At the DOJ they're sort of -- no offense to the legal experts for the government on

these kinds of issues. So, I think we'd better clarify this and make it clear that since DoD or since federal agencies believe that -- rather than the task force. I don't think the states would buy off on this statement. I feel very uncomfortable with that conclusionary statement without better legal --

MS. SHIELDS: I don't know that we need it in there, Larry. I guess my --

COLONEL HOURCLE: Okay.

MS. SHIELDS: I think we can just --

MR. GRAY: Is the proposal to delete the whole thing?

MS. SHIELDS: Delete the whole --

CHAIRMAN BACA: We are deleting the last sentence on paragraph 2.

MR. RUNKEL: And then, Mr. Chairman, I would propose that we add a sentence referring to -- and I know this will open some discussion, but we would like to see a recommendation that the task force ask Congress or recommend that Congress look into the issue of indemnification nationwide similar to what was done at Pease, they look into the issue of doing

that, of allowing DoD to provide for indemnification.

CHAIRMAN BACA: Okay. Can we handle that under issues at the end that need to be advanced?

MR. RUNKEL: Well, I'm afraid we might run out of time. I'd really like to have some discussion on that right now because --

CHAIRMAN BACA: Well, we won't run out of time. I'm going to sit here until we get this report finished. If it's midnight, I'll still be here.

MR. RUNKEL: Well, I think that we can agree not to talk about it right here in the overview, but at some point in terms of the criteria, we do believe it is an additional criteria. So, we would want to have it reflected. When we get to the criteria that NAG has proposed, we want to add two more. One is public notice and the second is indemnification. So, if we could do it that way.

CHAIRMAN BACA: Okay. Keep the thought on the issues that perhaps need to be advanced.

Don?

MR. GRAY: Yes. The second sentence in the first paragraph which begins, "Restrictions on use

are effective if they are made a part of the deed and run with the land." First of all, I think it should read "should be" instead of "are." I don't think we're in a position to conclude that they are.

CHAIRMAN BACA: I'm sorry, Don, where are you?

MR. GRAY: The second sentence in the first paragraph on page 7.

CHAIRMAN BACA: Yes?

MR. GRAY: It says -- maybe it's the third. Third sentence. "Restrictions on use are effective if they are made a part of the deed and run with the land." I think, first of all, it should read "should be" rather than "are," since I don't think we're in a position to conclude that they are effective. I am not sure that something else isn't needed. It's something the task force hasn't discussed, but it seems to me that if you're talking about a situation where a hazardous substance is left in place after a cleanup and you're going to rely on a deed restriction, that there should be another requirement, and that is that that promptly be marked

in some permanent way because nobody goes and looks at the deed before they start excavating, for example.

It's something that, it seems to me, whenever you have a situation where you're going to leave hazardous substances in place and, say, have a cap remedy and you're going to put deed restrictions on excavations and well drilling and those sorts of things, that that property needs to be marked in some permanent way so that you don't have to go and look at the deed to see if there is a restriction on that particular site before they start with the backhoe.

CHAIRMAN BACA: Comments?

MR. GOODHOPE: Not that we are coordinating, but we do have some suggested language.

MR. ETHRIDGE: This is too good.

CHAIRMAN BACA: Page 11 of the Texas amendments?

MR. ETHRIDGE: Since this is deleting "they are" and adding some additional language. The additional language, "They are made a part of a final order of the administrative agency or court having jurisdiction over hazardous substances on the site.

Restrictions also should be" -- delete "they are" and keep the last part."

CHAIRMAN BACA: Discussion on the Texas proposal?

COLONEL HOURCLE: My technical concern would be that it may not be true if the order doesn't particularly provide that it's going to run to follow-on purchasers and that's why we were focusing on the --

MS. SHIELDS: Well, that's why you put it in the deed.

COLONEL HOURCLE: That's why you put it in the deed.

MS. SHIELDS: But he's kept it in the deed as well.

COLONEL HOURCLE: Yes. I think any order or something like that would also have to provide the person being ordered were included in any deed transfer. So, I just wanted to make sure that the two things are connected and not viewed as you can do either this or this. To make the order effective, it's going to have to run with the deed.

With regard to the permanent marking solution, I'm not sure how that practically could pertain and I thought I'd put Mr. Jones on the spot from the GSA perspective as they do a number of land transfers. I don't know of any bronze plaques that say, "Something is under here."

MR. JONES: No, we don't do that. Mainly we rely on restrictions that are in the deed and monitor it, but there's no bronze plaque. Hamilton Air Force Base, for example, where you have the landfill that's going to be covered, you won't be able to develop on it. It will be restricted, but there's no sign.

COLONEL HOURCLE: I think there is a concept that putting in the deed is one thing. Making sure that the deed is structured so that there is a ride and an oversight capability of the nature nothing goes wrong at the site is something else. That may be a concept that's worth exploring.

MR. GRAY: When you pass property from the hands of the government by deed, the only handle you're going to have, I think, is what you get into

the deed of transfer. I'd like to hear from EPA as to what they normally do at NPL sites where an in-place type remedy involving capping is used. Do you, as a part of those remedies, include any kind of marking regarding future activities at that site?

MR. DAVIDSON: That's a good question, Don. I know under RCRA -- I'll get to CERCLA in a second. Under RCRA we would have in deed some sort of restrictions place in there. Obviously whether there's any physical sign, I'm not really sure. I'm not sure under CERCLA --

MS. SHIELDS: My staff attorney, Mark Haag, whom I should have introduced earlier, suggests we put up a sign that says, "Abandon Hope."

CHAIRMAN BACA: Let's go back to the Texas language. Does anybody have any problem with the views in it? Brian?

MR. RUNKEL: Mr. Chairman, if I could ask a question of Mr. Goodhope and Mr. Edwards.

When is the final order imposed? I know that in Texas you kind of have a process that may be different than what's allowed in other states. Could

you clarify when that happens?

MR. GOODHOPE: I defer to Mr. Edwards.

MR. EDWARDS: Mr. Chairman, under Texas law, and of course the law of different states will be different, under Texas law there is a final order under the state statute after the cleanup is completed, when all PRPs have been identified, and when the sharing of costs, cost recovery, has been determined, only then do you get the final order.

COLONEL HOURCLE: Let me suggest, in the spirit of Mr. Gray's earlier comment, that the "are" may presume too much and maybe it's should be a "should be" or "can be."

MR. ETHRIDGE: This is after use?

COLONEL HOURCLE: Yes, are effective.

MR. ETHRIDGE: Should be effective?

COLONEL HOURCLE: Yes, or can be.

CHAIRMAN BACA: "Should be"?

MS. SHIELDS: Why wouldn't you just say, "Restrictions should be made a part of the final order." What's with the effective stuff anyway?

CHAIRMAN BACA: Yes, I agree.

MR. PENDERGRASS: I think we've gotten away from the concept that was there originally. It was actually the negative of restrictions on use are not effective if they're not a part of the deed and we tried to make it a positive that they're effective if they're made a part of the deed and run with the land. Now we're talking about a two part thing of--MR. GRAY: What you just said, "Restrictions on use, if they are to be effective, must be made a part of the final order."

MS. SHIELDS: It is in the nature of a recommendation now. I think maybe we're in a different place to make the point. We are suggesting that you ought to put this stuff both in whatever is imposing the cleanup and in what is transferring the property.

MR. PENDERGRASS: Should we preface this with, "The task force recommendations that restrictions on use should be made a part?"

CHAIRMAN BACA: Yes. Let's buy that.

MR. RUNKEL: Mr. Chairman, we'd also like to see something reflected in this language to deal

with non-deed situations, like a lease or licenses that are not recorded, and get in a situation where you have some restrictions built into it in terms of the transfer. But again, you're not going to have any possibility when you get a new tenant of being able to determine that a transfer is taking place. We need to reinforce that.

CHAIRMAN BACA: Do you have a suggestion?

MR. RUNKEL: Well, I would say just anywhere in this paragraph where it talks about a deed situation, "Restrictions on use are effective if they are made a part of the deed or other --"

MS. SHIELDS: Transfer documents?

MR. RUNKEL: Transfer document or other vehicle of transfer, something like that.

MS. SHIELDS: They wouldn't run with the land, so if you're going to have them run with the land, you'd better hook them to the deed.

MR. RUNKEL: Yes, hook that back to the deed only.

CHAIRMAN BACA: Okay. As the recorder, do you understand the changes?

MS. SHIELDS: Let me suggest this reading for the recorder. "Restrictions should also be made a part of the transfer document or the deed and run with the land so that later owners or users cannot extinguish or ignore them."

CHAIRMAN BACA: Okay. We'll accept that.

Any other comments on page 7?

MAJOR GENERAL OFFRINGA: Is this a good point to raise the contaminated/uncontaminated issue? I know the State of California has the same concern in terms of definition and whether we're going to include that in the glossary or whatever we're going to add.

CHAIRMAN BACA: Okay. Those are obviously terms that need to be defined. Okay. That will be part of the glossary.

MR. RUNKEL: Can we have a chance to comment on that? I understand you want to get this report as final today, but just on that particular--the particular definitions, like next week?

CHAIRMAN BACA: Yes, we'll ask for comments on the glossary.

COLONEL HOURCLE: Is my recollection

correct that there's some -- I think in your letter, Brian, that there's something we can work from as the difference between uncontaminated and contaminated?

MR. RUNKEL: I don't know in terms of the actual definitions of contaminated, but we do have some criteria for determining that. Is that what you're referring to, for determining the extent of contamination?

COLONEL HOURCLE: Where we might go then with a definition is if we adopt criteria, land which is determined to not be contaminated pursuant to the criteria would be deemed uncontaminated and land which isn't would be deemed contaminated. The definition would be by application of the criteria, is where we go after we decide to pick up the criteria. If we don't pick up the criteria, please come back to this issue because then we've got another problem.

MR. RUNKEL: Well, I guess the only concern that we would have with that is, again, what we're suggesting is some criteria for looking at a process for determining contamination, but the actual fact of contamination, of course, can change. As long

as there's the ability -- you see what I'm saying? In other words, if later on further contamination is found, you've got to allow for that in the definition. You can't exclude that. It's not done at one place in time. If you apply a criteria, you might exclude further discovery of contamination, future discovery of contamination.

COLONEL HOURCLE: I think the way we're set up in the report though, when you decide to transfer land, you would make a judgment about whether it's contaminated or not contaminated. If you determined it was not contaminated, then you could transfer it by deed. So, in some sense, there isn't a temporal point at which you've got to make that decision.

MR. RUNKEL: And all we're saying is that we've got to have the ability to go back in and be able to pull DoD back in if there's future contamination found. We don't want to get caught by this definition. See what I'm saying? We don't want to have that precluded by a definition that applies only one place in time.

COLONEL HOURCLE: So maybe for the purposes of our definition, we'll also say, if it's in the criteria at the time you're doing it. You could caveat it and say, this is not to say that at some future time the land might change from uncontaminated to contaminated.

COLONEL HOURCLE: Something like that would be good.

MR. JONES: A general comment. Again, we've noted three or four times there are terms used that I think cause it to appear as though it were equivocating. For example, at the top of page 7, "Restrictions on use of cleaned up contaminated land may," the term "may" is throughout all the time. I think we ought to be a little bit more focused. Is that "should" or "will" or something other than "may"? At the bottom of the page, page 6, we use the term "may." It says, "You may have to have restrictions, you may not." Am I overstating something? I don't know.

MR. PENDERGRASS: I guess we were assuming that there are some cleanup technologies that would

allow you to have cleaned up contaminated land where there's a permanent cleanup that is completely satisfactory and there wouldn't be any need for restrictions on use, so that they would only be necessary in some instances.

MR. JONES: Do you feel comfortable with that?

MR. DAVIDSON: I think Mr. Pendergrass made a good point. The CERCLA statute has a strong bias towards permanence. That means that the word "may," I think, is more appropriate there to infer that land use restrictions will always be necessary.

MR. JONES: Okay.

CHAIRMAN BACA: Okay. Any more comments on 7?

MR. GRAY: Just a question, Mr. Chairman. In the first paragraph under uncontaminated land, I'm just wondering why this business about "was restored, released or disposed of" is put in brackets. Is this supposed to be a direct quotation from the statute or not?

CHAIRMAN BACA: Counselor?

MR. PENDERGRASS: Yes. That was a direct quote and we were trying to -- the language in the statute is awkward. We were trying to avoid the awkwardness of it. The part that's in brackets is not exactly the language because the statutory language was stored for one year or more.

MS. SHIELDS: Known to have been released or disposed of.

MR. PENDERGRASS: Known to have been released or disposed of. It was just an attempt to shorten things and avoid the awkwardness.

CHAIRMAN BACA: Okay. It is in the statute.

MR. GRAY: I just don't know what the basis is for the statement that it had been subject to varying interpretations. This looks fairly clear. Could there have been litigation or something?

MR. PENDERGRASS: No, there hasn't been any litigation over it and I think it's partly because there was a lot of discussion here about what the meaning of them was.

MR. GRAY: Are you talking about transfer

of such property, not -- it's pretty clear what stored, released or disposed of means, isn't it?

COLONEL HOURCLE: That's correct. The question is transfer and what that brings in. Now, we have had some differences, I think, as we've dealt with the EPA regions. I'm not sure if EPA has now a definite position on that. We've certainly have a lot of sporty discussion here about what it means.

MR. GRAY: I don't have any problem with it if you're just talking about the term "transfer of such property."

COLONEL HOURCLE: I think the "stored, released and disposed of" in the statute does give you pretty clear guidance about what that means.

MR. GRAY: It isn't clear -- I mean saying they have been subject to varying interpretations seems to imply the whole phrase.

MS. SHIELDS: Phrases is the subject of the -- what does that mean?

MR. PENDERGRASS: Well, actually, at the time that it was written, the litigation on EPA's notice requirement was still ongoing and there was

certainly varying interpretations about --

CHAIRMAN BACA: When notice was required?

MR. PENDERGRASS: Yes, which relates to the phrase, "any real property owned by the United States on which."

MS. SHIELDS: I see.

MR. PENDERGRASS: At that time it was unclear whether the notice of requirements were going to apply to everything. We can take the first phrase out, I think.

MS. SHIELDS: What if we say, "have been subject to scrutiny," period, because "with respect to this question," doesn't mean anything to me. I don't know what question you're talking about. What about that?

CHAIRMAN BACA: Subject to scrutiny?

MS. SHIELDS: Have been subject to scrutiny. Don, is that --

MR. GRAY: It's all right with me.

MS. SHIELDS: I think it just states --

CHAIRMAN BACA: Okay. Good. Let's move on to page 8. We are 21 percent of the way through.

At this rate it's going to take us six hours.

Any comments?

MR. RUNKEL: Yes, Mr. Chairman. The second sentence on page 8 where it says, "DoD, EPA and a state regulatory agency should develop a process." We believe that that statement should be applied throughout the report. There are places in the report where it talks about DoD only developing criteria and that needs to be consistent throughout.

CHAIRMAN BACA: You're right. I picked this up too. You're right.

MR. GRAY: There's also a typo.

MS. SHIELDS: Yes, is it plural or singular?

MR. GRAY: It's not a state agency.

MR. RUNKEL: It's plural.

MS. SHIELDS: Plural. So take out "a."

MR. RUNKEL: And we do know that you did go back and catch a lot of the areas that we had pointed out before. We appreciate that.

CHAIRMAN BACA: Any other comments?

COLONEL HOURCLE: Staff had a concern with

regard to -- on the first paragraph on page 8, the phrase the fourth line from the bottom includes statistically valid parameters. We aren't sure where that came from in retrospect.

MS. SHIELDS: But it sounds so good.

COLONEL HOURCLE: We are talking to some statisticians, that may be a lot more complicated, and we'd recommend striking statistically or using some other word. That gets awfully complicated, as I remember falling asleep during statistics classes.

CHAIRMAN BACA: The process should include sound parameters?

COLONEL HOURCLE: Sound parameters.

MR. DAVIDSON: I think this comes up in one other place in the report as well.

COLONEL HOURCLE: It does, the next paragraph.

MR. GOODHOPE: There's a philosophical problem here. We're trying to prove a negative.

CHAIRMAN BACA: I would like to delete the sentence -- the way I would like to read it is, "The process should include sound parameters," and then

scratch, "for quantity and type of data sufficient parameters to make the determination."

COLONEL HOURCLE: That a parcel is, instead of not contaminated perhaps, something like "that is available for reuse."

MR. GOODHOPE: It's fine.

CHAIRMAN BACA: Okay. If no question --

MR. DAVIDSON: I have one, Mr. Chairman.

CHAIRMAN BACA: Go ahead, Gordon.

MR. DAVIDSON: In some of the comments we received from the region and looking down the pike a little bit, the criteria really is going to be heavily dependent on what he determined to be the quantity and type of data that's necessary. So, I would like to have some reference to that left in because that's really what we're going to be looking at.

CHAIRMAN BACA: Let me offer the following, Gordon. The second paragraph, fourth line where it says, "If strict criteria," strike strict and put "sound or definitive criteria." Does that help you?

MR. DAVIDSON: Okay. Run that by me

again.

CHAIRMAN BACA: The fourth sentence, second paragraph -- fourth line, second paragraph where it says, "Section 120(h)(3), if strict," instead of strict say "sound or definitive criteria." That really follows the correction above.

COLONEL HOURCLE: And I guess with regard to the concern of the Regions, this concept is tied back to doing it in conjunction with EPA and the states.

CHAIRMAN BACA: Yes, right.

COLONEL HOURCLE: And we look at that as a way of ensuring that the valid concerns about the nature of this criteria and level of detail is sound.

MR. GRAY: On that same thing, Mr. Chairman, I think we need to say after the word "disposed of or released on," I think we need to add, "or are likely to migrate to a particular parcel."

CHAIRMAN BACA: I'm sorry, you're going to have to tell me where you are.

MR. GRAY: The last sentence says, "Such transfers will not contravene the policies underlying

Section 120(h)(3) if definitive criteria are used to determine that no hazardous substances were stored, disposed of or released on," and I think we need to insert, "or are likely to migrate to," because we're talking about these uncontaminated parcels being transferred. It's possible you could have one of those transfers where no hazardous substances have been stored, disposed of or released to, but contamination might migrate there from an adjacent contaminated site.

COLONEL HOURCLE: Good point. It goes back to the buffer zone concept. We don't want anybody transferring land that's likely to become a problem.

CHAIRMAN BACA: Okay. Any other comments on page 8?

MR. GOODHOPE: You've got the "must?"

MR. GRAY: Yes.

MR. GOODHOPE: Yes, we do have suggestions for the second paragraph.

CHAIRMAN BACA: Okay.

MS. SHIELDS: We're going to whip through

that contracting chapter though. I haven't read it yet.

MR. PENDERGRASS: Excuse me. Sam, you said something about the "must?" I want to go back to that because I want to clarify. The last sentence in the first paragraph it says, "A buffer zone between uncontaminated parcels being transferred in any area of contaminated groundwater or other methods," and there's a missing -- I think when we had drafted it, we had had "may" in there. I just want to ask, is it the task force's sense that something like this has to be used every time you're transferring an uncontaminated area?

CHAIRMAN BACA: I agree it doesn't have to be in every situation.

MR. GOODHOPE: It doesn't.

MS. SHIELDS: I don't know that it has to by law. I think DoD is saying it would normally be a prudent thing to do. But I don't know that any of us even collectively are smart enough to know that.

MR. PENDERGRASS: No, I don't. This is purely -- I'm asking because there's a difference in

the meaning of words. But I don't have a situation that I'm thinking about or not. I'm just asking is it something that would be every time or not? I just wanted to get clarification.

CHAIRMAN BACA: We have situations where it wouldn't be necessary just because of where that land is located.

MS. SHIELDS: "Should normally be used," or "should usually be used?"

MR. PENDERGRASS: Okay.

MR. GOODHOPE: In the spirit of cooperation.

CHAIRMAN BACA: Some discretion.

Any other comments on 8?

MR. RUNKEL: Yes. Mr. Chairman, and this could be in the form of a footnote. As an example, in the first paragraph when you go through this process or some criteria for determining contamination or property that's being uncontaminated, we had some discussions earlier this week with EPA Region IX and in our letter to you of yesterday we have an example of a process that could be used to determine property

that's uncontaminated. Region IX and our folks were in agreement on that. Again, this is an example. It's not meant to supercede what you have here, but we could offer and put it in the footnote as a reference.

You'll see in our letter page 2, we have specifically laid out the contents of a clean parcel assessment document. This is something that we're going to continue to work with Region IX on and the EPA headquarters, but offer it as an example of what could be done as a process. Page 2 of the letter to you.

CHAIRMAN BACA: Okay. I can buy that.

MS. SHIELDS: If I can go back for a minute, I'm reluctant to aid my colleagues here, but it does strike some of us that maybe you don't want to restrict that buffer zone concept to just where there's contaminated groundwater. What you mean to do, I think, is suggest a buffer zone between contaminated and uncontaminated places. So, I'd suggest that you say, "In any contaminated area." and leave out groundwater. I'll call in that chip later

on.

CHAIRMAN BACA: Very good. Okay. Can we move on?

MR. DAVIDSON: I just want to make sure I understand where Mr. Runkel is coming from.

MR. RUNKEL: I think a footnote would be before the last sentence of the first paragraph. It says, "The process should include," it talks about "in developing this process, DoD, EPA and the states should investigate practices and criteria are being developed," and then we would offer on page 2 -- we kind of go through a potential process.

MS. SHIELDS: Can we read this before we agree to put it in the report?

MR. RUNKEL: Well, it would be used as an example. It wouldn't necessarily say that this should be applied to the --

MS. SHIELDS: No, I'm sure it's brilliant.

CHAIRMAN BACA: Do you want to take time to read it?

MS. SHIELDS: Well, maybe I can read it at lunch or something and if I have any problems --

MR. ETHRIDGE: Would that include that whole section on contaminated land?

MR. RUNKEL: Well, I think it gets into that, but I think the meat of what we're proposing starts with the paragraph, "In order to make a determination."

CHAIRMAN BACA: Okay.

MR. JONES: Mr. Chairman, one question. In these instances where it states that DoD, EPA and others should do something, what will activate what will be done and when, or is this information on what will happen as a result of these --

CHAIRMAN BACA: Well, it's going to be important that these entities do that.

MS. SHIELDS: This is an advisory report, which I'm assuming will be circulated to all the --

MR. JONES: And so these things will ultimately occur. Is that what we're saying?

CHAIRMAN BACA: Yes.

MR. RUNKEL: Mr. Chairman, I do have one additional thing to include in the process and that is that --

CHAIRMAN BACA: In your reference document?

MR. RUNKEL: Well, no. Actually it would be in the paragraph that's already in the report. That would be adding in the need for public input in the determination of whether a property is contaminated or uncontaminated, that public input should always be considered.

CHAIRMAN BACA: I'm not sure where you are.

MS. SHIELDS: Up here at the top of the page.

MR. RUNKEL: Well, after the words, "including cleanups of other sites," if you'd just add another semicolon and another criterion, we could say, "Public notification and participation is required to complete the process for determining whether a certain parcel of base property is considered uncontaminated for the purpose of redevelopment and reuse."

MS. SHIELDS: I see. You're adding this paragraph toward the end of your page 2 down here about midway in that first paragraph.

MR. RUNKEL: Before the sentence, "In developing this process." Or maybe it should be after that sentence. Somewhere in there, either at the end of the sentence before --

MS. SHIELDS: Like make that into a semicolon and add this paragraph.

COLONEL HOURCLE: Staff is confused, I guess, about what the California suggestion entails regarding California's letter on page 2 of the complete parcel assessment document. Just putting on my base closure hat, I'm always concerned about things that add delay to the system. Just for the record, I assume that what you mean is that what could go into such a clean parcel assessment document would include that information which is already in existence and hopefully we don't want to duplicate data gathering that may already been available through the PA/SI or other documents that have been done to date.

MR. RUNKEL: One way or the other, we just want to make sure that public input is taken into account. So, if that's provided within the PA/SI, that's fine.

COLONEL HOURCLE: The other thing is are we creating now a fourth process that we're going to have to go through on closing bases and that's fine if you all want to do it, but recall that we've got a CERCLA remedial action study that will be done under state law or CERCLA or RCRA. We've got an environmental impact statement that will be done with regard to the transfer of the land, and we've got a community land use planning study that will be funded by our Office of Economic Assistance.

Now, I guess where I'm trying to get you to is --

MS. SHIELDS: Isn't that enough?

COLONEL HOURCLE: You know, these could be criteria that we might want to build into the NEPA study or the community land use plan.

MR. RUNKEL: Does the community land use plan specifically lay out the reuse of the property and the public has the opportunity to comment on that?

COLONEL HOURCLE: Well, it's a planning process that's intended to do that. It doesn't -- to my way of thinking, I don't think it has any real

requirements right now. Community comes in and says, "We want money to study this," and we give them money to go study what should be done with the community. We've had some friction between communities and the EIS documents already because they say, "Why is it my community land use plan part and parcel of the Defense Department's EIS is maybe the proposed alternative," or whatever.

CHAIRMAN BACA: The point is, there is a process to involve the community.

COLONEL HOURCLE: I guess my staff recommendation, looking at the implementability of this, is that it is a good idea perhaps make reference to this as an attachment of things to be done. Ideally you may want to get integrated in some of the other studies and it really makes sense to me that particularly the public input, if we're going to do -- if we're going to apply NEPA to the process of what's going to happen to the land, that does give you the public input parameter that I think you're seeking in here. And maybe this is some other good things that should be built into the NEPA decision making

document.

So, I'm just thinking about mainly what we want to do is say, "Here's some good ideas. Maybe there's a way to integrate them into some of the existing studies that are being done," or I can go back to OEA and say, "Let's make this a part of the community plan." But exploring whether we want to say we want a separate study.

CHAIRMAN BACA: Let's take Don and then Gordon.

MR. GRAY: Well, Larry, I think you already have established a separate procedure when you start talking about establishing criteria and processes for determining uncontaminated parcels. That will not have been done necessarily for a particular plot of ground back in the PA/SI that was done before or any of that. As I understand what Brian is suggesting, he's just saying that a part of that process for determining that a parcel is uncontaminated should be to provide an opportunity for public input.

Am I interpreting you correctly?

MR. RUNKEL: That's basically it.

COLONEL HOURCLE: And I wasn't focusing, Don, so much on the CERCLA study, because I don't think that fits four square, but in these other two studies, the NEPA about what's the eventual land use, and the -- and we've got to figure out -- we at DoD have to figure out a better way of integrating the NEPA study and also the community reuse plan that we're funding. It seems to me that this kind of information will be particularly valuable to those two studies and should be done maybe coincident with those studies to feed into them because these are things that talk about what the land use, reuse strategy is going to be for that installation. Certainly this is very valid information that should be available for decision makers to decide how they want to use this land.

MR. RUNKEL: We would agree with that, but I think what we're getting at is before you even get to that point, aren't you going to be determining what part of the base is contaminated and what part is uncontaminated? In that process you need public

input.

MR. GRAY: I think there's a way out of this. I think if you just strike the words "for the purpose of redevelopment and reuse," it would be fine because that would take you out of the NEPA process and would just provide that the public would have some opportunity to have input into making the determination that it is, in fact, uncontaminated and can therefore be transferred.

MS. SHIELDS: You could also draw up a footnote that says the task force recognizes this obligation may be accomplished through the NEPA or some other review process.

MR. RUNKEL: That's fine, getting rid of the latter part of that sentence. I thought the whole point here though was that we were saying that the current NEPA and PA/SI process would not make a determination.

MS. SHIELDS: Well, I don't think we know that.

MR. RUNKEL: You don't know that for sure?

MS. SHIELDS: I think it might in some

instances and it might not in others. Isn't that --

MR. RUNKEL: Is that what we're --

COLONEL HOURCLE: A good NEPA analysis should certainly highlight these issues.

MS. SHIELDS: We certainly don't want to build another requirement into this that's already been accomplished. But if it hasn't been accomplished, we want an opportunity for there to be public participation. Right?

MR. RUNKEL: That's fine.

MS. SHIELDS: Say that somehow.

MR. RUNKEL: Thank you.

MR. PENDERGRASS: Where do we want to put this? We understand that we want to include this as a footnote.

MR. ETHRIDGE: After "the parcel is not contaminated," after that sentence?

MR. RUNKEL: We would prefer that it be in the body of the report.

MR. PENDERGRASS: Oh, I see, instead of a footnote.

MR. RUNKEL: There are two separate things

going on here. I want to make sure that public notification and participation is noted separate even from this clean parcel assessment document. The clean parcel assessment document is offered as an example of --

MR. PENDERGRASS: And that we were going to put as a footnote after the sentence that ends, "that land is not contaminated."

COLONEL HOURCLE: That's something you're working on and here are some characteristics of the thing you're working on.

MR. PENDERGRASS: Okay. That's an example. Now, the issue of public participation. How will we decide to handle that?

CHAIRMAN BACA: Where do we want to put that?

MR. RUNKEL: Add it after another semicolon.

MS. SHIELDS: Change the period after "sites," before "in developing," to a semicolon and add it there and then drop a footnote on it that says, "The task force observes that this obligation may be

accomplished through NEPA or another public participation process." That's not very good language, but something to that effect.

CHAIRMAN BACA: Gordon?

MR. DAVIDSON: I just wanted to clarify. There's two issues here. One is whether or not there's going to be maybe a separate process for proving the negative, as Sam pointed out, and whether or not if you do indeed decide that a separate process needs to be set up, what the degree of public participation should be in that process.

Larry, I just want to get back to some of your concerns. Your concerns go beyond public participation and to asking the question of whether or not a separate process would show that there's uncontaminated land that should developed. Is that one of your --

COLONEL HOURCLE: Yes, and related to that is isn't there a way we could take that and integrate it into something that already exists. That's a separation that always bothers me. Another track line to run. So, to the extent that it may be very similar

or may fit into something else we're doing, maybe the recommendation should be we try to build it in there rather than creating some new thing to do.

MR. DAVIDSON: Okay. But you're comfortable with having an example, if there was, put into the document showing -- if the decision was that there should be a separate process established, that this may serve as an example of --

COLONEL HOURCLE: It should be integration of a process like this or there should be a process like this that's running, whether it's separate or integrated. This kind of stuff needs to get done with also, hopefully, the understanding that I think we all have that we're going to try to use existing data to do this to the extent absolutely possible rather than starting to go through more study phase which almost dictates delay.

MR. DAVIDSON: We would totally agree with that.

MR. GRAY: But your language says, "should develop a process, including criteria." I mean are you talking about just developing criteria that could

be used in some other context? You say establish a process. That sounds to me like that's what you're suggesting, establish a process.

COLONEL HOURCLE: Well, it's a process. Hopefully we're going to integrate it into other things, other things like the community land use plan certainly and then that gets built into the NEPA document I think is where we'd like to go in our goal of trying to get as much in one place as possible and have everybody on board with it.

CHAIRMAN BACA: Okay. Let's get back to page 8. Any other comments?

MR. GOODHOPE: We have a suggestion.

CHAIRMAN BACA: Okay. One more suggestion.

MS. SHIELDS: Is this on your page 13?

MR. GOODHOPE: Yes.

COLONEL HOURCLE: One question is why the deletion of independently parceling portions of the base, just for clarity or is there another --

MR. GOODHOPE: I'm not quite sure. Maybe you can explain what that means.

COLONEL HOURCLE: I'm just wondering why you deleted that line. Was it just in the interest of clarity, given the foregoing?

MR. GOODHOPE: We don't understand what that phrase means. So, I guess the answer to your question is yes.

MS. SHIELDS: Well, I think what they've added in, Larry, assumes that there will be cleanup going on on contaminated parcels and so you can transfer the uncontaminated ones before it's all cleaned up. I think that's what you meant as well.

COLONEL HOURCLE: It's starting to set up parceling and I think it still reads that. I wanted to make sure that our NAG representatives didn't have a concern about parceling off uncontaminated portions.

MR. JONES: Are you attempting to ensure ingress and egress to the contaminated portions? In other words, uncontaminated portions are a problem, but you may have to go through uncontaminated portions to get to the contaminated part just to clean up? Wasn't that the objective here?

COLONEL HOURCLE: I think that's where --

and that and to the extent you might need to stage things or whatever.

MR. JONES: It's very critical from a disposal perspective that you have this.

CHAIRMAN BACA: Unless there's any objection, we can accept that language.

Okay. Any others? Page 8?

MR. JONES: I have a comment on 8.

CHAIRMAN BACA: Go ahead.

MR. JONES: Oh, wait a minute. We're on 9 now?

CHAIRMAN BACA: No, just 8.

MR. RUNKEL: I guess we disagree, and you'll see in our letter, we disagree that we cannot transfer by deed contaminated property. We think that if there are restrictions built in similar to the restrictions that we addressed in our testimony the last time, that in some cases where cleanup is prohibitively expensive in the sense that it could take 50 years in light of cost concerns or technologically infeasible, which we discussed before too, that in those cases there may be appropriate

situations, again with many criteria laid out for protections.

MS. SHIELDS: Where do you get that?

MR. RUNKEL: I thought that we had agreed at the last meeting that that was possible.

MS. SHIELDS: I don't think so.

COLONEL HOURCLE: I think we got as far as what "taken" meant and that you might not have to clean --

MS. SHIELDS: You might not have to wait until the end of 30 years of pump and treat, which I assume is going to be a discussion later on today. But --

COLONEL HOURCLE: Now, I did hear, if I remember Mr. Gray -- and let me see if I can restate that. At one point I thought you mentioned something like is it square with the statute. I'm just trying to figure out where the statutory impediment is. Is it square with the statute when we read the statute to say that if there's a compliance agreement with enforced cleanup that you could transfer by deed because that would mean something had been

sufficiently taken. I'm not taking a position on that, I'm just trying to explore the issue with you. Does the task force believe that's good enough for a transfer by deed? Or if it isn't good enough, then I guess we've got one of those issues that seems to be, this is as far as we can go with the statute. If you want to go any farther, you'll need to look at the statute. I think that's where we are.

MR. JONES: We raised that issue, that if there was an agreement that all parties had endorsed, that you could, in fact, give title to property with such an agreement in place and enforceable. We gave as the example the military industrial plant facilities but we recognized that was sort of special in nature. But from a general perspective other than situations such as that, the basic policy, the regulations that we follow is you cannot give title to contaminated property. It might be cleaned up.

COLONEL HOURCLE: I'm just trying to get consensus on how far you can push the envelope along and I guess that's where we break it off.

MR. DAVIDSON: Can you run over what you

put --

COLONEL HOURCLE: Maybe I'll leave it to Don, but I thought I heard a discussion that went to the effect that, if you had an enforceable cleanup agreement, that perhaps that could be construed as the has been taken even though maybe the remedial action wasn't in the ground yet. The other break point I think we all agreed on was that if remedial action was in the ground, what you were doing was pump and treat or something else, that that probably met this requirement of 120(h)(3)(b)(i). I'm just trying to get to the break point.

CHAIRMAN BACA: Brian?

MR. RUNKEL: Well, according to Orchid Kwei and the discussions with Region IX earlier this week, they tend to agree that there may be situations where 120(h)(3) allows for transfer, again in situations where we've got contaminated --

MS. SHIELDS: Well, are we talking about the cleanup has been done so that human health and the environment are protected?

MR. RUNKEL: Okay. Yes. If you want to

get into how that's determined, with institutional controls in place. That's what I'm talking about.

MS. SHIELDS: That's where the leeway is. Maybe that doesn't mean the last piece of contaminated dirt is gone.

MR. RUNKEL: That's what we're getting at.

MS. SHIELDS: But you have done something where human health and the environment is protected.

COLONEL HOURCLE: Are we talking transfer by deed now or just other pieces and shifts and stuff like that?

MR. RUNKEL: Transfer by deed also.

COLONEL HOURCLE: Well, transfer by deed, I think, is the limiting factor.

MS. SHIELDS: That's (h)(3).

COLONEL HOURCLE: Yes. And other ones, I think we --

MR. RUNKEL: Other ones are clear. We understand that. That's what we're getting at.

MS. SHIELDS: (h)(1), you can have contracts in effect even if it is still --

MR. RUNKEL: What we're getting at is

determining what the meaning of all remedial action taken.

MR. DAVIDSON: Well, I think the operative word there is "necessary." We haven't really explored that. I have a little issue with you on Region IX's perspective.

MR. RUNKEL: I understand that.

MR. DAVIDSON: I'm not sure we can solve this particular riddle today. I'm going back to Larry's two break points, the latter one is the one that I'm more comfortable with discussing, this particular document, because I think that's starting to lay out procedures whereby we're still contaminated. We just starting to get the cleanup going, but we think we can transfer it and still be protective. I don't think we're there yet. I don't think that we're mature enough in our discourse to really try to lay some parameters around that in this particular document. I think there has to be a lot more consultation with the Hill on this issue, on exactly what the word "taken" and "necessary" means with respect to 120(h)(3).

CHAIRMAN BACA: Brian, if you don't mind, can we move on?

COLONEL HOURCLE: I guess what I hear then is that's what the conclusion is. If it's in the ground, we've met the requirement. If it isn't in the ground yet, the consensus view is that that's still a fuzzy area and maybe one of those that Congress

MR. DAVIDSON: In the ground you mean, for example, a solution.

COLONEL HOURCLE: Pump and treat is underway or the O&M stage, that type of a thing. The surface has basically been taken care of.

MR. GRAY: The remedy is in place.

COLONEL HOURCLE: The remedy is in place. Better term.

MR. GOODHOPE: I think, Larry, in the ground is probably appropriate because I think you tested the envelope and had a flame-out and went into a tailspin. I don't think we can agree that -- we can agree with the consensus that there is an issue here.

MR. PENDERGRASS: Now, the question is do we have -- are we going to need to change language

that's here? I suggest that that first sentence right now says may include all of the words--includes all the words of the statute and maybe allows it to be fuzzy to the extent that we've been talking about here. It says, "May transfer without violating (h)(3) only where all necessary remedial action determining coordinating criteria has been taken."

MR. RUNKEL: It's not incorrect. You're right, it's not incorrect. It follows a statute. It's just that I think we need to note that there's an issue. We've done that in other places where there is disagreement, an issue as to the meaning of all remedial action. Is that done someplace in the report? I don't think it is.

CHAIRMAN BACA: Hold it. Jay, do you want to answer that question? Is it covered?

MR. RUNKEL: That's still an open issue.

MS. SHIELDS: We're talking about transfer by deed in this sentence, right, not just transfer?

CHAIRMAN BACA: Transfer by deed.

MS. SHIELDS: Transfer by deed.

MR. GRAY: We should add "by deed."

MS. SHIELDS: Yes, you should add "by deed," after the transfer. This is in the last paragraph on page 8. We've -- "only" is sort of pejorative in there.

MR. GRAY: That means that's the only circumstances under which it can be done.

MS. SHIELDS: Sam, can we not agree that transfer by deed doesn't have to wait for 30 years of pump and treat, or is it your position that there are circumstances where it could not be so for 30 years or 50 years or however long you're pumping and treating?

MR. GOODHOPE: I am informed by counsel that we can't take a position. We have litigation going on.

MS. SHIELDS: That strikes me as a real-- we're sort of evading some responsibility there if we can't take a position on it. You're sitting here as the manager of a base and you're under the demand of Congress to recycle these things as soon as you can and you don't know based on the report of the task force that was supposed to figure out some of these

things for you, if I can do it today or have to wait for 30 years. That's pretty --

MR. PENDERGRASS: That issue is raised on page 14.

MS. SHIELDS: It's raised several times, yes.

MR. PENDERGRASS: It's fairly explicitly on the first full paragraph on page 14. We state that the task force discussed the merits of transferring -- well, actually, the sentence before that. "120(h)(3) could prevent final transfer of fee simple ownership of many parcels of contaminated land for decades if groundwater remediation is needed. Task force discussed the merits of transferring certain contaminated parcels before remedial action was completed, focusing on parcels where surface remediation is complete but groundwater remediation through pump and treat will continue for decades. The task force concluded this issue needs to be resolved but recognized that a definitive interpretation of the phrase 'all remedial action has been taken before the date of such transferring' may not be possible unless

the courts resolve the issue."

MR. GOODHOPE: We'd agree with that.

MS. SHIELDS: Yes, but that gives them no help.

MR. GOODHOPE: That's true.

MR. PENDERGRASS: The statute says what it says.

MS. SHIELDS: This is one place where we were talking earlier that if we decide we think Congress should clarify certain things, this is certainly one place where they were less than crystal clear. It just strikes me it's really walking away from our responsibility if we can't even take --

CHAIRMAN BACA: We can accept that as an issue that the law -- within existing law it is so unclear that that's a future issue for Congress to consider.

MS. SHIELDS: That's really not acceptable.

MR. RUNKEL: We need to have something either, I think, more clear or --

MR. GOODHOPE: Well, who owes each other

chips?

MS. SHIELDS: I think all the chips are coming my way. I've got several here but that may not be where I want to use them.

MR. RUNKEL: Well, I think we would feel pretty strongly that this is one area to recommend Congress clarify. We would like to see that in the final report.

MR. GOODHOPE: We could put in language where it doesn't have to come as a recommendation on legislative action, but this is an area that -- this is what the law says now.

MS. SHIELDS: Could we agree on something that says, "The task force believes that in many instances human health and the environment will be sufficiently protected under 120(h)(3) if transfer is allowed before a long period of pump and treat," or if there's a fancier word for that, "is done." Could we at least go one step and leave open the possibility that there may be certain cleanups where the only way you can be sure that human health and the environment is protected is at the end of the line, but that in

most instances when you've got the remedial action in place that you don't have to wait? The standard in the statute is human health and the environment.

MR. RUNKEL: We would agree with that.

MR. GOODHOPE: I think if it's absolutely clear that we're not taking any position on an interpretation of a term or a provision, we would defer to that.

MR. PENDERGRASS: The statement would be that the --

MS. SHIELDS: I don't know if we need to say that here. It might be 14.

MR. DAVIDSON: I think 14 is the place if you use the example you already have in there because I think that's really going to be the more normal case.

MR. PENDERGRASS: And the protection of -- you want to talk about it as the protection of human health and the environment would be satisfied as long as that long-term pump and treat remedy continues and the transfer of the land wouldn't affect that.

MR. DAVIDSON: Well, hopefully we could

create the impression trying to explain this issue that everything is really surface, as you have it here has basically been addressed. We're really talking about more circumstances where it's a long-term pump and treat. As long as you have access to the appropriate conditions and the covenants in the IAG or whatever you have, that it doesn't make sense to not allow transfer to really address this protective issue. But there's also a lot of fuzz in some of the circumstances that we're going to be coming up with.

So, I think I'd also like to see something -- like I said, it may be appropriate to continue discussion with Congress or something like that, falling short of legislative recommendation.

MR. GOODHOPE: Right. I think that's the approach.

MR. PENDERGRASS: I was going to suggest, and we're jumping ahead, but just on this one thing, on page 14, in the middle of that first paragraph, it says, "The task force concluded this issue needs to be resolved, but recognized that a definitive interpretation of the phrase 'all remedial action has

been taken for the date of such transfer' may not be possible unless the courts --" do we want to add "or Congress resolve the issue"?

CHAIRMAN BACA: Yes. Let's go ahead and make that correction.

MS. SHIELDS: And then can we add the sentence that I suggested after that that says, "However, in most instances, the task force believes that human health in the environment can be protected sufficient to allow transfer by deed before pump and treat is finally concluded"?

MR. GOODHOPE: Mr. Chairman, we will get another shot at the report before it goes out. Is that -- I mean to look at it before it goes out?

CHAIRMAN BACA: No.

MS. SHIELDS: Well, but you can make a side deal to have them send you this particular sentence.

MR. GOODHOPE: Okay. We could do that.

MS. SHIELDS: How about that?

CHAIRMAN BACA: Yes. Yes.

MR. PENDERGRASS: The production of

getting the report, we may not be able to get the report to everyone.

CHAIRMAN BACA: The Secretary wants it by October 5th. But if you do have issues that you want --

MR. GOODHOPE: We would reserve -- I mean we agree with you -- we'll do that, but I would like to see the language.

MR. DAVIDSON: Well, one way to address this may be to put something up front saying that, "The task force says," or, "The task force recommends." Say, "Logic would suggest that these types of circumstances --"

MR. GRAY: Can you research the legislative history of this provision to see if there's any clue in the legislative history as to what the intent was?

CHAIRMAN BACA: I don't think there's a whole lot of history.

MR. PENDERGRASS: It sort of basically restates what it is, what that statutory language is.

MS. SHIELDS: The best thing that you've

got in the legislative history is the legislative history that's hooked to the pre-enforcement review and the citizen suit provision where it says a citizen suit does not have to wait until the very end of the line before it can challenge a remedy. I think that's evidence here that if you don't have to wait to challenge the remedy until pump and treat is all over, you shouldn't have to wait to transfer the thing until pump and treat is all over. It hangs on the same word "taken", but there's nothing like that legislative history for particular provision.

MR. GOODHOPE: Well, Mr. Chairman, in the spirit of cooperation, if we could see the language today, then we could sign off on it today.

CHAIRMAN BACA: Okay.

MR. RUNKEL: If I could have one further point of clarification. In that sentence, "The task force concluded that this issue needs to be resolved," and then we've referred to we may need to have the courts or Congress resolve the issue, Gordon made earlier reference that this is still under discussion within EPA and I assume with DOJ whether as a policy

EPA could come out in favor of that, even short of a legal interpretation or further congressional clarification. We ought to either make reference to that or encourage it or at least make reference to the fact that EPA will continue discussions with the states and DoD as to whether this issue can be resolved. I just don't want to leave it said here that only the courts or Congress. I know the word "may" is used, but I want to put in what's left unsaid there, that EPA is continuing to look at this because that will make it clear to the outside world that it is under discussion.

Can you live with that, Gordon? That doesn't mean you're going to resolve it in our favor or even resolve it. It just means you're under --

MR. DAVIDSON: Yes. I think if the language was crafted that EPA in consultation with the Justice Department, DoD and everybody's brother, I would find that acceptable.

CHAIRMAN BACA: We'll work on that language.

MR. DAVIDSON: Like Sam, I'd like to see

the language a little bit later on today.

CHAIRMAN BACA: Sure. We can do that. Today we can resolve it.

MR. GOODHOPE: Where is that language being added?

MR. DAVIDSON: Well, I think all of this will be thrown into the first full paragraph on page 14.

MR. RUNKEL: We've just got to clarify the sentence -- I mean it's fine, the sentence is fine right now where it says it may not be possible unless the Congress or courts, but maybe the sentence before that or as a footnote to that sentence. Maybe as a footnote to that sentence.

MR. PENDERGRASS: I was thinking maybe a footnote to this sentence, "EPA, in consultation with states, DoD, other appropriate agencies --"

MR. RUNKEL: "Is currently considering whether this issue can be resolved short of congressional or legal ruling."

CHAIRMAN BACA: Okay. Let's get back to page 8. Any more comments on page 8?

MR. DAVIDSON: One second.

CHAIRMAN BACA: Gordon?

MR. DAVIDSON: I've been advised by counsel that I can proceed.

CHAIRMAN BACA: Page 8. Let's go to page 9. We're about 22 percent through. At this rate it's going to take us 13 hours.

MS. SHIELDS: Yes, but we resolved a big one.

MR. DAVIDSON: Yes, this is huge.

MR. GOODHOPE: If it makes you feel any better, we are halfway through our suggestions.

CHAIRMAN BACA: Okay. Let's go to page 9. Comments?

MR. JONES: I have a comment.

CHAIRMAN BACA: Earl?

MR. JONES: In the first or second paragraph, I think we should put a period -- right after where the sentence starts, "Section 120(h)(3)," put a period after department, then delete the rest of that. I think the footnote is somewhat contradictory. It refers to the United States as being a person in

the footnote and I think that's inconsistent with the statement at the top. I think a period right after "department" would take care of that.

CHAIRMAN BACA: Jay?

MR. PENDERGRASS: Wait a second now. Okay. Okay.

CHAIRMAN BACA: Any other discussion? Can you accept that after "federal agencies or departments," period, to delete the rest of that sentence?

MR. JONES: And the footnote?

CHAIRMAN BACA: And the footnote.

MR. JONES: I think that's good.

CHAIRMAN BACA: Any other comments?

MR. GOODHOPE: We have more additions.

CHAIRMAN BACA: At the end of the first paragraph? The first full paragraph?

MR. GOODHOPE: No, the carryover.

CHAIRMAN BACA: Okay. Page 9.

MR. GOODHOPE: Page 14.

CHAIRMAN BACA: Fourteen?

MS. SHIELDS: How would these -- I don't

quite get this. I mean we're on the hook for the cleanup. If we transfer it short of a transfer by deed, we're on the hook to clean it up. If we transfer it by deed thinking it's cleaned up and it turns out not to be, we're on the hook. I don't get the necessity of this.

MR. GOODHOPE: We were probably trying to be too polite. I think we don't want to engage in--be recommending that DoD engage in subterfuge or trying to get around circle --

MS. SHIELDS: I don't think they can, I guess is my point.

MR. GRAY: But the point is, Ann, that the most restrictive thing in the section of the statute is to transfer by deed and they go so far as to require warranties to say that you'll continue to do any of the cleanup. To then advocate that you do everything some way other than by deed seems to be implying at least that maybe you're trying to achieve a lesser statement of intent or give less assurance that the cleanup will be completed.

MR. GOODHOPE: I think in the first thing

we were talking about 30 year leases or 99 year leases.

MR. GRAY: Sales contracts where you don't transfer the deed but you, in fact, sell the property. It just seems like having noted that there is a problem with interpretation in 120(h)(3), we're now saying so let's avoid that by using every other means we can. Quite frankly, when you look at the terms of reference for the task force, basically it focuses on ways to expedite the cleanups when, in fact, we seem to have spent most of our time talking about ways we can expedite the transfer of the use if not the title to the property before cleanup.

MR. GOODHOPE: Right.

MS. SHIELDS: Yes, but that is the mandate of this task force, I thought.

MR. GRAY: To find ways to expedite the cleanup, as I recall.

MS. SHIELDS: And reuse.

MR. GRAY: And reuse.

MR. PENDERGRASS: The point, as I understand it, that you're making is that this

discussion is not intended to suggest that there's any attempt to avoid the government's responsibility to do the cleanup. Can we state that in a positive way?

MS. SHIELDS: To me the implication of this is that somehow there's a way to use these transfers to avoid the application of environmental law and I don't think it's there.

MR. GRAY: Well, when you start talking about substituting land use restrictions and so on, that sounds like --

COLONEL HOURCLE: How about something like, "However, if you use one of these instruments, the cleanup must still proceed as quickly as possible in accordance with the law," or something like that.

MR. DAVIDSON: Or say that recognizing that DoD still remains obligated to exercise the statutory responsibilities of cleanup.

MR. GRAY: I'll give you a theoretical. You enter into a lease for an industrial property on one of these sites and you say we're going to go ahead with it because we've cleaned up to the level that's necessary to run an industrial facility, and then you

just never get around to cleaning it up beyond that level because it's still being used as an industrial facility. It's the coupling of those kinds of things that makes it look like, on balance, there may be some effort going on here to avoid that section of the law that requires that you have a permanent cleanup remedy.

COLONEL HOURCLE: And the suggestion of the task force is we don't want to create that impression.

MS. SHIELDS: Isn't your next suggestion, which is also on page 9, doesn't that do the same thing? Can we just take -- if we take it, can we leave out the first one? It seems to me it's the same point basically.

CHAIRMAN BACA: Counselor, sounds similar to what you were saying. Sam?

MR. GOODHOPE: It's acceptable.

MS. SHIELDS: Leave out their suggestion on page 14, but adopt their suggestion on page --

MR. DAVIDSON: In the same location?

MS. SHIELDS: I don't know. They had this

at a different -- it's on the same page.

MR. GRAY: Where would it go?

MR. PENDERGRASS: It goes at the end of the third paragraph.

MS. SHIELDS: My only question here, and the same thing I think was in Brian's -- what do you call that-- A clean parcel assessment document. That's a CPAD. Are you -- when you speak of risk you use the word here and it sounds like a zero increase in risk. And the same sort of implication could be read into this. You don't mean that, do you?

COLONEL HOURCLE: I'm sorry?

MS. SHIELDS: By using the word "risk" in sort of any increase in risk way, without a modifier there, it sounds like any increase in risk at all from zero to .001. This would be prohibited. I think EPA is trying to weigh risks in a more comprehensive fashion -- you know, this against that type fashion and I just wonder if we don't --

COLONEL HOURCLE: How about may present a risk of harm or unreasonable risk of harm to human health and the environment?

MS. SHIELDS: I think what you need to get in is a modifier of risk so that it's clear you're not talking about any, no matter how slight. I can't think of anything other than unreasonable. It may present an unreasonable or significant or --

COLONEL HOURCLE: May present an unreasonable?

MR. DAVIDSON: Present any increase in risk beyond --

MS. SHIELDS: Any is what we want to get away from because "any" means "any".

MR. DAVIDSON: Well, what you're trying to get at is --

MS. SHIELDS: Is unacceptable.

MR. PENDERGRASS: Well, how about that? Is that the point we're getting at, that it may present an unacceptable risk of harm to human health or the environment? It does leave it open as to what's acceptable.

MS. SHIELDS: Yes. There just needs to be some opportunity for rationality to weigh in and I'd make the same suggestion on Brian's CPAD. I think

it's there somewhere.

MR. DAVIDSON: Can we add that friendly catch phrase "in accordance with applicable laws"?

MS. SHIELDS: We saw that somewhere. Where was it?

CHAIRMAN BACA: We need to clarify for the record what we're after on this amendment.

MR. DAVIDSON: Unacceptable, significant, one word or the other.

MR. PENDERGRASS: You've got a couple of proposals, I guess. One would be that you would change it --

MS. SHIELDS: Maybe it wasn't in this. It was somewhere. What else did you --

MR. PENDERGRASS: Change this to "that may," I guess, "significantly increase the risk of harm" would be one proposal, or another proposal would be that "may present an unacceptable risk of harm." Are there other proposals?

CHAIRMAN BACA: Okay. How about the following language? "Likewise, such cleanups should not be allowed if they will result in exposure to

hazardous substances that may present an unreasonable risk to human health or the environment."

MR. GOODHOPE: No, that may significantly increase the risk, I would suggest.

MS. SHIELDS: The same thing, Sam, is on page 8 of your amendments. We haven't gotten to where we're going to stick it in yet, but we basically agreed to stick it in somewhere. It's the third item. So, I'd suggest that whatever we adopt here, we also put in there.

MR. GOODHOPE: Significantly increase, is what I would suggest.

COLONEL HOURCLE: Now, by significant, you're talking about significance to the point where there is some real risk of harm. Everything has risks. Some of it is so low in a mathematical sense that you could probably quadruple it and still be very low in a mathematical sense. We're talking about the kind of significance where you worry about harm to human health.

MR. GRAY: No, we're not just talking about that, Larry, we're talking about situations

where if you don't proceed with the groundwater cleanup in an expeditious manner, it continues to move and hits somebody's drinking water well. There might already be a high level of contamination, enough to be harmful.

COLONEL HOURCLE: Well, I'm not worried about that and I agree with you there. I'm saying that when you drive a car onto the site to look at what your site is, you're increasing by a very, very small order of magnitude risk, in the eight digit places. You might drive ten cars on and you've had mathematically a ten-fold increase which could be significant. But I just want to make sure we're talking significance. We're talking about I'm worried, I'm heartfelt worried about harm and I see a yes and certainly in Don's case where you've got real problems, we want to not have caused any additional risk to real hard health problems.

MR. DAVIDSON: I'd like to ask, Sam, if you could maybe give an example of several different ways to look at what you're talking about here, that while you're doing a temporary cleanup, you're

releasing a lot of things. I don't understand exactly.

MS. SHIELDS: I also think you don't mean cleanups, you mean such transfers should not be allowed.

MR. EDWARDS: Mr. Chairman, if I may.

CHAIRMAN BACA: Go ahead. Can you help us?

MR. EDWARDS: The point here is that partial or temporary cleanups is the subject of what we're talking about. The delay may present the risk. So, such cleanups refers to delay. It refers to partial or temporary cleanups that delay a final cleanup. Probably instead of such cleanups, we ought to say such partial or temporary.

MS. SHIELDS: Such temporary measures or something.

MR. EDWARDS: Yes, temporary measures.

MS. SHIELDS: You don't want to stop cleanup, but such temporary measures.

MR. DAVIDSON: For example, if you had some contaminated soil that was creating some

groundwater contamination and you didn't fully clean up that contaminated soil, you just maybe capped it right now so you could allow something to happen and still have migration, that might be an example of where you might have some unacceptable risk since they would continue to feed into the groundwater. Is that kind of an example? I'm trying to get to what you're thinking.

MR. EDWARDS: Yes.

MR. PENDERGRASS: And the alternative that would be preferable in that situation is to remove the soil and treat it and then you would be dealing later with the contaminated groundwater and we haven't delayed that.

MS. SHIELDS: So, did we agree on significantly? "Likewise, such temporary measures should not be allowed if they will result in any exposure to hazardous substances that may significantly increase the risk of harm to human health and the environment." And on page 8 we would say, "Will not present a significant" -- page 8 of their insert.

CHAIRMAN BACA: Hold it. Let Ann finish.

MS. SHIELDS: "Will not present a significant risk."

CHAIRMAN BACA: Okay. Recorder, do you know where we are?

MR. DAVIDSON: I just wanted to ask one other question.

CHAIRMAN BACA: We're accepting that first part of their sentence, "However, it must be emphasized," and then adding what was just stated. Okay?

Gordon?

MR. DAVIDSON: Just a question on the use of the word "temporary cleanup."

CHAIRMAN BACA: Temporary measures.

MR. DAVIDSON: That sounds like an interim measure. I'm trying to get a definition. My question is that temporary and those appropriate words --

MS. SHIELDS: Will not be substitutes for --

MR. DAVIDSON: Should an interim cleanup -- temporary almost is like it's going to be

there for awhile and then it's going to kind of go away.

MR. PENDERGRASS: The phase in the sentence before was partial or temporary.

MS. SHIELDS: Will not be substitutes for.

MR. PENDERGRASS: The real concern --I mean as you're talking about it's partial or interim.

MS. SHIELDS: You may have a lot of phased measures and you're not trying to get to that. It's when they become a substitute for doing something more comprehensive that you're worried about. These cleanups often go in phases with different RODs for different phases and you don't -- that isn't what you're trying to --

MR. DAVIDSON: Well, I would -- the lexicon is interim. Temporary just -- I'm a bureaucrat. I use good old words. Temporary is a new one for me. It has a connotation I'm not sure is what you're trying to get at, is my point.

MR. GOODHOPE: We would not want to add to the stress of EPA. Interim would be fine.

MR. PENDERGRASS: In both places replace

temporary with interim.

MR. GOODHOPE: That's right.

CHAIRMAN BACA: Okay. Can we go on? Any other comments on page 9?

MS. SHIELDS: Wait, what is this?

MR. GOODHOPE: We're almost two-thirds of the way through our --

CHAIRMAN BACA: Oh, boy. Okay. Do you want to explain it?

MR. GOODHOPE: I think it just clarifies the language that's there right now.

CHAIRMAN BACA: Counselor?

MR. PENDERGRASS: We are now at the point where I think the criteria that are laid out on page 8 of these set of comments from Mr. Goodhope, that these belong here, that the suggestion for those comments was to put them in the overview and I didn't think they went here. I think they belong in this paragraph. So, maybe the first thing is exactly where to fit these comments. Let's get them into the draft and then this comment refers to them.

MR. GOODHOPE: Well, we could say, "The

criteria should include, at a minimum, the following transfer criteria."

MR. PENDERGRASS: And put these in. Okay. I think that's good.

MS. SHIELDS: Let's clarify what we're talking about here. You say leased or otherwise -- this is in the thing as it's written now. You're talking about short of transfer by deed.

MR. PENDERGRASS: Right.

MS. SHIELDS: And I think when you use the term "non-military users" that's too narrow because you can do anything within the federal family, which could be a non-military user. So, you're talking about transfer to a non-federal user.

MR. GRAY: I think you're transferring use here and not transferring the land and that's not quite clear, going back to what we started out talking about this morning.

MS. SHIELDS: It seems to me you have --

MR. GRAY: I think we need to put the words "use of" in front of the word "parcels." "Use of parcels at contaminated land facilities may be

transferred."

CHAIRMAN BACA: Tell us where you're reading, Don.

MR. GRAY: Well, this is the amendment.

CHAIRMAN BACA: Okay. What line?

MR. GRAY: The second line. The first line says, "That in certain circumstances," and I think we need to insert at that point the words "use of parcels of contaminated land or facilities can be leased or otherwise transferred. You can't transfer the property.

MS. SHIELDS: They use transfer in the statute to mean more than transfer by sale. It also includes transfer by contract, transfer by lease. It can mean short-term transfer. So, I don't know if you can speak of -- no, I guess you can speak of a lease for use.

MR. PENDERGRASS: I was going to say if we put in the use of parcels, then you don't need -- I don't think it makes sense to have leased. Then it would be in certain circumstances, use of parcels can be transferred to non-federal users.

COLONEL HOURCLE: I don't think you transfer use. You allow use by a lease or some other transfer.

MR. GRAY: But you're certainly not transferring the parcels unless you're going to give a deed.

MR. RUNKEL: How did we refer to it when we had the discussion about the definition of transfer being broader than just --

MS. SHIELDS: Yes. Don, what do you do with (h)(1)?

MR. RUNKEL: Yes.

MS. SHIELDS: (h)(1) is the notice provision and it uses -- it says, "Contract for the sale or other transfers." So, transfer includes more than sale.

MR. GRAY: It includes donations under the Federal Property Act. I think that's just making a distinction between sale and donation, right? That comment, "transferred by deed or transferring otherwise," is talking about selling it or donating it.

COLONEL HOURCLE: Let me suggest a way to read it.

CHAIRMAN BACA: Hold it. Too many speaking at once.

COLONEL HOURCLE: "In certain circumstances, use of parcels of contaminated land on closing base can be achieved through lease or other transfer to non-military users before cleanup activities at all contaminated sites." I would say instead say -- so we don't get in this confusion about the transfer being broader than transfer of deed, where you say, "Can be leased or otherwise transferred (not including transfer by deed)."

MS. SHIELDS: That's fine. But I still have a problem on the non-military users.

COLONEL HOURCLE: Non-federal.

MS. SHIELDS: Okay.

MR. RUNKEL: Does that clarify it for you, Don, putting in parentheses, "not including transfer by deed"?

MR. GRAY: The subject of the sentence is parcels of contaminated land or facilities, and I

don't think in light of the discussion we just spent 30 minutes on, about what Section 120(h) means, we want to turn around and be deliberately not clear in what we're talking about here. We're talking about leasing or otherwise making available the use of the land. We're not talking about transferring parcels of contaminated land, which is the subject of the sentence.

COLONEL HOURCLE: But I think Mr. Runkel's suggestion clarifies that we're talking about that concept of transfer under 120(h)(1) as being something other than transfer by deed and that's why we want to say this doesn't include transfers.

MR. JONES: Well, you only have a few options here. You're talking about either lease, license or permitted for interim use. Transferred, the way it comes across here, makes it appear as though it's some type of a final action. What you're talking about is interim use. So, you could say, "Can be leased or otherwise permitted for interim use before final cleanup actions are completed." Leased, licensed or permitted. Then you have covered it, if

you want to use the technical term.

CHAIRMAN BACA: All right. Leased, licensed or permitted.

MR. JONES: Or permitted, yes.

CHAIRMAN BACA: Okay. All right.

MR. JONES: And that means that there's no final title given.

MR. GRAY: Earl, do you agree with that? I think (h)(1) means -- sale or other transfer means possibly donation under the Federal Property Act?

MR. JONES: Yes, but donation is a conveyance.

MR. GRAY: That's right.

MR. JONES: It's not an interim use, it's a conveyance. You get title to the property.

MR. GRAY: I think that's the reason they use that phraseology, sale or other transfer. I don't think they're talking about by deed or otherwise. I think they're just talking about whether --

MR. JONES: That's why I said you had to clarify it right up front in a glossary what you mean by transfer.

MR. RUNKEL: Well, but I thought we had.

MR. GRAY: I think we said we're going to have to make it very clear.

CHAIRMAN BACA: Let's get that language clarified. Do you still have problems with that?

MR. RUNKEL: I'd have to sit back and think about it. I'd like to think about it because there may be situations where that doesn't cover everything. I thought we were going to keep it as broad as we could at this point.

CHAIRMAN BACA: Can you think of areas not covered by that language?

MR. ETHRIDGE: Just a question. We've had several changes. Does that sentence read, "The task force concludes that in certain circumstances use of --" Use of is still there, "parcels of contaminated land or facilities on a closing base can be leased, licensed or permitted and still to non-federal --

COLONEL HOURCLE: Non-federal.

MR. ETHRIDGE: Non-federal users? Is the rest of the sentence the same?

COLONEL HOURCLE: Yes.

MS. SHIELDS: Don?

MR. GRAY: Well, I don't have any problem with taking out the "use of" if you put down "can be leased or otherwise made available for interim use by." Is that what you're talking about, Earl?

MR. JONES: Yes.

MR. GRAY: That would be all right.

MR. ETHRIDGE: Leased or otherwise made available to non-federal users. Okay.

CHAIRMAN BACA: Okay. Any other comments on page 9? Does that take care of, Sam?

MR. GOODHOPE: I'm just wondering, is the rest acceptable?

MR. RUNKEL: We would like to add a couple of other criteria, but that's not taking issue with that's there.

COLONEL HOURCLE: I have a question for Mr. Goodhope, I guess, in his added language starting, "An example of such circumstances would exist when --"

MS. SHIELDS: Applicable standards may not require a complete --

COLONEL HOURCLE: Yes. It goes to that, I think about where you've got subsurface soil contamination, you've got a permanent cap that may be what the applicable standards call for in that particular remediation. I don't think we'd want to take that land out of circulation forever if everybody agrees that it's otherwise safe and we've got the institutional controls. So, I'm just not sure how far that takes us, that particular language. Maybe the word is completely, but --

MS. SHIELDS: And the no exposure, we're back to risk again.

MR. GOODHOPE: Completely is fine, to take that out.

COLONEL HOURCLE: Okay. Poses -- you've got that no threat.

MR. GOODHOPE: No significantly increased threat.

COLONEL HOURCLE: Okay. Threat to human health. What about ending it after health as an example and not getting into that last concept, which gets a little complicated.

MR. PENDERGRASS: Well, if you end it after "no significant threat to human health," you will have covered the worker exposure problem.

CHAIRMAN BACA: Okay. We'll end it. Scratch the rest of that.

MR. GOODHOPE: We just want to cooperate.

CHAIRMAN BACA: How about the rest of their proposal?

MR. ETHRIDGE: And we are adding the criteria?

COLONEL HOURCLE: Now, we add the criteria at a minimum criteria such as the following or the following criteria.

MR. ETHRIDGE: The following.

MR. PENDERGRASS: Should include -- criteria should include, at a minimum. Then we go to page 8 here.

MS. SHIELDS: Then we go back to page 8.

MR. DAVIDSON: Can I back up a second on who's going to be developing this criteria? The task force determined that DoD needs to develop criteria. Didn't we state earlier that EPA, DoD and the states

develop the criteria?

COLONEL HOURCLE: DoD in conjunction with?

MR. DAVIDSON: What language did we use earlier.

MR. PENDERGRASS: Actually you can just list them.

CHAIRMAN BACA: Let's just be consistent with the previous language we agreed to.

MR. GRAY: Well, this langauge comes up periodically through here. I think what I would prefer would be that "DoD develop with the concurrence of EPA and states."

MR. RUNKEL: We would prefer to have it developed because we'd prefer to have some way to drive the process and if we're on the hook to develop them too, we can continue to use that as pressure on DoD.

CHAIRMAN BACA: We don't have a problem working with the rest.

MR. RUNKEL: Otherwise, we're reacting to something DoD is putting together. We're waiting for them to develop something.

MR. GRAY: What do you do if you don't come to agreement?

MR. RUNKEL: We have to come to agreement. We have five years to get these bases.

MR. GRAY: Does EPA have an obligation under the --

MR. DAVIDSON: To develop such criteria, for example, or to implement parts?

MR. GRAY: To concur with what's done.

COLONEL HOURCLE: Staff's reading is no unless Johnston-Breaux passes, which is an amendment on our potential, in the Senate, bill to our authorization act.

MR. DAVIDSON: I think there's two levels here, Don, frankly. One is legal obligation under the statute. I think it would be harder to read in the current instruction that we do have a legal obligation on establishing such criteria. But I think on another level, I believe that we do have some obligation to ensure that things happen consistent with the statute.

MR. GRAY: Well, you may not have a legal obligation to approve the criteria, but you certainly

have a legal obligation to approve the application of the criteria.

MR. DAVIDSON: Well, that's, I think, an open question. I don't think it's clear in the statute that we do.

COLONEL HOURCLE: And certainly there may be many answers, depending on whether you're talking about an NPL site, a non-NPL site under state law and all various combinations that you could have.

MR. DAVIDSON: Well, I think the real issue, if I may, that everybody's getting at is veto authority and if we don't agree, this is what you're going to do instead or something like that. For the purposes of this report, I kind of agree with Brian that we all have a very strong interest in coming to terms on these criteria. I believe that we can do that in that I don't think DoD would proceed without some acceptance and I don't think EPA would allow it. I think the vehicles for not allowing it would be within our jurisdiction under the NPL --

MR. GRAY: I guess my question is how does DoD develop criteria in cooperation with EPA and 50

states? You can develop criteria and you can apply those criteria in a given state by dealing with the state of jurisdiction and EPA, but what does it mean when you say develop with the states?

CHAIRMAN BACA: Well, we'll probably work through the state organizations. I'm sure we're not going to work with 50 states.

MR. DAVIDSON: A huge work group.

CHAIRMAN BACA: We've done it before. I want to make sure you're comfortable with where we're going.

MR. GRAY: Yes. I want to make sure that the states and EPA are going to be full partners in the process of developing the criteria. That's my concern.

MR. RUNKEL: That's ours too.

MR. GRAY: That it not be something where DoD goes off and develops something and says, "Here it is -- take it or leave it."

MR. PENDERGRASS: Right. We would never do that.

COLONEL HOURCLE: In the interest of time,

can we go back to the criteria, because I think that should be a significant discussion before lunch.

MR. PENDERGRASS: A couple of times now we've discussed there's two places here, I think, where there's the discussion of risk. Previously we had made it "will not significantly increase the risk," the first criterion, "the transfer and subsequent use will not significantly increase the risk of harm." I think that's consistent with what we did before.

CHAIRMAN BACA: Yes.

MR. GOODHOPE: We will try one more time. Can we say, "The transfer and subsequent use will not cause or significantly increase any risk?"

COLONEL HOURCLE: It will cause risk. Very, very small, but it will probably cause -- you could cause harm or increase the risk of harm. That certainly is something that we don't want to have happen.

MR. GOODHOPE: Well, far be it from the state of Texas to try to cut against an eternal verity, if you will. Transfer and subsequent use will

not significantly increase.

MS. SHIELDS: What about the next one, "will not interfere?" Is that too --

MR. GOODHOPE: We'd prefer just to see it like it is.

COLONEL HOURCLE: How about instead of "will," "should?"

MR. GOODHOPE: Should not interfere?

COLONEL HOURCLE: Should not interfere.

CHAIRMAN BACA: I don't have problems with that simple language.

COLONEL HOURCLE: You want the without qualification?

MR. RUNKEL: Without qualification.

COLONEL HOURCLE: Because maybe I'm being nit picky, but --

MR. RUNKEL: If there's going to be litigation over it, there will be litigation over "interference."

MR. GRAY: How about "impede" instead of "interfere with"?

MS. SHIELDS: I'd prefer that.

MR. GOODHOPE: Obviously, what we don't want to have happen is -- we ask DoD, "Well, how come this base is not being cleaned up?" and we get a response, "Well, the doggone cities and the communities are using the land in a way, and we've let them use it, that we can't go in there and clean it up."

MS. SHIELDS: No, but you could read an easement as an interference of some sort, even if everybody agreed that there's got to be an easement through this to get to the place where you're still working.

MR. GOODHOPE: Good point.

MS. SHIELDS: That's an interference but it's been worked out, it's been agreed to and it's been worked out so that it doesn't impede the process.

MR. GOODHOPE: Okay. Do you think an easement would be an impediment?

MS. SHIELDS: It would be an interference. I would hope that it would be worked out so it wasn't an impediment.

CHAIRMAN BACA: Okay. Jay, anymore

comments?

COLONEL HOURCLE: Is number 3 significant risk or usual modifier of risk, standard modifier?

CHAIRMAN BACA: Right. Anymore comments, Jay?

COLONEL HOURCLE: I think that's it.

CHAIRMAN BACA: Okay. Let's get -- Brian?

MR. RUNKEL: Tom, we have two additional criteria to add, if you look at page 3 of our letter to you of September 26th. These will not be new. These were discussed in our testimony back in July. But the last two clauses there --

MS. SHIELDS: You're at the top of the page?

MR. RUNKEL: Yes, the top of the page. Skipping over the indemnifier, let's come back to that. But the one that we think clearly needs to be in there, "DoD agrees to retain the responsibility for any long-term operation and maintenance of the remedial action and for any necessary removal or remedial work identified in the future." I think that's been reflected elsewhere in the report.

CHAIRMAN BACA: I think that's our obligation. Counselor?

MS. SHIELDS: Is O&M your obligation? I mean that's normally the states' obligation.

COLONEL HOURCLE: In our statute, it's up to us. If we're talking about retaining a responsibility that's acceptable, we might execute that responsibility through an arrangement with a state or local government or follow-on land user. But I think ultimately we're always going to be on the hook to finish it.

Are we also including the indemnity, hold harmless and claims against the state?

MR. RUNKEL: In prior discussions we understand that -- and we've already noted there's disagreement as to whether that's even possible. That's the proposed language for that. We would like to have something on that and it would read as follows. I apologize that we didn't have it prepared in advance. And it could be a separate sentence. It could follow after those five criteria. "The task force also agreed that" -- and this could read many

ways, but that "indemnification similar to that done in Pease Air Force Base," something along those lines, "may be appropriate and should be considered," or just say, "should be considered and, if necessary, Congress should consider amending federal law to provide for such indemnification." That takes into account that that's still an open question of whether you're even allowed to exceed indemnification. But we would urge that it be done.

MR. GRAY: Well, Mr. Chairman, I'm always reluctant to be the defender of the Justice Department.

MS. SHIELDS: We welcome your support, Don.

MR. GRAY: I am really amazed. My original concern over the whole leasing process was that the facilities most likely to be released are things like aircraft maintenance facilities that are used for industrial purposes and that people can move into and start using fairly quickly. By the very nature of those activities, there's a good likelihood that additional contamination is going to be created.

If you have a blanket indemnification up front, then it seems to me like the government has taken on the liability for any such additional contamination.

MR. RUNKEL: Well, we could clarify that. You're right, that's a good clarification.

MR. GRAY: I mean it needs to be done in a way where the indemnification is going to be for any contamination that exists at the time that the transfer or use of the property takes place.

MS. SHIELDS: On the last clause too because if somebody comes on there and makes a mess--

MR. RUNKEL: No, you're totally right. Those are good clarifications on both points. We agree to that.

MR. GRAY: As long as it's made clear that -- I don't know how you unscramble the egg.

MR. RUNKEL: States would not want a private entity coming in, a Deutsche Airbus or whatever --

CHAIRMAN BACA: I'll tell you what, Brian. Would you propose some language and let's discuss it after lunch?

MS. SHIELDS: Yes, we want to see it.

MR. RUNKEL: Okay. We'll write that up.

CHAIRMAN BACA: Let me -- any other comments on the criteria? Any other comments on page 9?

MR. GOODHOPE: The last one. It's a very easy one.

CHAIRMAN BACA: Go ahead. We're on page...?

MR. GOODHOPE: Eighteen of the package.

CHAIRMAN BACA: Okay.

MR. PENDERGRASS: Seems fine. It, I think, accurately states their authority and what they may, in fact, do.

MR. GOODHOPE: There's no hidden agenda.

MS. SHIELDS: You sure? You may not have any order authority in the first place. We certainly can't hand you any in a task force report. We can't do that for you.

MR. DAVIDSON: Sam, you mean orders against a federal agency, transferee? The question is, what do you mean by orders?

MS. SHIELDS: What do you mean?

MR. DAVIDSON: Federal agencies or transferees or some other --

MS. SHIELDS: I think we're back to Rocky Mountain Arsenal, Sam, with this.

MR. DAVIDSON: I think we are too.

MR. GOODHOPE: Well, why don't we just say --

MS. SHIELDS: What are you trying to get at here?

MR. GOODHOPE: What are we trying to get at, Thomas?

MR. EDWARDS: Well, if I may, Mr. Chairman, Rocky Mountain aside and possible unitary executive problems aside, the state administrative agencies in many states have the authority to issue final orders and have the force and effective law and could apply it to federal facilities.

MS. SHIELDS: And what if they conflict with a remedial action plan they're already operating under or have consented to. Let's talk about Rocky Mountain Arsenal, because that is what we're talking

about here.

MR. EDWARDS: Well, if CERCLA trumps state law, then it trumps state law.

MS. SHIELDS: And we can't untrump it, which seems to me to be what you're trying to do, unless you're trying to do something less than that.

MR. EDWARDS: Well, we may need some qualifying language in there. We could say something like that "may in some circumstances have the authority."

MS. SHIELDS: Why do we need to say anything?

MR. DAVIDSON: All you're trying to get in the point is that if you have an enforceable arrangement, you want to make sure that any restrictions on use and so on that may have an effect on the cleanup are incorporated in that enforcement. Is that basically the point?

MR. EDWARDS: Yes, but also to point out that this paragraph by itself talks only about DoD. The states and EPA have very significant enforcement authority.

COLONEL HOURCLE: Let me suggest some language that I don't think anybody can object to. It just pushes the fight later on. "EPA, state, environment enforcement authorities may also under applicable law enter orders," or something that says if you've got the legal authority you can do it and we'll argue about -- we'll move that fight onto another time. EPA may be getting a change in its order authority very shortly with regard to federal agencies. So, it will continue to evolve.

CHAIRMAN BACA: Larry, what's your proposal? Read it again.

COLONEL HOURCLE: Something like --

MS. SHIELDS: Haven't we already put this in all the transfer documents and in the deeds? Now you're asking that we also do something else with it?

MR. EDWARDS: The potential is that somebody could read this paragraph out of context. This needs to be -- the paragraph by itself speaks only about DoD restricting changes and putting in legally enforceable restrictions. Taking that out of context, it gives a one-sided view of the real

process.

MR. DAVIDSON: From my perspective, I would like to have it reflected that we may want to include in our enforcement agreements with DoD some provision addressing -- at Pease Air Force Base we have a provision to the effect -- I know there's interest on Region IX's part to look at this with their three party agreements out there. So, notwithstanding the -- I didn't even want to bring up this arsenal thing. I understand your concerns, but EPA would support a provision reflecting that we would want to have the ability to put this -- or have people understand that we may want to put these types of things in enforcement agreements.

MS. SHIELDS: Well, is there a way to cut out your addition but work with the DoD singularity above that that would make people feel easier?

MR. GOODHOPE: We can just say "DoD, EPA and state environmental agencies must restrict changes."

MS. SHIELDS: I'm happier with that than this language that I can't figure out.

MR. GOODHOPE: Then follow-up through the paragraph.

MS. SHIELDS: What does DoD --

CHAIRMAN BACA: Sam, would you go with that again?

MR. GOODHOPE: Just say, "On a critical related point, the task force concluded that DoD, EPA, and the state environmental enforcement agencies must restrict changes from the planned use." Or we could say, "Concluded that DoD and, in appropriate cases, EPA and state enforcement agencies."

CHAIRMAN BACA: Counselor?

MS. SHIELDS: The restrictions are going to be in these -- we already agreed to all that several pages ago, that these restrictions would be contained in the contracts, in the deeds.

MR. GRAY: The leases.

MS. SHIELDS: You got it. It's all in there.

MR. EDWARDS: Of course nobody wants to go to court, but what if no such agreement is possible and the deeds and leases cannot be agreed upon? Then

what will happen?

MS. SHIELDS: They can't --

MR. EDWARDS: How about something like saying, "EPA and the state environmental enforcement agencies may also, in certain circumstances, have the authority to."

MS. SHIELDS: We can't give them that. We can't give them authority.

MR. EDWARDS: It says they may have it under the law in certain circumstances.

MS. SHIELDS: If they have it, they have it. We're not going to create it.

COLONEL HOURCLE: I guess the point I'm hearing is the state does have that authority, I guess whether we put it in or not. The state has whatever authorities it has.

MR. EDWARDS: See, the problem is the sentence right above that. "Rather than absolute bands on particular land uses, the restrictions or conditions should allow new uses consistent with ongoing and future cleanup." Sounds like DoD is driving the ship. They're able to say through their

restrictions what new uses may be allowed consistent with ongoing and future cleanup. That's not a correct statement of the regulatory procedure.

MS. SHIELDS: Maybe we can just finesse this thing some way.

MR. EDWARDS: How about taking out the last sentence to the paragraph, "and our changes."

MR. PENDERGRASS: Well, no, I think the last sentence to the paragraph is important because the point there is that you don't -- the point is to avoid rigidity in what you're doing.

MS. SHIELDS: Okay. Idea. In about the fourth or fifth sentence, say, "Rather than absolute bans on particular land uses, the restrictions or conditions should allow new uses consistent with state and federal law in ongoing and future cleanup" or something.

MR. PENDERGRASS: That's fine with me.

CHAIRMAN BACA: Sam?

MR. GOODHOPE: Why don't hold off until after lunch?

CHAIRMAN BACA: I thought we'd have a

working lunch, Sam.

MR. GOODHOPE: Well, that's fine too.

CHAIRMAN BACA: We need a break.

MR. DAVIDSON: A closing thought on this particular thing, that you would want specific restrictions in an order or you'd want the order to reflect authority to determine specific restrictions.

MR. GOODHOPE: Well, what's going to happen? If there is a new use, how is DoD going to find out about that? I guess I don't understand the process here, what's envisioned here. I have no idea at all.

MR. PENDERGRASS: Well, right here we're talking about this is used during cleanup. The DoD is going to find out about it because they're going to be on the site. They're going to see it happen.

MR. GOODHOPE: But what if it's a long-term cleanup?

MS. SHIELDS: And they've got a restriction in the contract that they have signed with these people who are using the property in the meantime that says, "You can't do X on this property."

So, they've got a contractual right.

MR. GRAY: Ann, I'm not sure that -- if that's what it means, I'm glad to hear it. But I think when they're talking about land use they're talking about industrial as opposed to residential use. In fact, what I want to get into after lunch is I think what needs to be done is put into those leases restrictions on the kinds of activities that can take place, in addition to the different classifications of land use. You have to be very careful about another situation where you lease one of these facilities to somebody and they decide that the floor needs strengthening and they go and break up the concrete floors to put new floor in and then you've got another release to the environment.

MR. DAVIDSON: As a matter of fact, we've had an instance at one particular base where regulatory agencies were not aware of activities undertaken by the lessee in an area of concern. That's the issue that I think you -- one issue that you're trying to address here.

MR. GRAY: We can get that one on the next

page.

CHAIRMAN BACA: I think we all need a break. Do you want to have a complete break and go up and have lunch or do you want to go up and get lunch and come down and continue?

MS. SHIELDS: Why don't we do that.

CHAIRMAN BACA: Let's do that. I agree. Let's take about 15 minutes break, go upstairs, get lunch and come back.

MR. GRAY: Bring lunch down here, you mean?

CHAIRMAN BACA: Bring lunch here.

(Whereupon, at 12:13 p.m., off the record until 12:41 p.m.)

MR. GOODHOPE: I think a deal's been struck. If we can put in -- we're willing to drop the last sentence if we change the existing last sentence slightly to read -- this would be the last clause after the last comma, "Consistent with state and federal laws as well as with ongoing and future cleanup."

CHAIRMAN BACA: And ongoing and future

cleanup?

MR. GOODHOPE: As well as.

CHAIRMAN BACA: Okay. Any objection to that comment? Okay. And we're dropping your last sentence.

MR. GOODHOPE: Once again we're cooperating.

CHAIRMAN BACA: You guys are great.

MR. GOODHOPE: Amen. Thanks.

CHAIRMAN BACA: Any other concerns? Any other comments on page 9? Can we move to page 10?

Staff has an addition and I'll defer to the rest of you guys for comments and get back to staff.

Sam?

MR. GOODHOPE: We have a slight addition that probably needs to be changed. I think this expands -- our additions expands A just a little bit. We would be willing to use the "significantly increased risk" language rather than risk because there's risk, I was told earlier today, in everything. Stipulating to that. We're willing to qualify the

risk.

CHAIRMAN BACA: Any comments? Counselor? No? Anyone else?

COLONEL HOURCLE: Staff wanted to include on page 10 the following discussion of the third paragraph starting, "In certain cases, DoD may want to issue a license." I think more particularly with regard to Mr. Jones, should be a license or permit. I think that would probably be the two other vehicles for a limited use of real property rather than lease. We wanted to conclude that paragraph by saying, "In the cases of leases, license or permits, DoD should not provide indemnification from liability for actions caused by the lessor, licensee or permittee." It goes back to the indemnification issue. We want to make sure that subsequent users are accountable for their acts with regard to the facility.

MR. GRAY: You may have a way for approaching it, Larry, the way you approached it when you were selling the "GOCO's."

COLONEL HOURCLE: Excuse me, sir.

MR. GRAY: When you were selling the

"GOCO's" you had to confront that same issue, I think.

COLONEL HOURCLE: We may have some language already and I'm sure GSA probably is doing --

MR. JONES: We can provide you with that.

COLONEL HOURCLE: But that's the concept. Any discussion?

CHAIRMAN BACA: Does everybody understand what he's proposing? Larry, do you want to read it again?

COLONEL HOURCLE: No. "In the cases of leases, license and permits, DoD should not provide a blanket indemnification for actions caused by the lessee, licensee or permittee."

CHAIRMAN BACA: Any problem with that?

MS. SHIELDS: Only to the extent that the addition of "blanket" makes it sound like you can provide some lesser indemnification. I don't think you should provide indemnification at all.

COLONEL HOURCLE: Okay.

MR. CARR: Is that going to create any problem for the interim situation where, for example,

you have the situation in Pease where the transfer from the United States is to a state agency who subsequently is going to be entering into commercial licenses or leases?

COLONEL HOURCLE: The operative term we were working on was actions. So, it is our position that the extent to which other actions may cause a problem, the United States should not be providing indemnification

MS. SHIELDS: Does the Pease agreement have a --

COLONEL HOURCLE: The actions of the United States, it's my recollection, with regard to the indemnification language we have in the '91 Appropriations Act, which is what made it acceptable to the Department.

MR. GRAY: Just a question, Sam. On this "expressly prohibit uses incompatible with the condition of the property," would that mean like if you had subsurface contamination there would be a prohibition against excavating without permission and that would be written into the lease itself? Is that

the understanding? I guess you'd say subject to covenants and I'm not sure -- would you have covenants in a lease as you would in a deed. Would it be lease restrictions?

MR. JONES: It would be in the lease too. Any authorizing document, it would have --

MR. GRAY: But that would be like a lease restriction.

MR. JONES: Sure.

MR. GRAY: And violation would then subject them to termination of the lease?

MR. JONES: Termination. They may be liable for other --

MR. GRAY: I think that takes care of my concerns.

CHAIRMAN BACA: Okay. Any other comments on page 10?

MS. SHIELDS: I guess I'd prefer "impede" to "interfere with" again like we did the other place. It would be more consistent if we changed it to "impede."

CHAIRMAN BACA: Can we make that a general

rule wherever we see "interfere", substitute "impede"?

MS. SHIELDS: Well, it may not be in the same context.

CHAIRMAN BACA: Page 11. Sam has no comments. Page 12. Page 11. I was only kidding.

MR. JONES: I have a comment.

CHAIRMAN BACA: Go ahead.

MR. JONES: The first paragraph, the top of the page, "Such lease may also provide a right of first refusal." Under current policy, right of first refusal is not authorized with regard to the disposition of real estate because the entire thrust of the Federal Property Act contemplates competition. So, what we would like to say is that GSA recognize -- in order to facilitate the disposition of the bases consistent with law, GSA will review this policy in coordination with the Department of Justice. Our policy goes back to the early 1960s, and was established in coordination with the Department of Justice. GAO was involved and others. We're trying to research it right now.

So, I would -- anyplace where you

mentioned the right of first refusal, I would suggest that this be deleted from this report at this time with the caveat that it's under review at GSA.

CHAIRMAN BACA: Okay. I think we can accept that.

MR. ETHRIDGE: So, what is deleted specifically in that sentence? The whole sentence?

MR. GRAY: Which sentence is this, Earl?

MR. JONES: The last -- I'd like that deleted.

MR. ETHRIDGE: The last sentence of paragraph 1?

MR. JONES: Yes.

CHAIRMAN BACA: Any other comments on page 11?

MS. SHIELDS: It's the carryover paragraph, Don. It's the last sentence of the carryover.

MR. JONES: Also, under the alternative purchase option arrangements, that's the second paragraph there where, "Options to purchase on contaminated property." I think we need that deleted

too.

MR. GRAY: Just out of curiosity, footnotes 8 and 9 on page 10, they're citations to the Base Closure Act?

COLONEL HOURCLE: No. They're citations with regard to allowing other people to use property under Title X, lease of excess government property.

MR. JONES: Where is this?

COLONEL HOURCLE: 10 USC 2667(a) and (f).

MR. GRAY: You can't lease excess property, can you, Earl?

MR. JONES: Oh, sure you can lease. This is the problem about leasing from a disposal perspective versus leasing in the context of cleanup. Leasing from a disposal perspective is only on an interim basis until such time as you can move to a final disposal decision. What you're talking about here in terms of leasing is leasing to facilitate cleanup. Okay? But you can, in fact, lease excess property, but it's for a short period of time, when it's declared excess.

MR. CARR: Could we ask for a

clarification on what is now the first full paragraph. You're there talking about the fact that this property may not fall into the excess property definition and I guess I understand that to mean that therefore the restrictions on the term of the lease would not apply. You seem to be saying two different things. You seem to be setting out a bunch of restrictions and then sort of say, "However, we're not sure that any of these actually apply to what." Now, are you saying-- when you say contaminated real property, are you using that in the sense that we're using contaminated real property here, that is property subject to 120(h)(3) or does it have some other meaning?

MR. PENDERGRASS: No, the same meaning. As we, I think, discussed earlier in the paper, it's the real property that has had the substances stored, disposed of or released.

MR. CARR: Okay. So, in other words, what you're saying is if there's a statutory prohibition against it being deeded, it then does not become excess and therefore these restrictions don't apply?

MR. PENDERGRASS: Right.

MR. GRAY: I think it's saying won't become excess until it's cleaned up. Is that what you're saying?

MR. JONES: That's drawing the line mightily close. But basically a decision has been already made that this property is excess. But what you're saying, it cannot be disposed of until such time as it is cleaned up. You're drawing a mighty thin line in terms of what you mean here. This property is excess property. In fact, it may be surplus property, but you cannot proceed to dispose of it. That's a technicality here.

MR. PENDERGRASS: Okay. I'll defer to your better experience with those rules.

MR. CARR: I guess I think that reading this as someone who has no familiarity with that process, I don't understand why we talk about the restrictions on the transfer of excess property, which we do at the bottom of page 10, and then at the top of page 11 we say, "The property we're planning to lease isn't excess property."

MR. PENDERGRASS: If that's confusing, I

maybe suggest deleting the paragraph.

MR. JONES: I think we ought to delete that paragraph because contaminated property can and is in many instances excess property. In our inventory right now, we have excess contaminated property. We just cannot dispose of it and we found out it was contaminated after it was reported excess. I think that's a fine line.

MR. GRAY: And under those circumstances you can lease it.

MR. JONES: I could lease it.

MR. GRAY: But only short-term.

MR. JONES: For a short-term.

CHAIRMAN BACA: Okay. Are we deleting the second paragraph on page 11?

MR. PENDERGRASS: The paragraph that begins, "Contaminated real property does not appear."

MR. JONES: Yes.

MR. PENDERGRASS: Delete that paragraph?

MR. JONES: I think that should be deleted.

CHAIRMAN BACA: Okay. Earl had the floor

and has some changes that he wishes to voice.

MR. JONES: We're also deleting this right of first review. Let's consider the third paragraph, last sentence, next to the last sentence, providing lessees with options to purchase the property. That should be deleted because we're not going to refer to options to purchase. Delete that sentence. Okay?

We have another. Again, under alternative purchase options arrangements, the first sentence. Again you reference options to purchase. That should be deleted.

CHAIRMAN BACA: That whole sentence, that whole first sentence?

MR. JONES: Yes. "To make the lease more attractive, DoD might desire to provide lessees with options to purchase."

CHAIRMAN BACA: I think the whole paragraph goes.

MR. JONES: Then the next one, "DoD also might want to consider selling purchase options." I think that should be deleted too.

MR. GRAY: And you couldn't substitute

rights of first refusal either. It wouldn't help.

MR. JONES: What?

MR. GRAY: Would it help -- you couldn't substitute rights of first refusal either.

MR. JONES: That would not help. In fact, that's prohibitive.

MS. SHIELDS: So, basically for all of that, we're substituting your reviewing this in the context of --

MR. JONES: Yes.

CHAIRMAN BACA: Well, there being nothing left on page 11, can we go to page 12?

MR. PENDERGRASS: Now, wait a minute. I want to clarify exactly what we're doing. We are deleting the section titled "Alternative Purchase Option Arrangements."

MR. GRAY: Well, there isn't anything left. You could leave the heading, if you'd like.

MR. PENDERGRASS: Yes, that would be really smart.

COLONEL HOURCLE: The problem, I guess, is a perceived inability to do these kinds of things

under the Federal Property Act, if I understand the problem with these arrangements.

MR. JONES: Yes, because if you are giving an option to purchase, again the Property Act contemplates that everyone has access. You're making a commitment to the disposition of the property without perhaps affording other Federal agencies, state and local government and others in the private sector a right to access that property under competitive arrangements. So, this is the reason why we have grave concerns. As I said, I feel certain GAO called us to task about that many years ago and also the Department of Justice. We just haven't found the particular reference yet. It goes back, we know, to 1959, 1962 and '63 time frame in terms of what our lawyers have been able to find so far.

COLONEL HOURCLE: And this doesn't cause concern to the state representatives about the ability to reuse the property after or attractiveness for reuse? We definitely found a legal limitation and one of the things we've been carrying is an idea. The question is do we want to raise it as, "Here's an idea

that might be worth pursuing. However, it's got a legal limitation it."

MS. SHIELDS: He said they're reviewing it.

COLONEL HOURCLE: Okay.

MR. JONES: GSA, in coordination with Justice, and others, will be pleased to review this policy.

MS. SHIELDS: Shall we say, "The task force suggests?" Are you doing this now or are you thinking about doing it?

MR. JONES: No, we're getting ready to start doing that.

MR. GRAY: The question is can you do this within the framework.

MR. JONES: So, it's not just a matter of reconsidering the policy as it is trying to find out whether it is possible to revise policy under existing law.

COLONEL HOURCLE: So maybe we want to have a sentence that said, "The task force considered these various forms of alternative purchase options,

arrangements --"

MS. SHIELDS: But made no recommendations based on --

COLONEL HOURCLE: Based on GSA's concerns and GSA related these matters are under further study at this time.

MR. GRAY: You could say GSA could examine permissibility of such arrangements under existing law.

MR. JONES: That sounds good.

CHAIRMAN BACA: Okay. Anything else under 11, page 11? Let's go to page 12.

MS. SHIELDS: The rule against perpetuities. Are we sure this applies? The only place I encountered the rule against perpetuity is with estates --

CHAIRMAN BACA: We'll let our law professor answer.

MS. SHIELDS: Well, I thought you had to worry about it in the context of in a will when somebody tries to tie up property by bequeathing it to a person who doesn't exist yet and from there into

perpetuity. So, what you could end up with is a piece of property that cannot be transferred. If somebody says in a will, "I'm giving this to Mary's child," and Mary never has a child, then it can never be transferred.

CHAIRMAN BACA: How about we just delete those two paragraphs?

MR. PENDERGRASS: It's the same issue.

MS. SHIELDS: Yes. That's what we just thought.

MR. PENDERGRASS: They're there because it was to show that there are problems with something. We've taken out the substance of the alternatives.

MR. GRAY: So, everything in that section entitled "Purchase option, related requirements and limitations," would be deleted?

MS. SHIELDS: Deleted.

CHAIRMAN BACA: Okay. Let's go to the installment and other executory contracts. Any comments?

MR. JONES: There's a term in the paragraph, "Installment and other executory

contracts." There's a put option. We didn't know what you meant by put option. What sentence is that? It's the 11th sentence in, put option in DoD -- maybe you could clarify that or restate.

MR. PENDERGRASS: Yes. A put option is -- it actually comes out of securities.

MR. GOODHOPE: Inadvertent file merge.

MR. PENDERGRASS: Yes. It doesn't make sense.

CHAIRMAN BACA: So, are you still explaining put option?

MR. PENDERGRASS: I'm trying to think of a good way to do this. I'm not coming up with a good way to explain this right now.

CHAIRMAN BACA: Do you have a suggestion? What if we delete the sentence? Does that hurt?

COLONEL HOURCLE: You'd probably want to delete the phrase and rewrite the sentence. The other things are probably still valid as concerns, the adverse --

MR. PENDERGRASS: No, because I think it's -- isn't it that the option is -- why don't we do

without the phrase.

MR. GOODHOPE: We tested a very weak envelope.

CHAIRMAN BACA: What are we deleting, Jay?

MR. PENDERGRASS: The phrase, "the potential recharacterization of the arrangement is a lease with an option."

COLONEL HOURCLE: How about having the sentence read, "These concerns of other requirements of the FPASA and the regulations thereunder. Examples include," and then pick up potentially adverse tax consequences. Does that make sense?

CHAIRMAN BACA: That's probably acceptable. Any problems with that? Any other comments on page 12? Why don't we move on to 13.

Staff has a comment, but we'll give everybody else a chance. Sam?

MR. GOODHOPE: We have some changes that have already been made elsewhere. This is going to be more in the nature of a conforming.

MR. PENDERGRASS: This is the same criteria that we discussed for the use during cleanup

and I think it is appropriate to put it in here with basically the same language.

MR. DAVIDSON: This is the issue of the nexus between land use and CERCLA process? Is that where you're getting at in terms of treating it the same way?

MR. PENDERGRASS: Yes. The criteria that you would use for determining when we're going to do these things.

COLONEL HOURCLE: I think the other changes here is -- didn't we before say it was not just DoD, it was DoD --

CHAIRMAN BACA: In consultation with EPA, states and others.

COLONEL HOURCLE: Yes.

CHAIRMAN BACA: All right. We'll put that in.

COLONEL HOURCLE: That's in there. And then we have the other criterion half --

CHAIRMAN BACA: I'm almost finished writing them.

COLONEL HOURCLE: It's page 2 of the --

MR. PENDERGRASS: DoD agrees to retain the responsibility for the long-term O&M.

COLONEL HOURCLE: Yes. And then we had the indemnification. It's hot off the page.

MR. RUNKEL: We can literally type this up in a couple minutes and have it in a cleaner version or do you want me to read it now?

CHAIRMAN BACA: Go ahead and read it.

MR. RUNKEL: On indemnification. I'm sorry, we're going to have to revise this a little bit more. This is not ready. We'll get something for you.

CHAIRMAN BACA: Okay.

MR. RUNKEL: We'll have to go back to that. I'm sorry.

CHAIRMAN BACA: We'll come back. Anything more on 13?

MS. SHIELDS: Yes. We thought this paragraph entitled, "Long-term Leases," was quite confusing. It's probably more so after all of this discussion of surplus property. I'm not sure where we are. But is that accurate, that a long-term lease is

anything longer than five years?

MR. JONES: In the context of the disposal of real estate, we always considered a long-term lease to be five years. But in the context again of what we're attempting to do here, I think the objective is to facilitate cleanup and use is secondary. So, consequently, a long-term lease could be much longer than five years because invariably you're not going to get it done in five years' time. So, I think again we need to clarify in this paragraph long-term lease from a disposal perspective and a long-term lease in the context of decontamination. Or maybe what we can do is just delete that sentence. Let's take a look and see. We may be able to delete something here.

MR. PENDERGRASS: That may be the point. Here what we're talking about -- and maybe that's the point to make. Under the FPASA and its regulations, however, your point that leases for the purpose of disposal are considered long-term if they're more than five years. However, in the context of facilitating cleanup, leases of longer than five years may be appropriate.

MR. JONES: That's exactly right.

MR. GRAY: Because it can't be sold before cleanup anyway.

MR. JONES: Yes. That's the statement you want to make.

MS. SHIELDS: So, we're going to rewrite that paragraph?

MR. JONES: Yes.

MR. PENDERGRASS: I hope I remember what I just said.

MS. SHIELDS: Take out that language, Jay, about "equivalent to a sale" because --

MR. JONES: Yes. We don't need that.

MR. PENDERGRASS: Right. Okay.

CHAIRMAN BACA: Do you want to read it back to us?

MAJOR GENERAL OFFRINGA: While he writes it, do we have to recognize leases under 10 USC 2667 in this paragraph too as a long-term lease as well as the Federal Property Act? We're doing that.

MR. GRAY: That's the citation I asked about earlier, right?

CHAIRMAN BACA: The answer is yes.

MS. SHIELDS: And the rest of this that you added repeats what we've said somewhere else, right? At least it sure looks familiar. Is that necessary?

COLONEL HOURCLE: So, it would be under the FTE, SAA and its regulation and DoD's independent statutory authority, footnote 10 USC 2667.

MR. DAVIDSON: Can you clarify exactly what that particular citation reads? I guess what I'm trying to get to here is a few questions on what facilitates cleanup and where long-term leases start looking more like sales and things like that. I'm just not sure what the rules are.

MAJOR GENERAL OFFRINGA: You have 10 U.S. Code 2667 as the leasing authority the Department of Defense has. Now, in terms of when it looks like a sale under long-term lease authority, I'd have to defer to the counsel.

Larry, I'm talking about the long-term lease under 2667.

COLONEL HOURCLE: Yes. We just have

authority, pretty discretionary authority when it accesses the Department to do it under such arrangements, if I recall, as the Secretary deems appropriate. The authority also applies to personal property too. It's under a kind of blanket authority.

MR. GRAY: Excess doesn't even come under the Federal Property Act.

MR. JONES: Again, under normal circumstances, if property is excess, leasing is a secondary option. It's only used in the event you are not in a position to dispose of the property, the objective is to dispose of it. So, again, what I think we're saying here, leasing is being done not to facilitate disposal, but to facilitate cleanup. So, consequently, the time of the length of the lease may very well extend beyond what would be normally recognized in a lease transaction.

MS. SHIELDS: It's also to facilitate interim use.

CHAIRMAN BACA: That's correct. Okay.

MAJOR GENERAL OFFRINGA: I think Larry had the right words. I think your concern is what the

impact of that is down the line.

MR. DAVIDSON: Well, the general line issue in all this is what is the greatest incentive for an expeditious cleanup. One could argue that long-term leasing is not supportive of expeditious cleanup. It kind of puts you in this never-never land of interim periods. But yet I think we all recognize that leasing is a very viable necessary option under specific circumstances. I'm just kind of wrestling with that as it relates to --

MR. JONES: I think a lease with regard to cleanup activities should be very, very specific and have built-in time frames that contemplates when something starts and when something ends and when you will be in a position to take final disposal action. But I don't think it would be nearly as loose as what you're saying that it would, in fact, enable the delay of cleanup rather than facilitate getting the cleanup accomplished. I don't think that would be the case at all.

MS. SHIELDS: What is the point of this? I think we need to go back to the drawing boards on

this particular section. I'm not sure what we're trying to do here and whether we haven't already done it someplace else.

MR. RUNKEL: It's not stated that clearly.

MS. SHIELDS: It's very unclearly written. I really am not at all sure what --

MR. RUNKEL: No, no, no. I mean it's not stated clearly anywhere else. It's not all in one place.

MR. PENDERGRASS: What we discussed this morning was the leases or use during the cleanup when you -- maybe just on the surface cleanup, soil cleanup.

MS. SHIELDS: I think what we've started to do here is erode our statement on the next page, which we agreed to this morning that we think in most instances we could sell it before 30 years of pump and treat is over. So, is page 13 to say in the few instances when we think final sale has to await the end of pumping and treating? Is that what we're talking about here?

MR. PENDERGRASS: What we're talking about

here, that there were different options of what to do when you've gotten to that stage, and one of them was lease and one of them was transfer and we weren't clear how far you could go with transfer. I think today, this morning, the task force got further in clarifying how far you would go with the transfer than we were at the end of the last meeting. But the leasing is one option and yes, it would be for a situation where you couldn't transfer or you decided that it wasn't desireable.

MS. SHIELDS: So maybe this part should go after page 14? Would that make more sense?

MR. PENDERGRASS: It might. I think the reason it was here is simply that it was a less final -- I don't think it matters.

MR. DAVIDSON: It is a little confusing because I think that we have addressed some of these points already. When you kind of walk page by page, you sometimes lose sight of the whole deal here and that's what I'm kind of wrestling with. This section right before this section is use during cleanup. This section is use after interim cleanup. I'm not sure

there's a real distinction because --

MR. GRAY: Yes, I don't think you can have use during cleanup unless you've already done an interim cleanup and make it safe for people to be --

MR. DAVIDSON: All right. If you're using it during cleanup, I don't quite understand the statement in terms of these two sections together. Maybe one section already address --

MS. SHIELDS: Maybe we could just say, "Use during cleanup or after interim cleanup," and condense the whole thing.

MR. GRAY: I guess my feeling is you had to have an interim cleanup.

MS. SHIELDS: Well, depending on what's there and what you're doing. I don't know that we can --

MR. GRAY: Well, I guess the point is --

MS. SHIELDS: As long as your criteria, which are the same criteria for during cleanup or after interim cleanup, if you met those criteria, that you're not significantly increasing anybody's risks or interfering with cleanup, etc.

MR. GRAY: Here's an example of what we're talking about. You're foreseeing some places that could be leased without any cleanup at all. And there are other places that could be leased after some interim cleanup? Is that what we're saying?

MR. PENDERGRASS: No. I think -- well, maybe if the only contamination -- if contamination did not involve any surface and solely was subsurface, then --

MR. GRAY: Pretty unlikely.

MR. PENDERGRASS: To the extent that you've got something that's a migrating plume, sure, the surface above the contamination --

MR. GRAY: But it had to be the source of the plume?

MR. PENDERGRASS: Right, the source--MR. GRAY: It's not an immaculate conception, I assume?

MR. PENDERGRASS: No, but, I don't know, I'm thinking of -- there are a number where the plumes are in sandy soils or something, they've moved pretty fast. The source may have been ancient or removed a long time ago, you're still dealing with the

subsurface problem. There is nothing else to do on the surface, so you're talking about -- conceptually, you probably can merge those.

I think it was -- I think we have them split up because at the last meeting the discussion was in terms of you can do certain things during cleanup, certain things after you've gotten to a certain level and then --

MR. GRAY: I think you've got to split it up because you're doing a long-term lease in one case and you're talking about short-term leases in another case. Was that the reason?

MR. PENDERGRASS: No.

MR. DAVIDSON: I would suggest that it's going to be tough to walk through all this thing today and feel confident that we have a complete package. Let's step back for a second, at least with respect to these two sections, and see if there's any redundancy between them. I think that we'll find that there is.

Conceptually to use during cleanup would include use after interim cleanup. I mean, I say "use

during cleanup," cleanup in that context meaning full cleanup.

MR. GRAY: There obviously is redundancy here.

MR. DAVIDSON: Certainly, I would address leasing in a little kind of a slant.

MR. GRAY: I think what's involved here, what Sam was trying to get at here in the rationale, was start and stop cleanups. What seems to be lurking beneath the surface of these two things is that in one case you've got a situation where you can allow certain use to take place before interim cleanup and then after interim cleanup you can then change the land use to something different. Was that the rationale?

MR. GOODHOPE: I wouldn't use the word "lurking."

MR. DAVIDSON: But also my concern about the -- what's a long-term lease and whether or not a long-term -- I mean, a real long-term lease facilitates full cleanup or whether it kind of gives you this interim period of not going towards full

cleanup, establishing institutional controls and just let it be. These are kind of the underlying themes here. Just walking through this page by page, it's hard to kind of take that look and see where it comes out. I'm not sure what to suggest.

MR. PENDERGRASS: I guess we need to have suggestion of do we want to consolidate the discussion of uses during and after interim cleanup. It was set up this way because that's the way that the tests were assessed at the last meeting, that there was a distinction between the two and that only leases and things short of transfer by deed were allowed during the cleanup phase and that's what is discussed in the section "Use During Cleanup," that use after cleanup was to discuss other kinds of transfers, including transfer by deed in some situations.

MR. GRAY: Well, maybe you need to take out the word "interim," then.

MR. PENDERGRASS: Maybe that's -- although, there is some discussion -- I mean, the interim is discussed at least in the first paragraph.

MR. DAVIDSON: Well, you wouldn't need to

discuss leases at the post-cleanup, necessarily.

MR. GRAY: Well, it would depend on whether or not we get back to all the groundwater remediation and --

MR. PENDERGRASS: We are going to -- we have to face the situation that a lot of these will be long-term ongoing things and I guess we've come to the point that some of them may be appropriate for transfer by deed, but there are probably others that no one would ever want to agree that it's not appropriate to transfer them by deed, and so something else will have to be in place.

MR. DAVIDSON: Well, how about this for a process suggestion on how to address this, anyway? I meant to bring this up earlier, Mr. Chairman, but one is we're probably going to have a fairly long afternoon here. This is worse than negotiating compliance agreements. You mentioned earlier about basically wanting to close out the process this evening or this afternoon. It might be, because of these types of questions here -- I would like to suggest that we consider -- what I would like to do

for EPA is to get everything wrapped up here and hopefully we'll have a consensus or at least we'll have understanding of where there are some differences which would be clarified in the report and having the ability to then read the report after everything's been incorporated for one final time, hopefully leaving with an agreement in principle that no legal quarreling over little words and that kind of stuff and just a final QA Monday or whatever so we have time to really think through this stuff, and at that point any --

MS. SHIELDS: They're not going to have it written by Monday.

MR. DAVIDSON: Well, no.

MR. RUNKEL: All I can say is that we would agree, and I'm sure the NAG folks would too, we have to at least get our NGA national office to look at this one last time. Again, we can guarantee that in a day or two. It's not like we need another week or two weeks, but I can't -- you know, I can't -- I have their approval to agree in principled, but we need to get them to look at it one last time.

CHAIRMAN BACA: But you are their representative.

MR. RUNKEL: I understand, but I'm just saying that we need to make sure that they feel comfortable on some things that did not come up before the meeting today. Most of this was discussed with them, but I think if we're given like one more day--we understand your need to get it out by the 5th, but we can work around that, no problem.

CHAIRMAN BACA: We discussed this issue either last time or several meetings before and we agreed, no, that telephone coordination and going back and forth is too difficult. That's why we're having the final meeting is so that we get everybody here resolving issues.

MR. GRAY: Mr. Chairman, as I recall, you indicated that you would allow a certain number of days so that people could file additional comments. I assume we'd have to get the final report so we could see it before we knew whether we wanted to have additional comments, and if there was something in there that somebody's disagreed with they could then

prepare additional comments.

CHAIRMAN BACA: Well, I'm hoping that when we walk out of here today that we have seen the final report.

MR. GRAY: Well, I understand, but if there are things like this that are left sort of fuzzy--

MS. SHIELDS: If you have to rewrite -- I mean, if what we need to do is combine these two sections, which seems to be what we need to do, they can't do that as we sit here. They're going to have to send that around or something.

MR. PENDERGRASS: I guess I want to propose that we not rewrite them for the reason that there are two different things going, the use during clean up -- and maybe the thing to do is eliminate the references to interim cleanups -- but, use during cleanup we agree cannot do a transfer of the fee and we're talking basically about leases. All the discussion of the other things is basically gone. There are some limitations and restrictions. We've got some criteria for that, but use after you've put

the cleanup in place does get to a different -- gets you to a different place where you may be able to transfer it by deed. I guess that is the way it was discussed at the last meeting. Leases may be needed in some of those situations because the criteria that were agree on of when you could transfer it by deed won't be met all the time.

CHAIRMAN BACA: Well you really are, except for that first paragraph, talking about after cleanup.

MR. GRAY: Well, aren't you talking about after surface cleanup?

COLONEL HOURCLE: I think we've agreed that if what we're talking about is the pump and treat part of clean up of groundwater contamination and the plant's built and you've started pumping and treating, you can transfer by deed. I think we got that far this morning. So if that's where we are and that sort of post-O&M pump and treat period is all this section is addressing, maybe we don't need it. Maybe we've covered it.

MS. SHIELDS: I don't think it adds.

COLONEL HOURCLE: Maybe we've covered it in the concept of, well, how do you use the land before you get to that point. And after you get to cleanup --

MS. SHIELDS: Or you get to the point where you can transfer.

COLONEL HOURCLE: -- you can do a deed transfer and --

MS. SHIELDS: You can sell it.

COLONEL HOURCLE: Everything else seems sort of unnecessary.

MR. GRAY: It seems that when we added all the extra safeguards that we did when we were talking about use during cleanup, and certain safeguards to move from one use to another use short of an actual transfer of the property, may have made this redundant.

MS. SHIELDS: I think -- I mean, all we're talking about omitting is these one, two, three, four, five paragraphs that are contained in full on page 13, right?

MR. GRAY: I think that would also cause

some additional problems for Earl, because you know his point is they don't normally go for long term leases, but he could go for a longer-term lease if it was for purposes of cleanup. But you're talking about after cleanup, which then takes away the rationale for a long-term lease.

Do you think that's a problem, Earl?

MS. SHIELDS: I don't think there's anything in there.

MR. DAVIDSON: Do we dare delete and read it later to see what happens?

MS. SHIELDS: And see if there's anything on that page that we somehow still need?

MR. GRAY: It there anything that the staff is trying to accomplish that will not be accomplished if we take this page out --MR. GOODHOPE: This is the way we talked about it. What I was going to ask was we talked about it because it was presented to us a certain way. I was going to ask, well, why was it presented to us for the first meeting in a certain way.

COLONEL HOURCLE: Pay attention to the

time, because you're looking at what to do with a 20 year pump and treat. And if we decided that you could sell it, maybe we don't need to talk about this at all, I guess is where I --

MR. GRAY: Well, we couldn't make that decision.

COLONEL HOURCLE: We couldn't make that decision until we just made the decision we made this morning that in fact once you start the 20 year pump and treat you can sell it.

MR. GRAY: Well, I don't know that we have agreement across the board on that.

MS. SHIELDS: In most instances. I can read you the language we talked about to put in a footnote, but we've got all that, then, when you get on to page 14 and I just don't see anything on 13 that isn't redundant until you get down to transfer.

CHAIRMAN BACA: I propose that we delete everything down to transfer.

MR. PENDERGRASS: I have a question.

Earl, do we need to have any of the discussion about your caveats about length of leases

in the earlier discussion of leases? Does any of that--

MR. JONES: If you delete everything here, if you delete everything down to transfer, I don't think we need any of that incorporated.

MR. PENDERGRASS: Okay.

MR. JONES: If you delete everything down to transfer.

CHAIRMAN BACA: Okay. No objection?

COLONEL HOURCLE: So is there a section now used after cleanup? Is that what our section is?

MR. GRAY: Well, I think your new heading will become transfer, won't it?

MS. SHIELDS: It may be just, then, transfer. You make "transfer" a bold heading.

CHAIRMAN BACA: That's a dangerous thing to do, isn't it?

MS. SHIELDS: We're being bold here.

CHAIRMAN BACA: Okay, let's go to page 14.

MR. RUNKEL: Mr. Chairman, I hate to back up, but we do have a language now --

MR. JONES: Okay.

MR. RUNKEL: -- that has two additional criteria. Might as well look at that.

MR. JONES: Okay. That goes back to the criteria.

MR. RUNKEL: Yes.

MS. SHIELDS: Where does this --

MR. RUNKEL: It would go after the criteria proposed by NAG that's been accepted. The first paragraph would be an actual --

MS. SHIELDS: But what page are we talking about?

CHAIRMAN BACA: It would be on page 8 of Texas' proposal, wouldn't it, the modified version of that? Is that what we're talking about?

MR. GOODHOPE: Let the record reflect it was Thomas Edward's.

CHAIRMAN BACA: Okay. We're on the amendments, additional amendments proposed. Any discussion?

COLONEL HOURCLE: On the indemnification, I'd just like to tighten it up a little bit, "task force may be agreed that it may be necessary and

appropriate for DoD to indemnify." I don't think we're really just talking about the states. I hate to extend indemnification. Subsequent users? "For any cause of action arising out of DoD's use of the property," and I think that gets you down to the "if necessary" provision.

MR. DAVIDSON: Did the Pease Amendment include lenders?

COLONEL HOURCLE: That's true, yes. The lenders -- we could say "indemnify." We could say "appropriate parties." There's going to have to be a lot of work on this one to figure out how you really do it. "It may be necessary and appropriate for DoD to indemnify appropriate parties for any causative action arising out of DoD's use of the property. If necessary, Congress should consider amending federal law to authorize such indemnification."

MR. GOODHOPE: I think your concept of appropriate parties is going to vary very differently from OMB's or DOJ's, who's entitled to indemnification.

MR. DAVIDSON: It would be parties

including states.

MR. GOODHOPE: You've got the states, the cities and the communities, people who use --

MS. SHIELDS: I thought we were using "subsequent users."

MR. GOODHOPE: Subsequent users would be fine.

COLONEL HOURCLE: Subsequent users. How about "other appropriate parties"? I've been through the mill on --

MR. DAVIDSON: Just put a marker in here so that we want to lay out the boundaries and then let people figure out exactly who these parties are. Does that get to the lenders, though?

MR. GOODHOPE: What about owners and operators?

MR. DAVIDSON: That's what came down to play at Pease.

COLONEL HOURCLE: In trying to get through it in a timely fashion, I think, A, we realize that there is some need probably to do something with regard to indemnification. I'm not really too sure

and I don't think we're all smart enough to figure out-- well, I know I'm not, you probably are -- all the parties that are involved. So I'd say certainly subsequent users are involved and then there may be other appropriate parties. You could put in "e.g., local governments, states, lenders."

MR. GOODHOPE: What about PRPs?

COLONEL HOURCLE: PRPs, no.

MR. DAVIDSON: I think "subsequent users."

MS. SHIELDS: We haven't forgotten the provision in (h)(3) that specifically says none of these safeguards are to apply to other PRPs?

COLONEL HOURCLE: That's correct.

MS. SHIELDS: The law says that.

COLONEL HOURCLE: Yes, PRPs are in a different category.

MR. GRAY: What's wrong with just talking about the owners. They have recourse against other parties.

MR. DAVIDSON: What did the Pease group cover. I mean, there was a lot of debate on this. Maybe that's an area that we could -- may I ask to

have my --

CHAIRMAN BACA: Go ahead.

MR. CARR: I don't have the language in front of me, but my recollection is that the state gives lenders and the officers and directors --

COLONEL HOURCLE: Development authority or something like that?

MR. DAVIDSON: I think we'd have concern about moving over into some areas of exclusion to cover PRPs.

MS. SHIELDS: Why is this necessary in light of the provision that's in (h)(3) that says you've got to pay?

COLONEL HOURCLE: I read (h)(3) as saying we've got to clean up more.

MS. SHIELDS: It says "a covenant warranting that all remedial action necessary to protect human health and the environment has been taken and any additional remedial action shall be conducted by the United States," so

MR. GRAY: But I think there is concern about third party liability. I mean, if they lease

the property to someone else, some third party in the area can file suit against them saying "I was injured in my person or property --

COLONEL HOURCLE: I've been working with sureties about bonds for hazardous waste sites recently and they are out there with strange concerns about tangential liability and I think I sense that Pease was -- that was chilling the lenders from wanting to come in and invest in an NPL site.

MR. PENDERGRASS: I think one of the-- maybe the reason why there's a problem created is 120(a), the last sentence of which says "Nothing in this section shall be construed to affect the liability of any person or entity under 106 and 107," and as soon as somebody else comes in and becomes an owner, then they're liable and indemnification would--

MR. GRAY: Owner or operator.

MR. PENDERGRASS: Right -- indemnifies them if they become liable solely because they've become an owner. They want to be indemnified by the government.

COLONEL HOURCLE: I guess of concern is

this was going to become a criteria for use of land.

MR. RUNKEL: Well, no. The first paragraph is really meant as additional criteria. This one would be more of a finding. I don't think it has to be a criteria. We can live without it being a criterion.

MR. GRAY: Well, they'll probably need to be split and the second one probably will need to go in the recommendation section, then.

MR. RUNKEL: Or just split out as a continuation of the paragraph without an indentation or something. I don't know. There are ways to do it when you're drafting.

COLONEL HOURCLE: So I propose I think we move this into a recommendation that the task force found a need to address -- that the task force needs to get DoD to examine the indemnification, similar arrangements it can offer subsequent purchasers and others who may bear liability.

MR. GRAY: I think "users" instead of purchasers.

COLONEL HOURCLE: Subsequent users.

MR. GRAY: Such as should only take place under one scenario, then, for cleanup.

COLONEL HOURCLE: Yes. Other subsequent users as a result of DoD's past activities on the site.

MR. GRAY: Because I think the people who have the most concern are the people that lease one of these properties early in the game where you have significant amounts of contamination.

COLONEL HOURCLE: Yes. I think they'd be the most concerned I think to the extent you've got parceling going on, a piece of a site that's an NPL. We're determining it's clean, it's available. The question is going to be what the reaction of lending institutions is going to be.

MR. RUNKEL: It's really going to be critical -- if we're talking about early interim use, it's really going to happen on every base that's closed in the next five years.

COLONEL HOURCLE: My sense is, and I think the task force is in agreement, that there deserves to be a recommendation about this indemnification risk-

carrying issue in there. And the question is going to be to what -- my sense is we can't address it right now with too much specificity, because one of those areas where we need to say go out and work it and you may have to asterisk that some kind of legislative relief a la Pease is going to be necessary to really put in place what's required.

MR. RUNKEL: I think that's what this does. It doesn't say that indemnification is required in every case. It doesn't define. I mean, it doesn't get into all that. It just lays it out. I think it's adequate for what we're doing, just raising the issue for further examination.

COLONEL HOURCLE: I would propose we modify that the task force -- as a recommendation the task force agreed that it may be necessary and appropriate for DoD to indemnify subsequent purchasers and other appropriate parties for any cause of action arising out of DoD's use of a property. "Appropriate parties," we could put in an open paren, (e.g., states, lenders).

MR. GRAY: But you used the phrase

"purchaser" again.

COLONEL HOURCLE: Okay, excuse me.

MR. DAVIDSON: And other appropriate parties, (e.g., states, lenders).

COLONEL HOURCLE: States, lending institutions.

MR. DAVIDSON: Just list some.

COLONEL HOURCLE: Closed paren, "for any causative action arising out of DoD's use of the property." And then pick it up, "If necessary, Congress should consider -- Congress may wish to consider amending federal laws to authorize --

MR. GRAY: Could we just say "may require"?

COLONEL HOURCLE: More words, Don. Help me.

MR. GRAY: "May require a change in federal laws."

COLONEL HOURCLE: "This may require a change in federal law."

MR. GRAY: I'm not telling you, though, just pointing out.

MR. RUNKEL: What are you proposing?

MR. GRAY: This may require changes in federal law or existing law.

MR. RUNKEL: We'll we'd like to recommend that Congress consider it. That's a little strong.

MR. GRAY: Well, but then we're getting back to that area where we were supposed to make our recommendations within the existing laws.

MR. RUNKEL: I don't think "consider" is telling them they have to. Congress may wish to consider.

COLONEL HOURCLE: Don, that sounds to be meeting you more than halfway there.

MR. RUNKEL: How's that, "may wish to consider"? Is that deferential enough?

MR. GOODHOPE: I would support you on that, Brian.

MR. RUNKEL: "May wish to consider." It doesn't say "shall" or "should." It says "may wish." It's still leaving it --

MR. GRAY: I don't have any problem with that.

CHAIRMAN BACA: Okay. Where are we?

Larry, do you want to recap, or Jay, where we are?

COLONEL HOURCLE: I wish I could. I think we're on transfers. Oh, on the two amendments? One goes in as -- the first paragraph goes in as an additional --

CHAIRMAN BACA: Why don't we modify the first paragraph just a little bit? Instead of "DoD agrees," "DoD should," since this is the recommendation of this committee, "retain the responsibility."

MR. GRAY: I think it's "must."

CHAIRMAN BACA: Well, I know, but --

MR. GRAY: I mean, under the law.

MR. PENDERGRASS: Okay. Go back to where this proposal is that this be added as the number 5 in what's on page 8, the criteria that are on page 8 of Sam's comments. So, it starts off with "The task force recommends that tracts classified as areas of concern not be transferred unless all of the following conditions are met," one, two, three, four, five.

COLONEL HOURCLE: With "Dod retained."

MR. PENDERGRASS: Retained.

MR. GRAY: On the part that's going into the recommendation --

MR. PENDERGRASS: And then there's the separate paragraph.

MR. GRAY: Can we hear how that reads now?

CHAIRMAN BACA: Larry, can you read it roughly?

COLONEL HOURCLE: Which one?

CHAIRMAN BACA: The second paragraph.

MR. GRAY: The second paragraph.

COLONEL HOURCLE: It would be a recommendation, "task force agreed that it may be necessary and appropriate for DoD to indemnify subsequent users and other appropriate parties, (e.g., lending institutions, states), for any cause of action arising out of DoD's use of the property."

Delete down to the end, "Congress" -- what were your words, Don?

MR. RUNKEL: May wish to amend federal law.

MR. GRAY: "May wish to."

COLONEL HOURCLE: -- "may wish to amend federal law."

MR. GRAY: Well, I think we said "may wish to consider amending."

MR. RUNKEL: Amending federal law.

COLONEL HOURCLE: Amending federal law.

MR. DAVIDSON: May I ask a question?

CHAIRMAN BACA: Sure you may.

MR. DAVIDSON: Going all the way back to the top of this criteria thing, someone define for me what "areas of concern" are? It's a term of art. I just want to see if we all have some agreement of it. It's something we've used in an IAG before, but it's not something that's in the common vocabulary. I think everybody thinks --

MR. DAVIDSON: That's NAG's term, isn't it?

MR. PENDERGRASS: Well, it's been a term -- I mean, it's a term used in DoD's --

MS. SHIELDS: Shall we include it in the glossary?

MR. PENDERGRASS: -- program and it's a broad term relating to anything that --

CHAIRMAN BACA: Anne suggested it go in the glossary. Any problem with that?

MR. DAVIDSON: So something that is contaminated or thought to be contaminated or could be contaminated?

MR. PENDERGRASS: Right. It's the broadest --

MR. DAVIDSON: If we put it in the glossary, I think that would be okay.

MR. GRAY: What's the term?

MR. PENDERGRASS: Areas of concern.

MS. SHIELDS: Area of concern. I would hope that would be the way it was defined, that it isn't defined as anything that ever has any possibility of being contaminated in the history of the world. It's not that broad, is it?

MR. GRAY: For this purpose, it would seem like it would be those things specified in Section 120.

CHAIRMAN BACA: Okay. The Recorder has a

question. Let's make sure he's clear.

THE COURT REPORTER: I'm just having -- this is going to be a terrible transcript with everybody talking all at once. That's all I wanted to point out. I'm having a very hard time following who's speaking.

CHAIRMAN BACA: Okay. My fault.

THE COURT REPORTER: I'm not trying to lay blame.

CHAIRMAN BACA: I'll accept any. I'll try to get Sam to shut-up.

MR. GOODHOPE: You won't succeed.

CHAIRMAN BACA: All right. I think we're through with the amendments. Let's go to page 14. And please raise your hand and let's do it in order.

Sam? The chair recognizes Sam.

MR. GOODHOPE: Well, I've been thinking about "may issue orders according to applicable law." Is that --

MS. SHIELDS: What are we trying to do here?

MR. GOODHOPE: Well, you know, going to

this "in order to preserve the ability to comply, DoD may need to reserve easements," and it talks about what DoD can do. I just don't see how that's going to work on down the line or there's a possibility that it may not work in certain cases. And in those certain cases, I think the states should have the ability, which I think they have. We're not conveying anything new to the states. We're just recognizing that this is another way of enforcement, of enforcing orders for those cases where DoD may not act.

CHAIRMAN BACA: I'm not sure what this does, though. We can't do anything that goes beyond the law.

MR. GOODHOPE: I don't think it does.

CHAIRMAN BACA: Why it necessary?

MR. GOODHOPE: No. I think it describes, it leaves out -- I look for rationale -- it leaves out what is a concept or a theme that I thought that we had agreed on that states "need to play a meaningful role in this cleanup process, a role in the form of partner to partner." I think all this does is recognize that.

CHAIRMAN BACA: Comments on this recommendation?

Anne, would you like to react?

MS. SHIELDS: Well, it basically says, "Yes, we said to put it in the easements, but we don't think that's worth anything." I mean, that's essentially -- I guess my view of it is if there's authority under state law for states to take some post-transfer action, nothing we've said here changes that. All we've said is --

MR. GOODHOPE: It's stating the obvious. I would just ask the indulgence that we have the obvious stated in the report. I mean, there are some other obvious things that we have stated in the report.

MS. SHIELDS: I mean, we've put the task force's -- I don't have any idea of what sort of order authority states would have and I'm very reluctant to have the task force agree to all of these controls out there that I don't know anything about.

MR. GOODHOPE: Well, I said, "may issue orders according to law, in accordance with law."

MS. SHIELDS: But you've just given them the --

MR. GOODHOPE: No. This task force cannot do that.

MS. SHIELDS: Why is that --

MR. GOODHOPE: We are simply recognizing state authority --

MS. SHIELDS: I don't know whether they have it. You're asking me to agree to something that I have no idea whether it's true or not.

CHAIRMAN BACA: That's a good point. You know, we didn't discuss this during our proceedings. It's not on the record. If you would like to make a suggestion.

MR. RUNKEL: What about "state environmental agencies and courts may have the authority under law to issue orders"?

MR. GRAY: What about just saying "To the extent that state environmental agencies and courts are authorized to issue..."?

CHAIRMAN BACA: Counselor, your suggestions?

COLONEL HOURCLE: It's a wonderful Friday. I think we should leave.

MR. RUNKEL: Again, we would echo NAAG's concern that -- it's not a concern, just a request that this be acknowledged as an issue of importance, great importance to the states and one that we put in the form of acknowledging that it's out there without endorsing it, and there are ways to do that.

CHAIRMAN BACA: One at a time.

Sam, then Anne.

MS. SHIELDS: It seems to me that we're right back into Rocky Mountain Arsenal right here. This is exactly what the state of Colorado tried to do with the cleanup at Rocky Mountain Arsenal. They tried to intervene in a partially-remediated situation with a state order and the judge says, "I have no jurisdiction." I'm not going to agree to anything in this report --

MR. GOODHOPE: Anne, that was in a CERCLA situation.

MS. SHIELDS: That's right, and that's what we're talking about here.

MR. GOODHOPE: I said "in accordance with law." Presumably that decision is the law, so therefore in accordance with the Rocky Mountain decision state agencies would not have the ability to do this.

MS. SHIELDS: So are you talking about, this applying in the case of a base that's being closed that's a non-NPL site?

MR. GOODHOPE: Whatever the law is right now. Right now, Rocky Mountain Arsenal is the law, and that's all this is saying.

MS. SHIELDS: You're going to have to persuade me that it's necessary to say this and why it's necessary to say it.

MR. GOODHOPE: Well, why don't we -- we can take a vote on it. Let's just take a vote on it. It's getting late. We can just take a vote on it.

CHAIRMAN BACA: All in favor of accepting this proposed amendment indicate by raising your hand. in favor.

Sam and Brian raise their hand and Don.

All those opposed?

Okay. Those opposed are the rest and you're overruled.

MR. GOODHOPE: Democracy is a wonderful thing.

CHAIRMAN BACA: That's right.

MR. GOODHOPE: Now we can go on to the next page.

CHAIRMAN BACA: Any more comments on page 14?

Okay, let's go to page 15. I've got a bunch of amendments.

Gordon?

MR. DAVIDSON: Is there a way in which that was going to be developed for 14 that we have not seen?

MS. SHIELDS: They're developing a footnote. We agreed to some language that would go in after courts or Congress resolved the issue that says, according to my notes, "However, in most instances, the task force believes that having the remedial action in place is sufficient to meet the standard of protection of human health and the

environment." And then there's going to be a footnote dropped on that about EPA, DoJ, and state agencies or working on --

MR. PENDERGRASS: And other appropriate agencies are considering whether this issue can be resolved short of judicial or congressional action.

MR. DAVIDSON: Okay. Is it possible to get that typed up this afternoon just so we have some paper to look at?

CHAIRMAN BACA: Thomas Edwards volunteered to type something up.

MR. EDWARDS: If, Mr. Chairman, I can pass this smooth copy of the indemnification language and see if this is what Mr. Pendergrass has.

CHAIRMAN BACA: Okay. If you hold the noise down because the recorder is picking it up, if you'd like to speak, just raise your hand.

Counselor, did you get that clarified?

Okay, Thomas?

COLONEL HOURCLE: Mr. Baca, I'm going to have to depart. Ms. McCrillis and Mr. Kushner will replace me.

CHAIRMAN BACA: Okay.

MR. PENDERGRASS: Could I try stating Anne's addition to the paragraph?

"However, the task force concluded that in most instances having the remedial action in place will satisfy the requirements of protecting human health and the environment."

Is there something after that that I've missed?

MS. SHIELDS: We were going to put a footnote

MR. PENDERGRASS: Right, and the footnote we're also typing. The footnote is basically that the parties are considering whether it can be resolved short of congressional or judicial action.

CHAIRMAN BACA: Is that correct? Agree?

MR. GRAY: Does that mean you don't just have the remedy in place, but that you also have taken steps to make sure there's no exposure of people like through other drinking water wells in the area where you've got plume contamination that's moving and that sort of thing?

MR. DAVIDSON: What I would propose on this --

MS. SHIELDS: It's all part of the remedy, isn't it?

MR. DAVIDSON: Yes. -- is to look at the language in the context of the whole thing, because this is such a critical point. It's the basis of this report and I want to make sure that we can achieve a consensus that really is a consensus. Because, for example, if you walk into the remedial action phase, what started our debate some time ago was the word "taken" means commenced. On the other end of that is the word "taken" means completely finished. The first part is not a plain reading of the law. The second part does not acknowledge a reasonable approach, so we're down there somewhere in the middle and EPA has definitions of construction completion, for example, and operations of maintenance, so I think we're down in that area.

I would like to see something in there that would reflect how you'd care to get at the remedies. Are they well underway or are they

implemented with the feeling that things are well in hand and under control, not just started?

MR. GRAY: In place.

MS. SHIELDS: "In place" were the words we used, which --

MR. DAVIDSON: Okay.

MR. GRAY: Thought we said "taken," "in place."

MR. DAVIDSON: Okay. Let's see if we can come up with even some quasi little example which -- I would just like to feel comfortable to see the written language.

MR. GRAY: Well, the other thing is, does it also specify that the appropriate covenants will be included in any deed of transfer?

MR. PENDERGRASS: I think that's a given under the Statute.

MS. SHIELDS: Yes.

MR. PENDERGRASS: The transfer simply cannot occur unless you make the covenant --

MS. SHIELDS: That's in the first section, Don, of the transfer section. That's how it starts

out. It starts on page 13 at the bottom of page 13 of the report. It's right there. What we're discussing is after that.

MR. GRAY: No, this is "has been taken."

MS. SHIELDS: I'm talking about in the report --

MR. GRAY: "The government will take any additional remedial action"?

MS. SHIELDS: Yes.

MR. GRAY: But you see, the implication of that is that it refers to something that might be discovered afterwards that you didn't know of at the time, when you say "any additional remedial action." It doesn't imply continuation of the remediation you've put in place.

What happens if five years into this you don't have the money to continue the pump and treat? If there's a covenant that the government will complete what it's started, then you have a better case for getting the money appropriated and so on.

But the way this section of the statute reads, I think that an interpretation is that when you

say "will take any additional remedial action" it implies if there's a discovery of additional contamination, that was not known at the time rather than a continuation of the remedy that's already in place.

MR. KUSHNER: Well, does it not also include the possibility of revising the remedial action? Because, during your operation and maintenance period, you have five year surveys and I would assume that if new technology comes down the road that there might be a requirement to maybe change from pump and treat to something else.

MR. GRAY: That's fine. All I'm saying is, if we're going to go out on a limb and take the position that we think it ought to be done, I think that there should be some safeguard to make sure that the government's going to follow through with its obligation to complete the remedy.

We keep talking about land use and at some point transfer of a piece of property and say, well, we cleaned it up to a point where it's all right for industrial uses and then there's nothing left but

groundwater remediation and we've got it in place and in 30 years it will be clean, and so you transfer it without anything in the deed and then five years later the money dries up and who finishes the cleanup? I think you've got to have a covenant in the deed specifying that the government will complete that cleanup.

CHAIRMAN BACA: That issue is really addressed in our fourth chapter, I think.

MR. GRAY: Back to my point, though, we know what's going to happen beyond five years.

MS. SHIELDS: I don't think there's any desire not to accomplish what you want. We intend to go on. The question is how we say it.

MR. GRAY: Well, as long as the covenants go into the transfer of deed to the property, you could make sure that it's completed, because --

MS. SHIELDS: Yes, but I was reading what's in the deed, which is "any additional remedial action" as being broad enough to cover that.

MR. GRAY: Well, if you precede that by saying "the remedy is in place," and then you talk

about any additional remedial action, it sounds like something different to me.

MS. SHIELDS: Well, maybe we can somehow clarify that that is meant to include what's left of the remedial action. I mean, I don't want to say something that looks like we're contradicting what the Statute says.

MR. GRAY: Well, I'm talking about whether appropriate covenants are incorporated in the deed of transfer to assure that the cleanup is completed, because the Statute says "if any additional remedial action is necessary." I mean, that's covered. I could argue the statute could be read a different way.

MR. DAVIDSON: I think we're pretty close. I just wanted to see how it fits in here.

MR. PENDERGRASS: We tried to put it together.

CHAIRMAN BACA: Let me just pause here for just a second. I'm going to have to leave and I will return. I'm sure you'll be here when I get back. I'm handing the authority over to Anne.

MS. SHIELDS: Tom suggested that we move

to contracting and go through that, since it would seem to be a lot less controversial an area. Maybe we can get through that while he's gone and then come back to where we are.

Are there any objections to that?

CHAIRMAN BACA: And also, if you do get back and proceed, "Findings and Recommendations," that should be reflective of what's in the text. I wouldn't spend a lot of time on that.

Okay. I'll be back.

MS. SHIELDS: Perhaps we could try to finish up on that one point. I think we should finish that concept.

MR. PENDERGRASS: This is what we think was agreed in terms of adding the sentence to the middle of the first full paragraph on page 14 with a footnote.

MS. SHIELDS: Don, maybe if at the top of page 14 where it says the government will take any additional remedial action found to be necessary after the date of transfer, do you want to propose adding a few words in there that clarifies that "additional"

means finishing up?

MR. GRAY: I think that this is a little bit too broad a statement, that having a remedial action in place satisfies the requirement of protection of human health and the environment. It doesn't do that at all unless it's followed through and the action is completed.

MR. GOODHOPE: If that would say "after remedial action -- well, let me take it from the beginning. "The task force concluded that in most instances having the remedial action in place may protect human health and the environment." I don't think we're ready to agree that it satisfies the requirements set forth by law. I don't think we want to be on the record as having supported anything like that.

MR. DAVIDSON: But the point of what we're trying to get to is that there may be some instances where it's reasonable to allow transfer to occur while remedial action is underway.

MR. GRAY: Well, if that's what you want to say, that's fine. But that's not what this says.

MS. SHIELDS: Well, let's talk about how to revise it so that it says that, because what we agreed this morning was that we thought in most instances they would not have to wait for 30 years pumping and treating before they could transfer by deed. Right?

MR. PENDERGRASS: Okay. Can it be "in most instances having remedial action in place will protect human health and the environment sufficient to allow transfer by deed"?

MR. GRAY: Provided that there are covenants.

MR. GOODHOPE: Well, it's the "sufficient" in there that is really -- "sufficient" relative to what? Relative to the statutory requirements, and I don't think we can agree with that.

MS. SHIELDS: I thought that is what we agreed to this morning.

MR. GOODHOPE: No. I think what we agreed to was that it may protect human health and the environment.

MS. SHIELDS: Which is the standard in the

Statute that allows transfer by deed.

MR. GOODHOPE: It may be.

MR. GRAY: Well, what kind of language means they're completed, have been instituted? The Statute says, "all remedial actions necessary have been taken." That doesn't mean instituted.

MS. SHIELDS: But I thought what we discussed this morning and agreed to was that we could interpret "remedial action has been taken" to mean that, except for the pumping and treating which may go on for years and years and years, that remedial action has been taken.

MR. GRAY: But that "except for" is the big problem, because that "except for" means, unless there is some kind of assurance that that action is going to be completed, it is not ultimately going to be protective of human health and the environment.

MS. SHIELDS: All right, so propose some language that would add the concept that the remedial action in place would be --

MR. GRAY: At some point, it should say "provided that there are covenants in the deed of

transfer to assure that the remedial action will be completed."

MR. KUSHNER: Do we not have the obligation already under CERCLA 121(c) to review the remedial actions in place where waste has remained and remedial action continues, to review that every five years and to take whatever action or additional action is required, which to me also implies the requirement to continue that remedial action such that the reference might very well be that you want simply "we will carry out our responsibilities under CERCLA 121(c).

MR. GRAY: Well, I think the assumption under 121(c), though, is you haven't transferred the property.

MR. KUSHNER: We can transfer the property. We still retain liability if it's formally owned Defense property under the DERA Program. We have responsibility to cleanup property we presently own and property we formerly owned.

MR. GRAY: Well, if you transfer the deed, then you don't own the property any more, and suppose

the new owner says "I want this pump and treat equipment out of here"? What do you do? You don't own the property at that point.

MR. KUSHNER: You have two options, and I forget what Executive Order 1205-80 provides, but either we have 104(e) authority to issue the order to get access to that property and carry out the remedial action or EPA can get that order. Of course, we would have to go through the Department of Justice to get the access order, but I don't know whether EPA has authority themselves to do that. So, we have the statutory authority to get on the property to do whatever is necessary.

MR. GRAY: Then what's the problem with putting covenants in the deed?

MR. KUSHNER: I didn't say there was any.

MR. GRAY: If we have the authority, then what's the problem with putting covenants in the deed?

MR. KUSHNER: I didn't say there was anything wrong with it. I just said --

MR. GRAY: I thought you were raising it as a reason why it wasn't necessary.

MR. KUSHNER: I'm saying that we could reference 121(c) and whatever our statutory authorities are to ensure that we carry out the remedial action implemented.

MR. GRAY: I don't think that will ensure it.

MS. SHIELDS: What if we added at the end of "human health and the environment," Don, "provided that the transfer documents ensure that the cleanup process will be completed by DoD"?

MR. GRAY: That's getting closer.

MS. SHIELDS: I think it is. I mean, I don't want to have to fall back on getting an access order to get on the property. We don't want to have to go through that.

MR. GOODHOPE: I'm sorry. I'm not trying to be difficult, but the Statute says what the Statute says. "All remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer." That's what the Statute says.

MS. SHIELDS: That's right.

MR. GOODHOPE: We cannot sign onto anything that in any way says that that complies with the Statute. We're willing to say that remedial action in place may protect -- may sufficiently protect human health and the environment. All right. That's --

MS. SHIELDS: That's the standard which allows transfer by deed. If we can make the determination when the remedial action is in place, but before 30 years of pump and treat is going on, that human health and the environment are protected right now --

MR. GOODHOPE: Yes, but I think -- no, because there was a jump there that you're making that we're not willing to make. I would prefer a sentence, and tell me if this is wrong, that would say "it is unclear whether this sufficiently meets the requirements of CERCLA." And that would put that footnote in. Well, that's the statement that's before this.

MS. SHIELDS: That's the statement that's

in there, Sam.

MR. PENDERGRASS: The paragraph begins discussing that issue.

MR. GOODHOPE: Do we want to reiterate or make it stronger?

MR. PENDERGRASS: Well, "the task force discussed the merits of transferring before all necessary was completed, focusing on where surface remediation is complete, groundwater remediation through pump and treat will continue for decades, concluded that this issue needs to be resolved and recognized a definitive interpretation may not be possible." We had the footnote about the administrative agencies trying to resolve it and this, as I understood it, this sentence was attempting to deal with the situations where it may be possible to do something else. If it's not -- maybe the task force is coming back to that it's not possible to say anything further about transfer, but I thought this morning we were at a point where we were saying something further about transfer of property where a long-term pump and treat was going to be ongoing.

MS. SHIELDS: I thought we did too. I thought that was the whole point of the discussion this morning.

MR. GOODHOPE: I'm sorry if I misled you by assenting to what you think we assented to.

MR. GRAY: I think what Sam is saying is that this task force may state its opinion that this would be sufficient to protect human health, but the Congress or the Court is going to have to make the ultimate decision.

MS. SHIELDS: But that's what I thought we've said -- that it's not crystal clear in the Statute, that Congress and the Courts -- or the Courts may have to resolve it, but in the task force's mind in most instances transfer before pump and treat is completed would meet the standard for transfer under the standards.

MR. GRAY: It would protect human health and the environment, but that would not necessarily meet the requirement of the law because it would not have been completed, which is the part of the law that we can't say we know it satisfies.

MR. PENDERGRASS: Okay. And the Statute does not say "completed."

MS. SHIELDS: It does not say "completed". It says "taken."

MR. GRAY: Has been taken.

MS. SHIELDS: Has been taken.

MR. GOODHOPE: I would like to see someone in court on that. You know, "has been taken" is to mean completed.

MR. GRAY: If they didn't mean completed, why wouldn't they say "has been initiated"?

MS. SHIELDS: That is not what "taken" means in the pre-enforcement review part of the Citizen's Suit Provision. The very same word is used there and it does not require a citizen or a state to wait until pump and treat is finished before they can challenge a remedial action. It does not require that and that's the only other place that I'm aware of that the same word has been used in the Statute. And the citizen's groups, the environmental groups, fought long and hard for that interpretation that they did not have to wait until the end of the remedial action

to question it.

MR. GRAY: But the subject matter is very different in that case. It's a matter of whether or not you have access to the courts at that point know, before you wait to see if the remedy is going to work or not. This is an entirely different matter, it seems to me.

MR. GOODHOPE: What happens when the U.S. goes after a private party that has initiated remedial action and the person says, "Hey, I started it and I've taken action." I'm sure that that person wouldn't be allowed to say that.

MS. SHIELDS: Well, let me ask you this. What did you think we agreed to this morning?

MR. GOODHOPE: That remedial action in place may in fact protect human health and the environment.

MR. GRAY: That doesn't go far enough for me, but it may for you.

MR. PENDERGRASS: And then there's--if we stop there, there's an unstated implication as to what consequences may flow from that.

MR. GRAY: Well, we've already said earlier we think it may have to be decided by the courts and the Congress.

MS. SHIELDS: All right. Is that --

MR. GOODHOPE: That would be enough to give you guys --

MS. SHIELDS: I mean, that is not as clear as I would like it to be. If that's all I can get--is this the language that we've agreed to now?

MR. GRAY: I haven't, because I still have my problem, which is --

MR. GOODHOPE: Provided that the transfer documents ensure that the cleanup process will be completed by the responsible agency expeditiously and in accordance with the applicable standards.

MR. GRAY: I'll buy it.

MR. GOODHOPE: That picks up --

MS. SHIELDS: Would you go over there and write that and then maybe we can go on?

MS. McCRILLIS: Is not, then, the implication of that that we cannot then transfer property until completion of the final remedy?

MR. GRAY: Well, we're not going to render that judgement.

MR. GOODHOPE: I think DoJ can give an opinion, EPA can give an opinion, and that's their opinion. That will be tested in court.

MS. SHIELDS: It does not give as much guidance to the bases and to DoD as we thought we had provided this morning, at least as I thought we had provided this morning, which was why I was pushing it because I thought that's what this group was supposed to do was to try to work out some of these problems. But if this is as far as we can get, this is as far as we can get.

MR. GOODHOPE: Yes, and we would be happy to, after talking with NAG, to help push for any legislative clarification. I mean, this gets in the way of our community's getting title.

MS. SHIELDS: That's right.

MR. GOODHOPE: But, you know, that's what the Statute says.

MR. GRAY: At least maybe since this report is going to the Congress it will stimulate

Congress to clarify.

MS. SHIELDS: Well, and Mike West's bill that he came and talked to us about I think does do that to a certain extent. It is to move these closures faster, so --

MR. PENDERGRASS: It may make things more complicated, because it adds a lot of new language.

MS. SHIELDS: All right. Can we move at this point to page 23, which is the beginning of Chapter 3?

MR. GOODHOPE: Where are we leaving this now?

MR. PENDERGRASS: We should probably let people read whatever he's added.

MR. GOODHOPE: I mean, if we move, does that mean that we've accepted this?

MS. SHIELDS: I would hope not to come back to it.

MR. GOODHOPE: Okay. Then we're not done.

MS. SHIELDS: What is wrong with it?

MR. GOODHOPE: "...concluded in most instances." I don't think we've had -- how can we

make that conclusion?

MR. PENDERGRASS: In many instances.

MR. GOODHOPE: Some. In instances, I mean, certain instances.

MR. GRAY: Why don't we just say --

MR. GOODHOPE: I yielded today all day on significant risk.

MR. GRAY: Why don't we just take out "in most instances"?

MS. SHIELDS: Just take it out?

MR. GRAY: Saying "having the remedial action in place may protect," I mean.

MS. SHIELDS: All right.

MR. GOODHOPE: Now it's become an absolute.

MR. PENDERGRASS: No, no. It says "may."

MS. SHIELDS: It says "may."

MR. GRAY: "May protect."

MS. SHIELDS: Okay, Sam?

MR. GRAY: Especially with the other addition that you'll have assurances that the clean up it be completed.

MR. GOODHOPE: There's got to be a better way.

MR. GRAY: Well, Sam, the only situation where that would not be a true statement is if somehow it's a defective remedy and it doesn't work.

MR. GOODHOPE: And that happens a lot of times.

MR. PENDERGRASS: Yes, but there's other - -

MS. SHIELDS: Can we move on?

MR. GRAY: That's the reason there's a "may" in there.

MS. SHIELDS: And we will not come back to page 14.

MR. GOODHOPE: Thank you for your indulgence.

MS. SHIELDS: Okay. We are on page 23 now.

MR. GRAY: Are you keeping Tom out of the room for this so we can speed it up?

(Whereupon, at 2:29 p.m., off the record until 2:36 p.m.)

MS. SHIELDS: We are moving to Chapter 3, Contracting. You'll be happy to know that I have no comments on Chapter 3 at all. Does anybody have comments on Chapter 3? If you do, we'll start page by page.

MR. DAVIDSON: Why don't we start with the general purposes? I think mine is minor.

MAJOR GENERAL OFFRINGA: Paragraph 2.

MS. SHIELDS: Page 23.

MAJOR GENERAL OFFRINGA: Page 23, line 4, recommend deletion of "and the Corps of Toxic and Hazardous Material Agency, THAMA." They are not a contracting center as defined in the book here, Federal Contracting Authority.

MS. SHIELDS: Does anybody have any problem with that? All right.

MAJOR GENERAL OFFRINGA: I would just note for the record, and we'll fix it in the errata sheet, we call THAMA about four different things in here and we'll get that standardized.

MS. SHIELDS: Well, we want to get that straight.

MAJOR GENERAL OFFRINGA: Similarly, at paragraph 3, third line, fourth line up from the bottom, delete "CETHAN" for the same reason, and change "there" in the next to the last line to "its."

MS. SHIELDS: Okay.

MAJOR GENERAL OFFRINGA: That's it.

MR. PENDERGRASS: What was the acronym you used?

MAJOR GENERAL OFFRINGA: CETHA.

MS. SHIELDS: All right. That's it for page 23?

Page 24, do you have any comments on this page?

MAJOR GENERAL OFFRINGA: Yes. Contractor pools, first paragraph, line 2, recommend the addition of a sentence and the reason for it is -- and the deletion of prequalifying wherever it occurs. Prequalifying implies that we don't have competition and we do have competition. I think we should define with a sentence what a contract pool is.

MR. CIUCCI: Wait a minute, General. Based upon this gentleman's comment earlier about

having a glossary, Sonny sat in the back and assisted us and we have clarified the use of the terminology in the glossary.

MAJOR GENERAL OFFRINGA: Oh, okay.

MR. CIUCCI: We have three glossary terms --

MS. SHIELDS: You've clarified what, the contractor pool?

MR. CIUCCI: Yes, that term.

MS. SHIELDS: All right. Is that good enough for you, General?

MAJOR GENERAL OFFRINGA: I'd like to see what the clarification is.

MS. SHIELDS: Would you people please identify yourself for the reporter, so he knows who you are?

MR. OH: I'm Sonny Oh.

MAJOR GENERAL OFFRINGA: Okay. Good. With the provision then that we will define that and come to agreement in a glossary, we'll go ahead. But I would still recommend deleting "prequalifying" and in line 2 of that paragraph the contract will say,

"using." So, the sentence would read, "The concept of using a pool of contractors."

MS. SHIELDS: Is that all right with everybody?

MAJOR GENERAL OFFRINGA: Okay. Then, prequalifying is used in several other places in that paragraph if we'd just pick those up and delete them. Okay. That's it for page 24.

MS. SHIELDS: Any more on 24? Page 25? Yes, Don?

MR. DAVIDSON: Mine is on 25.

MS. SHIELDS: Okay. 25? Don?

MR. DAVIDSON: Yes. One of my comments earlier on the draft was that if we're going to put in this business about the contracting pools and all, we ought to include language that would say that failure to perform satisfactorily should be grounds for disqualification from the pool. In other words, the comment was there needs to be a careful review of their performance and I would hate to see a situation where once in the pool you could forget about how well you perform. Now, if there's some other provision

that covers that --

MS. SHIELDS: Does DoD have any regs or rules now that would accomplish that?

MAJOR GENERAL OFFRINGA: Not that I'm aware of.

MS. SHIELDS: That would prevent that or are we running up against something else?

MR. CIUCCI: First of all, the contracting pools will not exist forever. They'll be competing occasionally. One of the criteria when you select the contractors -- have a source selection, -- will be past performance. But I don't object to that proposed language.

MR. GRAY: I would like to see that in.

MS. SHIELDS: No objections? Do you have language to supplant?

MR. GRAY: Yes. You would insert just before the last sentence of paragraph 2, after the word "performance," period, "Failure to perform satisfactorily should be grounds for disqualification from the pool."

MR. DOXEY: I just want to further clarify

one item. That beginning of the sentence, "Also contract options should be reviewed annually on the basis of performance." Are we actually saying that the failure to, if you will, renew is the same type of grounds.

MR. GRAY: That could be one way of disqualifying.

MR. DOXEY: That's what I'm saying. So, maybe you already have that mechanism.

MS. SHIELDS: It just says review.

MR. GRAY: You've got to review them, but it doesn't say you'd have to disqualify them.

MS. SHIELDS: And that's the concept that Don has added, is bump them out if they're performing --

MR. CIUCCI: Well, it's possible to have them in the pool and they hadn't performed in a year, they hadn't been picked up to do a job. So, that language --

MR. GRAY: It's an emphasis point, I think.

MS. SHIELDS: Is that all for you, Don?

Did you have some?

MAJOR GENERAL OFFRINGA: The first paragraph, the next to the last sentence where it says, "Very few of DoD's contracting centers have this capability." Are we talking about the capability or are we talking about the pools here? My reading is we're talking about the pools.

MR. OH: The capability to use hybrid contracts, use a cost plus and fixed type of contract.

MAJOR GENERAL OFFRINGA: So, the statement says very few contracting centers have the -- very few of them have the pools, I would agree. I would dispute that they don't have the capability to create them. I would propose changing that to, "Very few of DoD's contracting centers have these pools."

MS. SHIELDS: Do you have any objection to that? That's what you mean, right?

MAJOR GENERAL OFFRINGA: I would also propose in addition to paragraph 2, after the sentence says, "Geographic monopoly within a pool must be avoided," and I propose a sentence that has to do with making sure that we don't go to the other extreme and

create excessive capability which we then do not use. I would propose a sentence then that would say, "Care must be taken to assure some overarching control is placed on the contracting effort to assure that contract capacity is managed to avoid non-productive resource expenditures.

MR. CIUCCI: Yes. We had received those comments. We don't object to them.

MS. SHIELDS: All right. You have those written down so you can put them in?

MR. CIUCCI: We got something from Jack--

MAJOR GENERAL OFFRINGA: Yes. That basically reflects that he submitted to you.

MR. CIUCCI: We don't object to that. I don't at least. Do you, Sonny?

MR. OH: No, I don't have any problem with that.

MS. SHIELDS: Anything else on that page?

MAJOR GENERAL OFFRINGA: That's all.

MS. SHIELDS: Can we move to page 26? Don, do you have anything?

MR. GRAY: Just a typo. I think "change"

should be singular not plural in the first line. "Services generally change."

MS. SHIELDS: Page 26, anything else?

MAJOR GENERAL OFFRINGA: I propose on the second paragraph or the first complete paragraph, line 3, that rather than say "process-oriented cleanup technology could be better managed under the service model," say, "might be better managed."

And then the last sentence in the second full paragraph which says, "When remedial effort contains combinations, it is not always clear to the contracting officer how the contract should be classified." That kind of left me up in the air. It may be a true statement, but we didn't propose any solution to that. How about, "When a remedial effort contains combinations of these work elements, the contracting officer must make the decision as to which contracting model is most appropriate?"

MR. GRAY: That's certainly safer than what's in here. That won't raise as many hackles.

MAJOR GENERAL OFFRINGA: And then I would recommend on the last partial paragraph, again that we

replace prequalifying with using. That's all I have on 26.

MS. SHIELDS: Anything else on 26, Don?

MR. GRAY: No, not on 26.

MS. SHIELDS: No? Page 27?

MR. GRAY: I have one thing on 27. The first full sentence on the page reads, "DoD should increase the use of the turnkey approach to combined design and construction under one contract." The last time when we discussed this at our July meeting, I expressed the opinion that that should be done only to the extent that they had the capability to monitor and oversee the work effectively.

MS. SHIELDS: That's right.

MR. GRAY: And I would like to see that language added at the end of that sentence saying, "Provided that they have the capability to monitor and oversee the work effectively."

MS. SHIELDS: Do you all have that? "Provided that they have the capability to monitor and oversee the work." It's on the top of page 27, after the first full -- at the end of the first full

sentence.

MR. KUSHNER: Let me ask a question about that to people who have more expertise in contracting than I do. But having done construction contracting and service contracting and A&E contracting myself, I know there's a provision in the Federal Acquisition Regulations that provides that the -- that prohibits the awarding of a construction contract to the firm that did the design. I'm just curious as to how this provision relates to that prohibition. Is there some mechanism to get an exemption?

MS. SHIELDS: I thought it was a different method.

MR. CIUCCI: In AFLC, for instance, where they have all the overhaul for the Air Force airplanes and engines, etc., the centers out there often go up and ask for a waiver of the FAR on some of these issues.

MR. KUSHNER: I'm only talking in the context of construction and design, A&E here, Brooks build type contracting, which is generally the type of contracting you do in your study phase. After the rod

and you've got your scope of work, you go out with a set of plans and specifications for the work to be done. That's usually fixed price and it functions to me in an equivalent manner as when you do a design of a building and you go out with a fixed price contract for the construction of that building. So, I'm not talking systems, I'm not talking ship or aircraft overhaul because the FAR is specific in the construction context because it is in the construction contract or the construction section of the Federal Acquisition Regulations.

MR. CIUCCI: Yes. I'm talking remedial action. The reason I point to those bases is that they have a lot of activity for remedial action for the Air Force because they're industrial centers, and they have generated a lot of waste over the years leading to contamination of underground water, etc..

MR. KUSHNER: Right.

MR. CIUCCI: So that's what I'm talking about, the A&E for the design. I'm talking about the construction for cleanup when you get into moving earth. If the two phases are combined, then the

organizational conflect-of-interest problem goes away.

MR. DOXEY: I think there was a lot of discussion on that last time and Jack Mahon from the Corps was mentioning that. I think they intended the Brooks Act and what was it applied to and also the FAR provisions and how those are actually applied warrants that there may be some flexibility within this type of cleanup and that we should make use of that wherever we can. I don't think we're proposing to replace any language in the statute. Instead, we're looking at where you do have those provisions we should look to an attempt where we can have a turnkey approach.

I think the example that was used last time was the clean contract. Where that is now underway, it is not violating any laws and it is almost like a turnkey type approach.

MR. GRAY: That was the reason that I asked -- that we had some discussion about that, because to some extent having different contractors in different phases of the work provides an internal control that will be missing with this turnkey

approach, which makes it even more important to have adequate capabilities of oversight.

MS. SHIELDS: That's right.

MR. GRAY: Now, whether or not that violates the rules and regulations. The Brooks Act is specific for architect and engineering contracts.

MR. DOXEY: That's correct. I'm saying it may not apply to this type of --

MR. KUSHNER: I know within the Navy, I believe, we use Brooks Act procedures for our study.

MS. SHIELDS: Can we move on? Do you have anything else on 27?

MAJOR GENERAL OFFRINGA: Yes. I'd suggesting changing in paragraph -- the second full paragraph, fourth line, which says, "The turnkey approach will require changing," I'd say "may require changing".

Then the last paragraph, again we need to delete on the third line CETHA. So, it would just read, "HSD contracting officers."

MS. SHIELDS: All right. Is that it for 27?

MAJOR GENERAL OFFRINGA: The only other question I have is whether we're --

MR. GRAY: Wait a minute. If you just take out CETHA, you're saying, "Contracting officers now belong to different organizations," but it doesn't say from what. The statement was that HSD and CETHA officers belong to different organizations. If you take out one of them, you've only got one left.

MAJOR GENERAL OFFRINGA: I think the point of this was that the HSD contracting capability is outside of HSD. Is that correct? I guess you could read it the other way.

MR. CIUCCI: That's what he means. They're not in the --

MS. SHIELDS: You mean to say in HSD and other contracting officers? Is that what you mean?

MR. CIUCCI: No. I didn't write this, but I know that's not what he means.

What do you mean, Sonny? Do you mean in these two organizations the contracting folks do not form a part of that organization?

MR. OH: That's correct.

MR. CIUCCI: So, even if you take the one out, this holds true with respect to HSD?

MR. OH: Yes.

MR. DOXEY: I think the point is that these two entities are outside of that process, and now that you've eliminated one, only one remains outside.

MR. CIUCCI: That's correct.

MR. GRAY: But then you need to revise the sentence accordingly because you're saying they belong to different organizations and one outfit can't --

MS. SHIELDS: It's the sentence that's left.

MR. CIUCCI: HSD contracting officers belong to a different organization.

MS. SHIELDS: Belong to a different. Okay. A different, okay. All right? Are we through with 27? 28?

MR. GRAY: I have one thing on 28. The end of the first paragraph where it says, "Such as against liability arising from the contractor's negligence." I think we should add, "or misconduct."

MS. SHIELDS: Yes. I do have a comment here. I have to take back my previous statement. Doesn't Section 119 of CERCLA do precisely that, indemnify a contractor for his negligence?

MR. GRAY: Except in cases of negligence.

MS. SHIELDS: I thought it was gross.

MR. GRAY: Beg pardon?

MS. SHIELDS: I thought it was gross negligence in 119. I thought we did indemnify for simple negligence.

MR. GRAY: They may have put gross in there. It may have been gross negligence. You think we ought to put gross in?

MS. SHIELDS: Well, I don't think -- I think if we leave that statement --

MR. GRAY: In most places it just says negligence or misconduct. That particular section may say gross.

MR. DAVIDSON: Our suggestion was just to delete that.

MS. SHIELDS: Delete the parenthetical phrase?

MR. DAVIDSON: No, delete the sentence starting from "Of course."

MR. CIUCCI: The authority to use this indemnification provision stems from Public Law 85-804. That's the background here. In DoD, the Agency is going to tailor a clause within the confines of Public Law 85-804 and the DFAR clause. So, I know that as a policy matter among commanders, they will never approve one if it has anything that allows contractors to be reimbursed for costs resulting from his own negligence. Now, if you want to go beyond that and say gross negligence and misconduct -- fine, but certainly that's obviously implied.

MS. SHIELDS: Well, the problem is you have taken what the DoD standard apparently is and put it in the whole U.S. government. Within the four walls of CERCLA, it is not an accurate statement because EPA can indemnify their --

MR. GRAY: I don't think they can do it in cases of negligence and misconduct. I was involved in the legislation --

MS. SHIELDS: For simple negligence, they

can.

MR. DAVIDSON: I think that what they can indemnify for is gross negligence and willful misconduct. But for matters other than those two --

MR. GRAY: Gross and willful were added?

MR. DAVIDSON: I believe -- well, we have the statute.

MR. KUSHNER: In A-2 it says, paragraph 1, response action contractors, the indemnification shall not apply in the case of releases -- I'm sorry. Never mind.

MR. GRAY: Well, can I offer this for purposes of clarification?

MS. SHIELDS: Maybe we can just change U.S. government to DoD.

MR. DOXEY: I think one of the points the purpose of that last sentence was to go that one step beyond and clarify. If it's caused confusion, then the point would be to just eliminate from "of cost," to the end of the paragraph, because I think the point that we were making earlier was the provisions under

85-804, and that is different than the Section 119, because the intent of Section 119 was to handle sites where you have no responsible party, where 85-804 recognizes that in the way in which we conduct our contracting. We do have different authority and I think that's what the question is.

MR. GRAY: Well, I kind of like that phrase in there. I have a problem recommending that we indemnify somebody for negligence and misconduct. I don't care whether it's gross and willful or not.

MS. SHIELDS: All I'm saying is Congress did care in CERCLA; however, Don doesn't want to delete it. He wants to just change U.S. government to say DoD. I don't have any problem with that.

MR. DAVIDSON: If I may, just a related question. Is there any sense for the federal government having the same standard of indemnification or are the circumstances sufficiently different that EPA would do it differently than DoD?

MR. KUSHNER: Of course the question I think, Gordon, to answer is 119's phrased in the context of the precedent shall for all site releases, you would be the precedent. For on DoD, we may have the authority to carry out 119 authority, and therefore, we may be limited to the same, which is this provision is --

MR. DAVIDSON: Right.

MR. KUSHNER: Consistent with that.

MR. DAVIDSON: That's right.

MR. KUSHNER: With the executive order.

MR. DAVIDSON: I don't have a copy of 12-580 here, but we may have the 119 authority for releases on our own facilities such that --

MR. KUSHNER: I would propose just knocking that sentence out, because --

MS. SHIELDS: The 119(c) reads, "The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability for negligence arising out of the contractor's performance, carrying out response

MR. KUSHNER: Of course the question I think, Gordon, to answer is 119's phrased in the context of the precedent shall for all site releases, you would be the precedent. For on DoD, we may have the authority to carry out 119 authority, and therefore, we may be limited to the same, which is this provision is --

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MS. SHIELDS: The 119(c) reads, "The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability for negligence arising out of the contractor's performance, carrying out response action activities, unless such liability was caused by conduct of the contractor which was

grossly negligent, or which constituted intentional misconduct." I think we're going to have to leave it out.

MR. GRAY: Well, no, we can add gross and intentional.

MS. SHIELDS: Well.

MR. CIUCCI: How is that implemented?

MS. SHIELDS: The problem is, Don, that 85-804 has the "you don't indemnify for simple negligence."

MR. CIUCCI: That's what we said.

MR. GRAY: Well, if you want to make it consistent, then, you would add gross and willful here.

Mr. CIUCCI: If the tailored clause prohibits indemnity for sample negligence, it is understood that gross negligence and willful misconduct would not be reimbursed either.

MS. SHIELDS: But we can't change 85-804. That already says you can't -- that's another, that's one of your statutes, right?

MR. GRAY: That's right. Then limit it to DoD and you can say that. Gordon's point was if he

thought it wasn't going to be uniform, if the law doesn't provide for it to be uniform, then we have to follow the law.

MS. SHIELDS: It appears that DoD could use 119.

MR. CIUCCI: Did the President agree? How did he implement it? I have never run onto that one yet. This is what the President has allowed in P.L. 85-804. He has delegated authority to the Sec Def, who has delegated it on down to the services. So, -- and this is what contractors are looking for, some indemnification agreement in the contract, before they agree to enter into these kinds of projects. So this is something that is in being and should be workable in these clean-up situations.

MR. KUSHNER: Of course, the other option, too, you get of 85-804's to classify the work as not being nuclear or ultra-hazardous. Then 85-804 wouldn't apply. You would look at 119 on its own.

MS. SHIELDS: Could we just leave out, agree to leave out, the "of course" sentence? Then we don't --

MR. CIUCCI: Of course we can leave out the

"of course".

MR. GRAY: I take exception here.

MR. CIUCCI: No. I thought you just wanted to leave out the two words. That's what I agree to. To leave out the "of course".

MS. SHIELDS: We need consensus here, folks. I don't think we want to create more confusion. Under one statute you have one standard, namely, that you can't indemnify for any negligence; under another statute, you can indemnify for negligence, just not for gross negligence, or intentional misconduct.

And if there is no reason to even throw in the "of course" sentence, why don't we just leave it out.

MR. DAVIDSON: I support that. I just think it confuses --

MS. SHIELDS: Then you have got the standard you preferred, which is no indemnification for any negligence, even simple negligence, because that's the standard in 85-804. Okay? Any more of 28?

MR. GRAY: I just want your understanding of whether the effect of knocking that out is that contractors will not be indemnified for circumstances

involving negligence or misconduct, is that correct?

MS. SHIELDS: Not under 85-804, they won't.

MR. GRAY: Well, are these contracts going to be under 85-804?

MR. CIUCCI: Some could. That's the authority.

MS. SHIELDS: That's what we're using.

MR. CIUCCI: That is the only authority that interests top industry officials, whenever it comes to putting indemnification agreements into the contract. In DoD, 85-804 is the main authority you're talking about with respect to DoD and those agencies in which it's authorized.

Now, in DOE you have the Price Anderson Act and if that authority would go to DoD, they would throw that one in. Now, don't talk to your section 119; it is not a contracting statute and this is contracting, that's what we're talking about.

MS. SHIELDS: They've got a really bad lobbyist here.

MR. CIUCCI: And I think it should stay the way it is. You can take out "of course," but I don't have a vote. So --

MS. SHIELDS: Well, then you're just creating a lot of confusion.

MR. CIUCCI: No. This is DoD policy. You heard it discussed by DoD lawyer the last time it was brought up here.

MS. SHIELDS: Yes. But the problem is, EPA uses 119.

MR. CIUCCI: I know.

MS. SHIELDS: And there's no reason I can think of that you people couldn't, if your contractors were smarter, and you pointed it out to them --

MR. CIUCCI: How did they use 119, EPA?

MS. SHIELDS: They indemnify RACs (response action contractors).

MR. CIUCCI: Do you have it in your contract?

MR. DAVIDSON: Yes. We're currently writing the regulations. I don't know all the details. There's some dispute as to what the ceiling is, what the amount of the indemnification is.

MR. KUSHNER: Let me raise an issue, too. Maybe we're talking apples and oranges here. I have heard 85-804, and I have heard contractors, or direct labor contractors talk about 119. The contractors I

have heard talk about 85-804 are contractors that go out and do production work for us, and handle hazardous materials, and want indemnification in the event they have any releases and they have real responsibility.

Because 119 won't address them, because they wouldn't fall under the definition of response action contractor. Response action contractors, I guess for the Navy, I am very certain would be very happy to have 119 indemnification. So, I think you need to characterize 85-804 applies, and it applies to a much broader range of circumstances than simply 119, which is limited to response action contracting.

MR. KUSHNER: I think there is a key point, you know, as you look through each of this, this section was designed to address the options under 85-804. You know, Section 119 exists, and for EPA, Section 119 is really sort of an attempt when you have no responsible party.

And as a result, they need some mechanism in order to protect their contractors. Whereas, when we go out and do contracting under 85-804, we do have an existing mechanism. We're not going to go anywhere,

whereas a third party would be. So I think what this section would conclude is that there are certain provisions that we do have accompanying 119.

I don't say that we're replacing 119, or that this is -- you know, supersedes 199. I think this is just one area that needs to be discussed. And that's what that was. And cost was to be clarified.

MS. SHIELDS: We have agreed to leave out the last sentence of the first paragraph, right?

MR. GRAY: If you'll tell me what 85-804 says about indemnification, for negligence.

MR. CIUCCI: I don't think it addresses negligence, so you're going to have to put that policy in your study.

MS. SHIELDS: I thought that's what you just said, was that 85-804 doesn't allow you to indemnify them for their negligence.

MR. CIUCCI: That is what we are recommending in this. That would be put in a clause. Any clause that is drafted by the contracting officer, see? There is broad authority under 85-804. That's the reason this is part of the recommendation.

MR. KUSHNER: Doesn't the FAR have a

standard clause, a standard indemnification clause that you can simply add to the contract?

MR. CIUCCI: The FAR does, and the DoD clause also allows the contracting officer to write up very specific liability indemnity provisions, such as the Air Force did with flying the civilian aircraft (CRAF fleet) into the Middle East during Desert Storm and Desert Shield.

They drafted all the provisions, sent them up to the Secretary of the Air Force and got approval. So, you have that authority there to indemnify. But as far as I know, industry in all their recommendations, right now through CODSIA, the others, NSIA, all agree that they don't want to be indemnified for their negligent acts, because the statute's wide open.

You don't have that specific language like you have under 119, and I'm not that familiar with the indemnification working under 119.

MR. GRAY: That's what I was working on when the House did the -- I don't know who screwed it up afterward, but Gross --

MS. SHIELDS: I remember sitting in the room

when gross negligence was being decided on -- because the contractors were in the room, and they demanded it. And they said there would never be a CERCLA clean up if they didn't have indemnification.

MR. GRAY: Was that in the conference?

MS. SHIELDS: Yes.

MR. DOXEY: I could offer a possible solution. I think this was limited just to highlight a certain area. There is, as you know, an ongoing effort on indemnification and bonding, and a discussion of the direction that the Department should take. That's a separate study you probably find yourself bogged down with.

So, I would suggest that issue is further being addressed. The whole issue of indemnification, and Section 119, and 85-804. But I think that for this Task Force, the narrow focus is that here are some areas, here are some possible ways of expediting the program. And I think that is what your charter calls for you to do.

And as you look at that, does this section cause a problem? And if not, then I would propose that you leave that in, and then go forward.

MS. SHIELDS: Leave what in?

MR. DAVIDSON: The language as you haven't excluded that last sentence, because that last sentence was designed to sort of carry you one step further in understanding what we're seeing here. But I think what I'm hearing around the table is that that last sentence actually confuses the issue much more.

MR. GRAY: It doesn't confuse it if there's no provision in the law now, prohibiting indemnifying the contractor for acts involving negligence and misconduct.

MR. DAVIDSON: So you guys don't provide your contractor racks any indemnification. Your claim contractors? No indemnification.

MR. DOXEY: There is nothing that prohibits us from doing that.

MR. GRAY: Can't we make some provision for limiting indemnification for negligence and misconduct -- you can follow the 119 example, you can follow the other example. If you want to be consistent, which is Gordon's concern, you could use the same language as in section 119. But this way, we're in the position as a task force of saying, "We think you

ought to indemnify your contractors, without saying there ought to be any limits on indemnifying in cases involving negligence and misconduct." And I'm not prepared to do that.

MR. DAVIDSON: Is there some compromise here we can say? The task force recommends that these indemnification issues warrant further review? I don't know.

MR. DOXEY: Maybe the way to handle it would be to propose that this should be addressed further. The specifics on to what degree of indemnification. Not necessarily call out the difference between, simple negligence versus willful misconduct, or a whole host of different tests. Just say that should be spelled out to resolve the issue.

MR. GRAY: Do you have the authority to do it under existing law?

MR. DOXEY: Under 85-804, we do have the flexibility. We are not offering it at this current point. And that's been a part of the debate about the lack of qualified contractors.

MS. SHIELDS: So we should say that DoD should review its indemnification procedures.

MR. GRAY: No. I'm saying they should -- if they're going to engage in indemnification of these contractors, I'm saying they should put some provisions into the contracts to limit indemnification for acts involving negligence and misconduct.

Now, you can call it gross negligence or willful misconduct, or you can just call it negligence and misconduct.

MR. CIUCCI: So what you just do is add two words, for the contractor's negligence and misconduct?

MR. GRAY: Yes. That was my suggestions.

MR. CIUCCI: And if you want to delete "of course" I'll be agreeable to that.

MS. SHIELDS: So what would you have it read? "Of course Dod should -- even though Congress in 119 has specifically allowed indemnification of negligence," you're going to say in this task force report --

MR. GRAY: Unless it's gross negligence or willful misconduct.

MS. SHIELDS: Are you going to change this to say gross negligence and willful, so that it agrees with 119?

MR. GRAY: I'm saying it can go either way they want. All I'm saying is that if we're going to endorse the concept of indemnification, they should put into the regulations under whichever statute they're operating under and, as I understand it, they're operating under 85-804 --

MS. SHIELDS: What if we do this, Dod should review its indemnification procedures, but in no circumstances should it indemnify contractors for above the gross negligence and willful misconduct standard in 119? Okay?

MR. GRAY: Okay.

MS. SHIELDS: Dod should review its indemnification procedures, but in no circumstances should it indemnify contractors above the standard provided in Section 119 of CERCLA. Okay.

Okay, can we move to page 28 and 29.

MR. CIUCCI: You can adopt that standard. That's fine with me.

MS. SHIELDS: Any comments on page 29?

MR. DOXEY: Can we go back to that for a second?

MS. SHIELDS: Oh, where -- page 29 would

move to the finding and recommendations. So, what he saying is, we just reiterate -- I see. If there are changes to the rest of the chapter, it will be reflected in this part.

All right? That means that we can move to chapter five now, which is one page 35. This was also considered a less controversial section that maybe we could get through while Tom is gone. We will go back to chapter four. We will skip to chapter five now.

MR. OH: Before you move on, for the record, I have, items for the glossary to help clarify the concepts you talked about.

MS. SHIELDS: What is this? Let's go off the record.

(Whereupon, off the record briefly.)

MR. GRAY: Page 30 I think is a typo, under recruitment, first sentence, second line, "should concentrate on bringing on board contracting officers experienced in using <u>different</u> contract types." I think there's a word missing there.

MS. SHIELDS: All right. We are turning to page 35, resources and funding. Are there comments on page 35?

MS. SHIELDS: No comments. We'll pass to page 36. I have a question on the first full paragraph. The third line, you say, retain engineers, do you mean retain, or do you mean retrain? It could mean either one, I think.

MR. DOXEY: It could mean either one, I think.

MS. SHIELDS: Right here, page 36.

MR. CIUCCI: We corrected it.

MS. SHIELDS: Yes, sir.

MR. GOODHOPE: I have been quiet long enough. That first sentence of the first full paragraph on page 36, does that only speak to personnel resources, or are we talking about resources to ensure the clean up?

MR. DOXEY: I'm sorry. I missed that question. Which one?

MS. SHIELDS: We are talking about resources here. What are we talking about? Are we talking about the whole clean up process? Why not. Let's go for approach, right?

MR. DOXEY: Adequate resources with design, both personnel, and financial for those personnel.

MR. GOODHOPE: Well, I'm wondering if -- if we look at what is supposed to be happening over the next five, ten, 15, 20 years, the 80 some bases closing that have to be restored, and it is going to cost a lot of money.

And decisions are going to be made by certain people where that money is going to be spent. And those decisions, more often than not, are made at OMB. And I was wondering if the brooding omnipresence of OMB, coupled with the anti-deficiency act might just be enough, I mean, to make everything else that we're talking about here somewhat futile.

If OMB goes in and doesn't give us enough money to do 86 bases, you know, what's going to happen. I guess that's beyond the scope, I think, of this task force. But I think maybe we should have a task force, or a recommendation going back to Congress about what -- what will the role be of OMB the next -- you know, the coming decades, and getting these bases restored.

There are a lot of agreements that will be depending upon funding, a lot of commitments. Communities will be going out to try to get people to

come on bases. They are trying to redevelop these bases. And, you know, five years down the line there might not be any money for clean up at certain bases, or at most bases. And it's something I know that we haven't addressed, and I think it might be beyond the scope of this task force.

But I think we would not be taking care of our responsibility if we did not say something to Congress. Say, "Look, you have really got to worry about what role an agency that's not even here at this table, what an important role that agency is going to play. And nobody -- who is overseeing them? What is happening with them?"

But anyway that's -- I would -- I'm hoping Brian comes back here pretty quickly. Do you have his proxy?

MS. KWEI: Yes. I have his proxy. He is making an emergency phone call. States do have some concerns regarding whether states will be fully reimbursed for all of the state's oversight cost. Because at this point, the DSMOA's we have limit the coverage of funding or reimbursement to DERA funded activities.

And now we have these new issues relating to base closure and re-use. So, states would like to recommend that the existing DSMOA be amended as soon as possible to ensure that states will be fully reimbursed for, number one, state's oversight activities conducted under FFA's, number two, oversight activities related to, or required as a result of any oversight activities required of us -- I'm sorry, there's a typo here.

I'm reading basically from the letter we sent to Mr. Baca. Required as a result of any removal or remedial action identified as necessary in the future. And states would also like to be assured that any assistance or support the states provide with regard to the assessments or re-use of any clean or uncontaminated base properties would also be fully reimbursed.

These later issues were not -- did not exist when we negotiated and finalized the DSMOA's. These issues are related to base closure and re-use. So we would like to amend the DSMOA to make sure that the state will be fully reimbursed for these type of oversight activities.

MS. SHIELDS: If we just throw in "and oversight after restoration," does that give you some peace of mind?

MR. GOODHOPE: No. I think --

MR. DOXEY: If I can address a couple of those issues.

MR. GOODHOPE: If I can just finish my comments. I have no doubt that DoD wants to clean up the bases, and that the base commanders out there want to clean up the bases. But that just may not get the job done. And I think it's an important issue that needs to be addressed again. I think it's beyond the scope of this task force.

I think we need to make a recommendation, though, that Congress really needs to look at the budgeting process, and spending priorities, and closing and cleaning up 86 bases.

MS. KWEI: Also we know that now we have a base closure account. This is in addition to the DERA account. Base closure account is not addressed in DSMOA, but we understand that in practice we have been reimbursed out of this account. So we would like to make that clear in the DSMOA.

And the DSMOA we have in California is very limited. It just says, "DERA funded activities." So, for example, in California we have Mather Air Force Base. And right now, under pressure from the local communities, Mather feels like they need to do some assessment of the very very clean parcels, which is just pre-industrial pristine state. It has never been used, in the natural state.

So they are doing work assessing the status, or the condition of this parcel, and they are asking the state to provide oversight activity, like review their work, draft plan RI/FS. And we just want to make sure the work we are doing relating to the clean parcels are also reimbursable.

MS. SHIELDS: What do you want in here -- in where? Have you got a proposal? Do you have some language?

MR. GOODHOPE: We will draft up a proposal.

MR. DOXEY: I have a suggestion that I think maybe might speed it a little bit. I think that the words that we have right here, "That Congress ensures adequate resources." Maybe we can work something with those words, right in that area that would address

your concern.

I think some of those concerns that you mentioned, if I could take a moment and just hit those, you may see that they really don't belong within the Task Force. Maybe there is a different forum that you might want to seek to do that.

The issue of the oversight, the one percent I heard mentioned, that was "agreed to" through a lot of debate, and a lot of discussion with the National Governor's Association, the Association of Attorney Generals, also ASTSWMO. And what I would propose if that's inadequate, or if there is a problem with that, maybe that be the focus, because I think that worked pretty well to identify a level. Whether it's one percent, three percent, who knows what it is? But that would offer you an opportunity.

As far as things outside of that mechanism, that you would see that you would have oversight, if they were related to the base closure activity, our Office of Economic Adjustment has the ability to offer grant money, and has the ability to work for community redevelopment. You mentioned Mather, about additional moneys, and we may be able to be address it through

that mechanism.

I think we were trying to capture here is that "adequate resources," are available. And the BRAC -- I was talking about this special account. There is no difference whether it's DERA, or whether it's BRAC, as a source of funds as far as the oversight issue.

What we were getting at as far as this task force recommendation in whether Congress could ensure whether there is adequate resources identified, and I know that they were trying to handle this problem through hearings. There is going to be a series of hearings next year by the House Armed Services Committee.

Maybe the Congress is too early right now, if what your saying is that if OMB doesn't provide adequate funds, let's say, going in, but that doesn't preclude Congress from saying, "Hey, you didn't provide adequate funds" debating it and then adding funds.

MR. GOODHOPE: That's why we have a base closure account.

MR. DOXEY: Right. I think that is DoD's

and EPA's responsibility is to provide a workable plan. I think what we're going to be bumping up against is the ability of our contractors out there to perform the work way before we hit the big one.

MR. GOODHOPE: Ken, I hope you're going to be coming out next week to Texas. And when the people ask you from the community, well, "Is there going to be money to clean up the bases?" Whatever the commitments that we are signing, that we will be signing now over the next year or two, those commitments are good.

You know, and I hope we haven't answered for them because, you know, if the answer is, you know, there are, you know, and I don't mean this pejoratively, you know, there are gnomes in OMB that make decisions that intuit whether or not money goes to Bergstrom, or Fort Worth. It depends on what those decisions are.

And they may decide that money shouldn't go there, and advise whoever it is that they need to advise that the agreements that we're signing now mean nothing. Because we can't do anything.

MR. DOXEY: I guess, let me respond to that

with --

MR. GOODHOPE: I don't mean to put you on the spot.

MR. DOXEY: The Department, in open testimony before Congress, has stated that plans on meeting its responsibilities at the bases they have signed agreements to. And we are continuing to negotiate agreements, working with EPA to sign more. Our good faith hasn't been broken.

It's hard to justify what will happen in the future except to say, today we plan to have adequate resources.

MR. GOODHOPE: And I believe that. I'll be the first person to believe that. But when you're talking about making allocations among 86 bases, or 83 bases, I think that's going to be very hard.

MR. GRAY: I think one thing is maybe taken -- I don't think DoD necessarily is who Sam mistrusts, I think it's OMB, Kevin.

MS. SHIELDS: Congress is the one who finally appropriates --

MR. GRAY: I understand, but in this case, the Congress added the whole base closure account and

there is a record of Congress here. But I think if you're going to make this kind of recommendation, it ought to be a substantial recommendation that the Administration and the Congress ensure that adequate resources are available to DoD, EPA, and the states, for environmental restoration.

And then we have got a recommendation that also goes to OMB, and not just to the Congress, because a zero sum budget game is going on under the budget agreement up there. You can't add one place without subtracting some other place. And, if the Administration doesn't put base closure cleanup money into the budget request, then the Congress has to find someplace to cut in order to add it. And I'm afraid that down the road they're going to do what we have said elsewhere in this report we don't want them to do, and that is, shift money from the DERA account for operating facilities over to closing bases.

So, I think that recommendation ought to be addressed to the Administration, as well.

MR. DOXEY: Would that fix your concern?

MS. KWEI: No.

MR. DOXEY: Your immediate concern?

MR. GOODHOPE: I think we need to have recommendation that Congress needs to look at the way these, the clean up -- the closing and the clean up of these 86 bases, I think they need to do another task force, or something, on that. And get OMB to the table, and ask them what they're going to be doing. And ask them about previous problems.

MS. SHIELDS: I'm sorry, we're negotiating with proxies.

MS. KWEI: What I mentioned earlier, states believe that this task force report fails to address states' concerns regarding funding and reimbursement adequately. And thus we --

MS. SHIELDS: Why doesn't that sentence -- it says to give you money. And if we add in oversight after restoration, why doesn't that do it? I'm just trying -- we're getting all hung up on --

MS. KWEI: Right. Let me just point out that --

MR. GOODHOPE: This is a very important issue.

MS. KWEI: In this report, the report strongly recommends that we use the mechanism, set up

in FFA's, and the mechanism set up in the DSMOAs, so I think it's very important to follow up. I think that the FFA's and the DSMOAs need to be amended to address the new base closure issues.

MS. SHIELDS: Well, have you got some language?

MS. KWEI: Yes. The one I just read to you basically is from the letter from Mr. Strock. We would recommend that this paragraph be added to this report, perhaps as part of the recommendation at the end. That the DSMOAs need to be amended to make sure that states oversight activities be fully reimbursed.

MS. SHIELDS: Where are you reading from your letter?

MS. KWEI: Page five. Chapter five, first paragraph.

MS. SHIELDS: Do you have any problem with this?

MR. GRAY: Did we amend it to say the recommendation would go to the Administration and the Congress?

MS. SHIELDS: I don't care.

MR. GOODHOPE: I would suggest that sentence,

in addition to the addition of the paragraph from Mr. Strock's letter, that we amend the first sentence of the first paragraph of page 36 to read, "The task force recommends that Congress and the Administration ensure that adequate resources are available."

MS. SHIELDS: And you want to add, "And oversight after restoration," or not?

MR. GOODHOPE: That would be fine.

MR. DAVIDSON: EPA would.

MS. SHIELDS: And then you want to add this paragraph on your page five of the Strock letter as the final paragraph before you --

MR. DOXEY: I don't want to say this as an objection, but why don't we just express a view at this point in time is that, we arrived at a percentage, and the involvement that we had with all the regulated entities in doing that but, I think by putting a paragraph that says, "as soon as possible," would defeat the openness of the process.

And I guess from a DoD perspective, when we were building the DSMOA, not necessarily a comment on this language, we felt that a one percent cap was sufficient enough to fully reimburse.

MS. SHIELDS: Let me offer a compromise. What if the task force recommended that DSMOA's be reviewed as soon as possible to ensure that states are -- that base closure oversight --

MR. GOODHOPE: Be fully reimbursed.

MS. SHIELDS: -- is addressed in the --

MS. KWEI: Well, I don't think we view it strong enough, because this is, after all, an agreement between DoD and the state agencies.

MS. SHIELDS: But what Kevin is saying is that in DoD's view, it may be that some of these already have taken into consideration the amount of money that it's going to take on the bases that are going to be closed. Maybe some others haven't.

The task force shouldn't make the decision that they have to be amended, but we could recommend that they be reviewed to see whether they need to be amended.

MS. KWEI: Well, maybe here DoD headquarters in D.C. is not aware of the real life problems we have in California. You look at the DSMOA language, you can interpret it either way. It's not that clear. And that's where the problem comes from.

In California, for example, we did some work on Presidio, and that's not their -- somehow it's -- okay, we sent a bill to DoD, or to the base. The base commander sent it back, and said, "The work you did is not DERA funded activity." But it's base closure activity. But it's not spelled out in the DSMOA. So we're having a problem billing DoD in California.

So, because of these problems we have -- actually they are reoccurring. Because some base commanders have a very narrow interpretation of DSMOA. On the face of the language, if they don't see anything outside of DERA, so they just send the bill back to our department. So, for that reason, we would like to address problems like that in the future by amending DSMOA to make it very clear. Base closure or re-use related activities are all reimbursable.

That's only fair. So we would like to --

MR. DOXEY: Let me address the one comment that you made. When we looked at the DSMOA program, the DSMOA program was seen as a leadership effort to bring resolution in certain areas where there was some uncertainties. So, I think there's a lot of merit to

doing what you're saying.

In view of how that DSMOA process has evolved, it would be counterproductive to have the task force go in after DSMOA. But I don't object to having a review of the funding issue to see if there are adequate resources for the state for whatever function is eligible. Our point was that we wanted to focus on that your having adequate resources to do what is necessary to close that base.

There's a lot of history to the one percent. And that's a very controversial subject that has always been, and always will be. You may not want to discuss this point.

You may want to ensure, "that there are adequate resources, and that a mechanism can be reviewed."

MR. DAVIDSON: Can I make a proposal that I have. After the first sentence, which would say, "The task force recommends that Congress and the Administration ensure that adequate resources," blah, blah, blah, "for environmental restoration and oversight at closing bases." Next sentence, "Base closure activities may result in regulatory oversight

activities that are in addition to existing CERCLA responsibilities, (e.g., clean closure, or clean land determinations), and so on and so forth.

It may be useful here to get to your point, that there is a marker left in here to indicate that, CERCLA, we have certain responsibilities, base closures, there's going to be some different ones in addition to those that will have some resource ramifications. Because I know we are concerned about that at EPA.

MR. DOXEY: That's a good point. I agree with that.

MR. DAVIDSON: With an e.g., I don't know if we can figure out exactly, but take some of the stuff out of there.

MS. SHIELDS: That sounds better to me than mandating that all of these be amended, when we don't know whether they all need to be amended or not. So, I would agree to that in concept. Why don't you all write it, and we'll read it before we move out of this chapter, okay? Is that -- will you work with the state and write it down?

MS. KWEI: Sure.

MR. GOODHOPE: Ma'am, one point of clarification. And that is that, while the sentences that we have, while the first sentence is fine from our perspective, that we will be reserving the right to add a little bit more of our concerns, probably from the state perspective, in additional, or some other comments.

MS. SHIELDS: I wouldn't be the least bit surprised. (Laughter) I wouldn't be surprised if there are other places in this chapter where you may want to say the states need money. Okay?

Are there any more specific comments on page 36? We'll move to page 37. I have a rewrite of the description of the consent decree in the letter that we circulated. It's on page three if people want to read it. It's page 37, the third full paragraph, rewrite the first sentence as follows, "The defendants also agree to establish a second trust (the Custodial Trust) to receive the full title to approximately half of the site, which was owned by defendant that had no other assets."

Then under the terms of -- then it goes on, this is a more accurate summary of the case. I don't

imagine anybody else would know or care about that. (Laughter) But, we try to focus on events. Are there any more comments on page 37? We'll move to page 38.

Are there any more -- are there any comments on page 38?

MR. GOODHOPE: Let me make sure the recommendations conform to the body of the --

MS. SHIELDS: Right. We're still working on the language, so I pledge to you that we'll come back and read that before we leave here. And we'll move back now to chapter four. But, madam chairwoman is going to take a break before that, so we will resume in two minutes.

(Whereupon off the record from 3:36 p.m. until 3:42 p.m.)

MS. SHIELDS: We're going to chapter four now. Exercising the prerogative of the chair, I get to make my comments first. Page 31, at the end of the second paragraph, someone threw in the idea of modifying the waiver of sovereign immunity. I would propose ending that sentence at EPA, and leaving out the next sentence.

There is not a hidden agenda here. I think

we are really talking about delegation, not immunity waivers. And I think the reason that was put in there was to say it's unlikely that Congress would give -- would take authority away from the states. Truly, that's not going to happen.

That's more in the nature of delegation than waiver. As for the last sentence of the paragraph, the point is more clearly made in the next paragraph which talks about what the states can do. So, I would end the paragraph at EPA. That leaves out the last clause about sovereign immunity in the last sentence. And I would change in the next paragraph "most states" to many states. I think that is more accurate.

Anybody have any problems?

MR. GRAY: Well, having spent 30 years with the Congress, I hesitate to predict anything Congress is likely or unlikely to do.

MS. SHIELDS: I mean, as far as I'm concerned, we could leave out the whole sentence.

MR. GRAY: I would prefer leaving out the whole sentence.

MS. SHIELDS: That's fine with me.

MR. GOODHOPE: Which -- what are you talking

about now.

MR. GRAY: The sentence that says, "Congress is unlikely to eliminate this overlap and place the entire responsibility for..."

MS. SHIELDS: That's a good point.

MR. GOODHOPE: I can allow --

MR. GRAY: I didn't know what that meant. The only thing predictable about Congress is its unpredictability.

MR. GOODHOPE: I can see why it's there. The only way the states will have some authority -- I guess we were saying it's unlikely the Congress was going to take away --

MS. SHIELDS: There's just no point in saying it.

MR. GRAY: On the other hand, in that next sentence, I think you need to say, "States have significant statutory responsibilities for non-NPL sites."

MR. DOXEY: I'm sorry? What was that?

MR. GRAY: The next sentence says, "On the other hand, under CERCLA, states have significant statutory responsibilities," and I think you should

add, "for non-NPL sites."

MS. SHIELDS: I would leave out that sentence because in the next paragraph you talk about what CERCLA provides for states. I don't think it hurts anything to just leave that out.

MR. GRAY: Yes. Because non-NPL sites is mentioned in that last sentence.

MR. PENDERGRASS: It was supposed to be a transition to the next sentence -- or to the next paragraph. It was just to be the transition.

MS. SHIELDS: I would end the second paragraph, "After delegation is -- " And then go to the next paragraph.

Does anybody -- I think Gordon, you made -- we suggested changing "most states" to "many states also now operate their own clean up programs."

MR. PENDERGRASS: Well, factually -- factually it is most states.

MS. SHIELDS: Is it over 50 percent?

MR. PENDERGRASS: Oh, yes. Actually, there are 49 that have funds to do clean up. And, well, somewhere right around 25 that have full enforcement kinds of authorities. Forty nine of them have funds.

MS. SHIELDS: I'm happy to defer to --

MR. GRAY: I think the last time we looked at it, though, something like 50 percent of the clean ups were done by something like six states. I mean, they have programs, but that doesn't mean it's an effective program.

MR. PENDERGRASS: But they have -- they do have funds, and are authorized to do clean ups.

MS. SHIELDS: You want to leave it "most" -- should we -- ?

MR. GRAY: I think it's an accurate statement that most states have a clean up program, although they obviously do vary significantly.

MS. SHIELDS: How well funded it is is another question.

MR. GRAY: One further thing, if I might, on that page, on the first line, I think we should add the word "may," where it says, "EPA and the state may have overlapping regulatory authority." I don't think it's a sure thing. It may or may not occur.

MS. McCRILLIS: In all cases, or as a general rule? I think we might say that in many cases the potential is there in great measure. Particularly

where, definitely where the site is also a RCRA facility.

MR. GRAY: If you want to say, "have overlapping regulatory authority at most Federal facilities," or "at many Federal facilities." That's fine. I just don't think we need to say that they automatically have overlapping regulatory authority. It may not be true.

MS. SHIELDS: I would prefer your first, because I don't know whether it's most, or many, or some, or -- so let's just say may.

MR. EDWARDS: We have some revisions up here, to the paragraph before.

MS. SHIELDS: Are these -- ?

MR. GOODHOPE: Page 27. And before the chair has any fits, please give me a chance to retract. Most of the changes are self explanatory, except for the last one regarding the unitary inspective executive theory. We are going to withdraw that change.

We will go on record as saying, though, that the reason we are is that it's not a statutory barrier, it is an interpretation, an administrative

interpretation barrier. But nonetheless, we were -- we will withdraw the unitary executive change at the end of the --

MS. SHIELDS: So basically then, the changes on this page amount to changing the word "delegation" to "authorize".

MR. GOODHOPE: Right.

MS. SHIELDS: I think that's a more accurate way.

MR. KUSHNER: May I ask a question. What is the RCRA -- the actual transfer from EPA to the state. Is it a delegation, or is it an authorization? What is the executive order?

MR. DAVIDSON: It's an authorization.

MR. RUNKEL: This correctly states the activity.

MR. KUSHNER: For Texas?

MR. DOXEY: And is that the way it is for all the states, or is it just for Texas?

MR. RUNKEL: We treat Texas differently than (Laughter).

MR. DAVIDSON: I do have a question on -- not on the changes you guys are suggesting, but there

are four sentences down that states, "Although states may be authorized to administer the RCRA regulatory program, Congress should quickly provide that EPA retain authority to enforce the statute." Okay, that's overfiling authority. I assume that's what they're trying to get at here.

The next sentence, "This ensures some regulatory overlap and duplication, even under a statute that provides for authorization." That's a fairly strong statement there that, I don't think it practice --

MS. SHIELDS: Yes. It is. It's pejorative.

MR. DOXEY: Which one is this?

MS. SHIELDS: "This ensures some regulatory overlap and duplication." It also ensures some environmental safeguards, I would point out, when you have got a state that's not doing anything.

MR. DAVIDSON: Yes. I -- what's the point of having that --

MS. SHIELDS: That's a good question.

MR. PENDERGRASS: Well, the point of having it in here is that the problem is that the task force is trying to deal with is eliminating overlap, and

this is where the overlap is.

MR. DAVIDSON: In overfiling authority?

MR. PENDERGRASS: No. The overlap is in two places. It's the overlap between RCRA and CERCLA, that's one situation. Then there's also overlap in overfiling authority. And I don't think it's pejorative to state that it's there.

MS. SHIELDS: Well overlap and duplication are not non-pejorative words. They are -- in our lexicon, those are bad words. Now, if you want to add some good words in there, maybe, we can --

MR. DOXEY: I think what we're getting at -- what is the purpose of the overlap that there -- maybe that's a bad word, overlap, but that dual responsibility; it ensures something. Maybe that's what we want to get at.

MR. PENDERGRASS: Maybe it means that there is some dual purpose --

MS. SHIELDS: Maybe dual responsibility.

MR. DAVIDSON: If there is a situation of noncompliance at a DoD facility, and EPA doesn't feel that the state is taking appropriate enforcement action, we have the ability to go in and using state

law take that action. So it's a protective devise.

I'm not sure that that creates an duplication or an overlap. What it creates is administration of enforcement of law.

MS. SHIELDS: Can everybody agree on amending -- on changing "regulatory overlap and duplication" to "dual responsibility"? Can we go with that?

MR. DAVIDSON: Well, I want to -- how would that be a dual responsibility? I mean -- there's

MS. SHIELDS: Well, it's -- both entities have a responsibility. One didn't live up to his.

MR. DAVIDSON: Well, the reason I say that is that may connote some duplication. Okay? And I'm just not sure that's really the case in point.

MR. PENDERGRASS: Well, there is some duplication, because the only way you're going to find out about it is to be doing the oversight. And, it would not be duplication if you got out completely.

MR. DAVIDSON: Well, the point is, does this type of structure slow down DoD, or create confusion in the field by DoD to expedite clean up and compliance? Is that what we're trying to get at here?

MR. KUSHNER: I think that's what we have said. That why we -- that's why we have this issue to begin with.

Ms. McCRILLIS: But, what I would clarify is that the problem has not been so much with the EPA's ability to be able to come in and enforce the statute under its oversight, RCRA oversight, but rather the dual jurisdiction problem has been more with CERCLA and RCRA, than possibly state laws. I wouldn't say it's as real a problem with state laws.

I don't think we have really experienced the, type of dual jurisdiction problem, where EPA has exercised its oversight role over a state delegated RCRA program. So, I don't know that is as much the problem as the other area, RCRA vs CERCLA, is the problem.

MR. GRAY: I think we have made another one of these leaps here. I don't see anything in the terms of reference of this task force that talks about eliminating overlapping authority. It talks about improving interagency coordination within existing laws and regulations. By the way, it's to streamline within existing laws and --

MR. PENDERGRASS: The point here was not that -- this is not here to talk about eliminating. It's here to talk about there's a problem, and the next -- the recommendation is to use the agreement processes to avoid the problems.

Now, if DoD is saying that it's not really a problem, then we'll take it out. But it's part of the background to say that there are some problems, and that the solution is to deal -- to use the agreements, and better use those agreements.

MR. DOXEY: How about if we put the fix in maybe the word that says, since this is supposed to be an example, or a prediction of what could happen, maybe if we interject the word, "the potential is there for," or something like that.

That may make you a point here, and then allow your recommendation to clarify what you're actually saying later.

MR. DAVIDSON: To be honest with you, I have got kind of a problem with that approach. I mean, RCRA CERCLA is one thing. We'll get to that in a second. But in terms administering compliance, I mean, there is a design, and there are reasons for

doing this.

Nowhere in my tenure at EPA has it ever been brought to my attention that overfiling authority, or administration of compliance in enforcement of regulatory standards has reduced, has caused delay, or overlap, or duplication, and frankly I'm not sure I want that laid out here, because I don't think that's the case.

RCRA CERCLA is something different. We can talk about that. But my proposal would be just, not to even include most of this paragraph.

MS. McCRILLIS: I would concur, or I would recommend that that happen. I agree with what you're saying. The problem has really been between, RCRA and CERCLA, not so much EPA RCRA overfiling state RCRA.

MS. SHIELDS: Is it sufficient for you to just delete the line that starts, "This ensures."?

MR. DAVIDSON: Well, the line after that also.

MS. SHIELDS: That's already gone. The last two are gone. So we're just deleting the last three, so that that paragraph would end with, "Congress clearly provided that EPA would retain authority to

enforce the statute." Period. End of paragraph.

MR. KUSHNER: I would like to make a point. I recognize your concerns with respect to enforcement of compliance, and I agree with you that in general, compliance as used generally do not impede our CERCLA programs, except in one instance.

And, in fact, this is the one instance I think that causes most of our RCRA CERCLA integration problems. Because my experience has been that we have been very successful in coordinating our CERCLA obligations with our RCRA corrective action obligations. Where the difficulty comes, then, is when you have got closure issues with respect to unpermitted units that have also been scored for purposes of CERCLA, and was the basis for listing a facility that the state wants to address as a RCRA compliance issue.

But as part of closure, as you know, there are corrective action provisions included, ground water monitoring, etc., that sometimes do not mesh with the overall remediation going on at the facility. So, to the extent they want to address those type of closure issues in the context of a consent order, and

the state may wish to impose inconsistent schedules with the schedules that have been negotiated for the CERCLA clean up agreement, the compliance issues do cause us problems.

And cause additional expense in the clean up, because often we require them to install separate ground water monitoring systems for the particular unit, which is some instances has been located in a larger area contamination, such as the ground water monitoring provides little beneficial information for us. So, it costs us a million dollars to install ground water monitoring for, in our mind, no reason.

MR. DAVIDSON: The closure issue is -- I wouldn't -- that is sort of in a gray area. But I don't think -- that's something I would address more in terms of a clean up RCRA CERCLA type of issue, because that's where we find that problem. Not in terms of, "Have you labelled your drums in safety -- ?"

MS. SHIELDS: Okay. Have we got agreement to end that paragraph at the word "statute," at about the fifth line from the bottom of the paragraph? Can we move on to the next page?

MR. KUSHNER: Excuse me. We have some changes on pages 31 and 32. The first paragraph, the introductory paragraph, on the last full line after "regulatory" editing the words remedy selection, so it'll say regulatory remedy selection authority.

MR. DOXEY: Excuse me. I don't have those. Where are those from.

MS. SHIELDS: Whose changes are they?

MS. McCRILLIS: These are changes that we recommended. I talked through some of this with Mr. Baca yesterday.

MR. PENDERGRASS: In the first like of --

MS. SHIELDS: Wait a second. What was that one? You have added -- ?

MR. PENDERGRASS: Remedy selection authority.

MS. SHIELDS: Instead of regulatory?

MS. McCRILLIS: The issue here was the term "lead" started creating some problems. What you really mean by "lead" responsibility. Did you mean remedy selection authority, did you mean you're actually doing the clean up work, or did it mean that you were oversighting? And so, in order to make sure that there was some clarity, and there wasn't

confusion over what we meant by these various terms, these are recommended changes to help sort through that.

MR. PENDERGRASS: I'm not sure that -- again, I think -- I think it's whatever as consolidating regulatory authority there, that's the problem that we're dealing with. Later on, there are specific points where it discusses lead, and we were willing to add --

MS. SHIELDS: The chair is changing over, and we would like to break for a minute, so we can get clear where the comments are coming from at DoD.

(Whereupon, off the record from 4:02 p.m. until 4:12 p.m.)

MS. SHIELDS: Maybe we don't need to wrestle with some of this. We are finished with page 31 of chapter four. No -- we're not. I'm sorry, we're not. We're finished with some comments on --

Oh, Tom, this is left over. On page five, we agreed in concept to something, and then they went and drafted language. And this is the draft language that people need to agree to. It's supposed to fit in -- this language that came around for chapter five is

after the first sentence of the first full paragraph? Is that right?

MR. RUNKEL: On page 36?

MS. SHIELDS: On page 36, first full paragraph, after the first sentence, this would be inserted? Is that right?

MR. DAVIDSON: I would -- I think that the -- I was the thinking the base closure activities may in regulatory agency oversight should actually go up, should go in after the first sentence.

CHAIRMAN BACA: Does everybody have a copy?

MS. SHIELDS: Just put this as a new paragraph before "use of proceeds"?

CHAIRMAN BACA: Do you have extra copies to hand out? The reporter is having difficulty with everybody talking at the same time.

Let me read the statement. "The Task Force recommends that Congress and the Administration ensure that adequate resources are available to DoD, EPA, and the states for environmental oversight and restoration at closing bases. In addition, the Military Services should expand environmental education programs to retrain engineers, scientists and contracting

specialists who have been displaced from other jos assignments due to base closures and realignment.

Base closure activities may result in regulatory agency, i.e., EPA and the states, (oversight activities that are in addition to their existing clean up oversight responsibilities.) The Task Force recommends that the existing DSMOA be reviewed as soon as possible." I'm not sure what this means. "To ensure that the states will be fully reimbursed for their oversight activities. These additional oversight activities may require amendments of DSMOA."

What do you mean by the task force recommends that the existing DSMOA be reviewed as soon as possible?

MR. RUNKEL: We had talked about the current DSMOA's not reflecting base closure oversight activities. And that's when Gordon had added in that first sentence or the second to reflect that. And then we had originally said the existing DSMOA's be amended as soon as possible. And DOJ again expressed concern that that was too mandatory.

CHAIRMAN BACA: Does anybody have a problem

with this language?

MR. KUSHNER: My only concern would be to ensure that that language is consistent with the existing DSMOA principles and policies.

CHAIRMAN BACA: As far as I know, it is. Where do we want this inserted? Page 36? After "closing bases"?

MS. SHIELDS: This is the first paragraph. This is this paragraph.

CHAIRMAN BACA: For the record?

MS. McCRILLIS: May I just bring up one issue we had discussed earlier was the question of fully reimbursed? Did we not talk about that earlier?

MR. RUNKEL: We're just recommending that it be reviewed, not saying they have to be amended. That was the issue.

CHAIRMAN BACA: Okay. Then are we through with page 36? Okay. Let's go to chapter four? It shouldn't take more than a few minutes to get through this.

MS. SHIELDS: We have already made quite a few changes to page 31. We're not quite through.

CHAIRMAN BACA: Okay, page 31. Anymore

comments on page 31?

MR. GRAY: Just a question. The statement is made, the second sentence, "The overlapping authority has, however, led to confusion, conflict, and delay in timely clean up of military bases." In the preceding discussion, I think we sort of came around to the point of view that this problem is more a problem between RCRA and CERCLA rather than between EPA and the states.

Do we have some examples where it has led to confusion, conflict, delay in timely clean up of military bases?

CHAIRMAN BACA: There are many examples. Many examples.

MR. GRAY: Well, is it an overlap between state and EPA?

MS. McCRILLIS: One of the ones that Larry mentioned this morning was at Robbins Air Force Base, where the state had an ongoing RCRA corrective action, and then the site was later added to the NPL. And, you know, we were all able to finally get together and work out the problems at the facility but, the problem is, it takes time to work through those issues.

MR. GRAY: But was it the state that was handling the RCRA action?

MS. McCRILLIS: Yes. The state had the lead, and then the site was added on the NPL. That's correct.

MR. GRAY: And that led to problems between EPA and the state?

MS. McCRILLIS: Yes. In that case it depends on, obviously, whether the state has the delegated RCRA authority or not, whether or not you're going to encounter dual jurisdiction between EPA and the state. But in that particular case, that was the situation, where the state was --

CHAIRMAN BACA: It's a real situation, though. It really is.

MR. GRAY: We seemed to be in agreement a while ago that it was between RCRA and CERCLA and not whether it was the state that had the lead, or EPA.

CHAIRMAN BACA: It's a problem with the laws, and it's a problem with the agencies applying those laws.

MR. GRAY: I'm sure we have some examples.

CHAIRMAN BACA: Yes. We do. Any more

comments on page 31? We don't need any more examples. Sam?

MR. GOODHOPE: Page 29,

CHAIRMAN BACA: We're not going back.

MS. SHIELDS: We finished page 14. I want you to know that we are not going back.

MR. GOODHOPE: Well, you do have to go back to chapter two.

CHAIRMAN BACA: Okay. Go ahead.

MR. GOODHOPE: Again, just standing up for the rights of states to maintain their roles -- their role.

CHAIRMAN BACA: This document is not going to do that.

MR. GOODHOPE: Pardon?

CHAIRMAN BACA: This document is not going to do that.

MR. GOODHOPE: This document?

CHAIRMAN BACA: This document.

MR. GOODHOPE: What?

CHAIRMAN BACA: I mean this report.

MS. SHIELDS: Does not give them something they don't have, in the sense of the state --

MR. GOODHOPE: I'm reiterating, or reinforcing the idea that there are state out there do have some responsibilities under laws as they presently exist. And again, I may be stating the obvious, but --

MR. PENDERGRASS: What they have done is add a little specificity. We already have that many states take an active role in clean ups of Federal facility NPL sites. It was period. We have added the including responsibility for oversight, and management at state lead and Federal NPL sites.

And my only question is that phrase has caused problems with -- EPA doesn't, I believe, refer to them as state lead sites.

CHAIRMAN BACA: Can we have EPA clarify that?

MR. DAVIDSON: That's my question. I'm trying to get what you guys were -- what you meant by that. I mean, we can't delegate certain authority to the states at NPL sites.

CHAIRMAN BACA: Okay. Sam do you want to let your attorney speak?

MR. EDWARDS: An example of this would be like the Sykes Superfund site in Texas, which is a

Federal Superfund site, but includes the state has taken the responsibility of managing the contracting, and so forth. Of course, EPA still writes the broad, but it the management's responsibility under an MOU with EPA, not a delegation.

MS. SHIELDS: But why are you calling that state lead?

MR. EDWARDS: Because that's what it's called.

MR. DAVIDSON: But the difference here is that's not a Federal facility, right?

MR. EDWARDS: That's correct.

MR. DAVIDSON: It's a private orphan site that would be under our fund lead program which, through cooperative agreements and MOU with the Region VI, that's a little confusing here, because it's not specific --

MR. GOODHOPE: Is it a crucial difference between what -- what difference does it make if it's a Federal facility or not? Whether states can take over the management?

MR. DAVIDSON: Well the difference is under 120 CERCLA. I want to clarify, the way the statute

works under 120, in 120(g) we probably have section authority. We're not allowed to delegate that. So, basically, EPA would retain certain authority. We can't give that to you to run the site.

MR. PENDERGRASS: And on the other side of the -- the agency that owns the facility is the one that is taking the lead in doing the action, whereas in a private facility, the state might take the lead and actually -- on a Fund lead one, the state would be doing the contracting and everything.

I think we just -- we have to -- maybe the thing to do is here delete this phrase "state lead," and say, including responsibility for oversight and management at some Federal NPL sites, rather than characterizing it.

CHAIRMAN BACA: Gordon, do you have a problem with that?

MR. DAVIDSON: Well, let me think that through. I don't think that's still clear about what the reality of the situation is.

CHAIRMAN BACA: Why do we even need that sentence?

MR. GOODHOPE: That's fine.

MS. SHIELDS: Just leave it out.

MR. GOODHOPE: You know, just have a report with a lot of minority views, or you know, views that detract from the overall --

CHAIRMAN BACA: Sam, the point is, what I'm saying is, because many states take an active role in the clean up of federal facilities and being on site.

MR. DAVIDSON: What's the point that you're trying to make?

MR. GOODHOPE: In the interest of plugging on, I'll withdraw the amendment.

MR. GRAY: Is it objectionable if we just take out the word state lead? Does that still leave you with a problem, Gordon?

MR. DAVIDSON: I have a problem -- I'm not sure what the point is that you're trying to make here.

MS. SHIELDS: They don't have oversight and management at all Federal NPL sites by all means.

MR. DAVIDSON: Well, the way to say that, then, at -- when you say Federal NPL sites, what you mean are EPA lead NPL sites, not federally owned NPL sites. That's the distinction. It's not a Federal

facility. It's an EPA lead, Federal lead, and a private work site. That's a major difference.

MR. EDWARDS: It's a state lead. Federally funded, Superfund.

MR. GRAY: Well one difference I think is that you can't pay for clean up at a Federal facility out of the trust fund.

MR. EDWARDS: That's correct. It's against the law.

MR. PENDERGRASS: I guess, I think we're probably better off leaving it as it exists.

CHAIRMAN BACA: Well, they withdrew it.

MR. GOODHOPE: How about the last, that next addition? In addition states may obtain -- ?

CHAIRMAN BACA: It's stating the obvious, it's withdrawn. Okay. Any more comments on page 31?

MR. GOODHOPE: We have one more -- page 31, fourth paragraph.

CHAIRMAN BACA: I guess I don't have a problem with it. Jay, do you want to react?

MR. PENDERGRASS: We already agreed to that.

MS. SHIELDS: Yes, this change is "delegation" to "authorization".

CHAIRMAN BACA: Okay, no more comments on page 31?

MR. DAVIDSON: Yes, Mr. Chairman, I just want to consult with my attorney.

MS. SHIELDS: I wasn't sure that we had agreed to that.

CHAIRMAN BACA: Are you thinking out loud? Go ahead.

MR. DAVIDSON: I have a couple questions on clarification. Two items in here, authorization tended to eliminate duplication -- the agency that ultimately bears responsibility. I'll have another question later on. The task force suggests authorization of more safe programs, corrective action authority might expedite clean ups.

Now, is that pursuant to NPL and non-NPL, or just non-NPL sites? Or on the latter point, and I'm not clear how authorization eliminates duplication. I mean, the statute is for it, and EPA does it.

MR. EDWARDS: As a practical matter, it takes a long time to get full authorization anyway. I'm not sure, in fact, I think you do not want to hold up clean ups awaiting authorization of host states.

MR. DAVIDSON: Yes. I agree with that, but I'm not sure that that theme is reflected in this --

MR. EDWARDS: Well, there's no suggestion anywhere that anyone's waiting on doing any clean ups for authorization.

MR. DAVIDSON: I think my observation would be this may be impractical.

MS. SHIELDS: That this recommendation -- ?

MR. EDWARDS: That this recommendation may be impractical.

MS. SHIELDS: I would suggest leaving out that paragraph.

MR. GRAY: It might be true for non-NPL sites.

CHAIRMAN BACA: I'm for deleting the paragraph. Any objection? The paragraph?

MS. SHIELDS: Especially in light of our changes to the paragraphs above.

CHAIRMAN BACA: Any objection to deleting that?

MR. GRAY: What part are you deleting?

CHAIRMAN BACA: We're deleting that whole

paragraph. Delegation.

MS. SHIELDS: We're deleting the paragraph in the text that starts delegation.

MR. GRAY: The original paragraph and the changes are being deleted?

CHAIRMAN BACA: No. Just the original paragraph. Okay, any more comments on page 31? Let's start page 32. We have a staff recommendation. Lucy, would you explain it?

MS. McCRILLIS: Yes. I'll try again here. The issue is, in this first main paragraph under administrative mechanisms to reduce delay, the term "lead" is introduced, and lead agency, and obviously we have already had some discussion here on what that term really means. And so, our recommendation was that at a minimum what we need to do is to define the term lead.

CHAIRMAN BACA: I think that is one of our glossary terms that needs to be included.

MS. McCRILLIS: Do we mean oversight? Do we mean remedy selection? Do we mean taking the lead to do the clean up? You know, what do we mean by that?

CHAIRMAN BACA: In this case we mean

oversight.

MR. RUNKEL: In different contexts it's different things, and I think just add oversight to this sense. Just so you don't get in that problem. Just "states lead oversight agency."

MR. DAVIDSON: And this is in the context of non-NPL sites.

MR. KUSHNER: In interpreted, I asked the question, because this is the way I interpreted this sentence, having been involved in the negotiation at Seal Beach, and some of the California, and FFA's. The experience has been is that within the state itself, one agency or the other will be delegated to lead for purposes of representing the state only. Is that what that sentence is intended to convey, that either the Cal EPA or the Regional Water Board is the lead agency for the state in the remediation of that? The states representative? And that's what this sentence means?

MR. RUNKEL: That's right.

MR. GRAY: Add the words, "for the state," after --

MR. PENDERGRASS: The phrase has the

possessive, which is, does that exactly. So the state's lead, and that's what that means. The lead agency for the state, the possessive form of state does that.

CHAIRMAN BACA: Lucy. Go ahead.

MS. McCRILLIS: Okay. A second issue. Are we -- actually, how did we resolve that last one? Are we going to define it, or are we going to -- ?

CHAIRMAN BACA: We're adding oversight.

MS. McCRILLIS: Oversight. Okay. The second issue, then, was the use of the term IAG's, and particularly with respect to California IAG. And IAG, at least in CERCLA is a term of art, and generally people refer to it, or think of it in terms of a Federal agency/EPA agreement.

A state could be a party to it, but the core of it is DoD, or Federal agency/EPA agreement, and so, it might lead to some confusion in so far as, although, this agreement between DoD and the state may be worked out, if any of those sites are then added to the NPL, it could raise the issue of then, who is in charge of the site, regardless of whether or not any agreement has been negotiated.

So, we offered as a suggestion that perhaps IAG's really isn't the right term there, and that also there might be a need to add a sentence at the end of that paragraph that said something to this effect. "The IAG's -- this IAG, or this agreement, however, does not preclude the need to reexamine lead or remedy selection, or whatever, status, should some of the sites be later added to the NPL."

It just simply brings up the issue, again, of -- we can have dual jurisdiction.

MR. GRAY: Well, it's like that paragraph, that says at non-NPL installations. Are you suggesting a lot of these have not made that determination yet?

MS. McCRILLIS: Some of them could later be added to the NPL, yes. That is very possible.

MR. GRAY: Where there is already an agreement?

MS. McCRILLIS: Yes. Where -- particularly in this California situation, that's exactly a possibility.

CHAIRMAN BACA: Does anybody have any problem with that line?

MS. SHIELDS: The way it is stated here is just a fact. What are we arguing about?

MR. RUNKEL: I don't know.

MR. KUSHNER: I think the concern might be with the term IAG. It's just an interagency agreement.

MR. RUNKEL: Either one. FFA or IAG. It's not meant then as, like, the official act. I know what you're saying. We could decapitalize it, or something. Just spell it out in lower cap -- in small letters, so it's a generic IAG.

CHAIRMAN BACA: Okay. So we'll do that and not make any other changes, not make that addition. Any other comments? Lucy, did you have any other comments?

MS. McCRILLIS: No. I think that's all.

CHAIRMAN BACA: Okay. Any other comments on page 32? Let's start page 33.

MS. SHIELDS: Did you, Gordon, have any problem with all this, for example, the coordination and early as possible involvement? Do you have resources for the involvement at early stages, even at non-NPL sites? What that seems to suggest is

everybody is doing everything.

MR. DAVIDSON: If the implication is that we will be formally getting involved in non-NPL sites, I think that needs to be clarified. We don't have a formal policy on it, but in practice what we do is--

MR. GRAY: I think I'm the one who made the suggestion. It was not intended that EPA had to be involved if it was a non-NPL site. It's just a matter of whatever regulatory agencies are involved. The earlier you get them involved and make them aware of what you're doing, the less likely you are to run into delays down the road.

MS. SHIELDS: What if we added, "when appropriate," -- "as appropriate."?

MR. GRAY: As appropriate, that's fine.

MS. SHIELDS: Okay. Involve EPA and state regulatory agencies as appropriate, as early as possible.

CHAIRMAN BACA: Okay? Any problem with that? If not, we'll accept it. Page 33?

MR. GOODHOPE: Mr. Chairman, I have a proposed --

CHAIRMAN BACA: Okay, Sam, go ahead.

MR. GOODHOPE: Okay, page 31, paragraph two. I think that paragraph's just legally wrong.

CHAIRMAN BACA: Jay, do you want to address this?

MR. GOODHOPE: Some of the analysis I believe was wrong.

CHAIRMAN BACA: Gordon? Do you want to address that?

MR. DAVIDSON: I'll be glad to. Is it correct or not correct, I guess is the --

MR. PENDERGRASS: Well, the first two sentences are factually correct.

MR. DAVIDSON: In all cases?

MR. PENDERGRASS: That is correct. EPA's policy statement says that --

MR. DAVIDSON: There's one clarification that could be made in the first sentence, is that there are three specific criteria that surround whether or not we're going to list a RCRA facility. We may want to have those spelled out in here. They are willingness, ability to pay, essentially, that kind of thing.

If you have a viable RCRA owner and operator, they are willing to work with the regulatory

agency. There is one other that will defer them from NPL listing. So I think it's important to have that distinction in there, because if we have a recalcitrant owner/operator, or someone who can't pay, we will list the RCRA facility under TSD's.

MR. GRAY: Under certain circumstances they may not be listed, then.

MS. SHIELDS: Is it they're usually not listed? Or -- ?

MR. GRAY: Except under exceptional circumstances they will not be listed.

MR. DAVIDSON: No. Under normal circumstances, RCRA TSD's, private RCRA TSD's will not be listed.

MR. GRAY: That's what I'm saying. Except under exceptional circumstances, they would not be listed. Exceptional circumstances being like they're not willing, and so on. Those three criteria, which would be an exceptional circumstance.

MR. DAVIDSON: I think that's a good clarification. What I would like to do is go back and just make sure that that's indeed true, because what that connotes is that almost every time we do not list

it.

MR. GRAY: Under certain circumstances then, meaning those three criteria.

CHAIRMAN BACA: All right. Sam?

MR. GOODHOPE: There's a suggestion in here to amend the existing regulations, which is clearly beyond the scope and authority of the task force.

CHAIRMAN BACA: Would you just point that out for us?

MR. GOODHOPE: Yes, sir. The task force suggested that EPA may have the authority to amend existing regulations to preclude Federal facility RCRA sites from being listed on the NPL.

CHAIRMAN BACA: Is that not true?

MR. GOODHOPE: No. It's not.

CHAIRMAN BACA: We do not have the authority to amend existing regulations?

MR. GOODHOPE: No. Sir.

CHAIRMAN BACA: EPA doesn't have the authority to amend existing regulations?

MR. GRAY: Not in that case. What you have to bear in mind here is that they have the ability to do this on the private sites, because it's just like

the rest of CERCLA, it's just like -- on a private site, they can sell the property any time they want to, they just can't transfer the liability.

Section 120 governs, listing of Federal facilities. And the only portion of Section 120 that I think hasn't been quoted here today is 120-D, which says, "The administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the docket," meaning Federal facilities, "following such preliminary assessment, the administrator shall, where appropriate, evaluate such facilities with the criteria established in accordance with Section 105 under the National Contingency Plan, for determining priorities among the listings and include such facilities on the national priorities list if the facility meets such criteria."

Now, I don't see any discretionary authority there.

MR. PENDERGRASS: The next sentence then says, "Such criteria shall be applied in the same manner as applied to facilities owned or operated by other persons."

MR. GRAY: Of course, the criteria applied

in the same way --

MR. PENDERGRASS: Well, I think this discussion --

MR. GRAY: For determining whether or not they qualify.

MR. PENDERGRASS: This discussion -- the same discussion occurred at the last meeting, and this language came out of a discussion about whether there was room under the statute interpreting this language that include those if they meet such criteria, and such criteria shall be applied in the same manner as private facilities, that that might indeed allow EPA, because it has done this for the private facilities in deferring listing, that it might also give them the authority to do the same for Federal facilities.

That's where -- that's where this came from.

MS. SHIELDS: I think -- I haven't thought about this much, but I think Don is right. I think that's a more proper reading.

MR. GRAY: The use of the criteria in the section implies you go through the hazard ranking system, and you apply those criteria to determine whether or not you qualify for the NPL in terms of the

degree of hazard. I don't think it has anything to do with saying, "Because at a private facility you choose not list them, "that you can do the same thing when you have a different section of the statute that govern Section 120." Which it clearly does in this case.

MS. SHIELDS: I think that's sort of boilerplate language, that treating them like everybody else to provide a specific mandate --

CHAIRMAN BACA: Okay. One more comment?

MR. KUSHNER: Mr. Chairman, I would just want to point out to the task force a couple things. First, EPA's own policy I think, describes its conclusions as being based upon an interpretation of the statute, not anything explicit in the statute regarding how to list Federal facilities.

I think also, too, that there is sufficient room to maneuver under 120(e) as to whether it's a mandatory obligation to list Federal facilities, and I would just also point out what's in 120(a)(ii) regarding how guidelines that apply to the private sector also apply to Federal facilities in listing.

My only recommendation would be that we not

come to any definitive conclusion on issues of law in the context of this report unless we want to fall on our face.

MR. DAVIDSON: We've been doing that all day.

MR. GRAY: That's exactly what it does now is come to a conclusion of law.

CHAIRMAN BACA: Let's take a vote.

MS. SHIELDS: If you leave out the paragraph, I think --

MR. DAVIDSON: Before we vote, Mr. Chairman, I think I would like to make a remark here, because I think -- when I here last time we talked about this, and in the meantime we spent a lot of time in the PA discussing this particular issue.

I think it is one of -- not one of EPA regulatory discretion or authority, but it's one of statutory construction. And it's -- I would hope that the remark reflected in this report would be that it's not EPA's responsibility to go back and it own requirements or its regulations to see whether we can do this, but it's a responsibility that probably lays with Congress. You get to this issue of whether you recommend legislation, or whatever, but I think that's

where the issue is.

I think that the prevailing feeling within our office of general counsel at EPA is that we are to list the Federal facility of the NPL pursuant to 120(d).

CHAIRMAN BACA: I would like to propose the following. We put a period after facilities and delete the rest of the sentence.

MS. SHIELDS: Which sentence is this now?

CHAIRMAN BACA: The second paragraph where it says, "sites shall also apply to Federal facilities."

MS. SHIELDS: That isn't a sentence then. The states' proposal, Sam's proposal, is to leave out the entire paragraph.

CHAIRMAN BACA: I know. I know what Sam's is, but I would like to propose that we delete the sentence starting with "given" and ending with "NPL."

MR. GOODHOPE: Delete that whole sentence?

CHAIRMAN BACA: Delete that entire sentence.

MR. GOODHOPE: Well then -- then the last sentence would have to go, too.

MS. SHIELDS: And the question is whether

there's anything left.

MR. GRAY: It's now a factual statement that we have verified with Gordon, but it hasn't been --

MR. GOODHOPE: And using the rule that was developed today that we're not stating the obvious, then I think we should delete the whole paragraph.

CHAIRMAN BACA: Okay. Let's take a vote on deleting the whole paragraph. All in favor of deleting the entire paragraph, signify by raising your hand? Okay, everybody except Brian. Sorry about that. (Laughter)

MR. RUNKEL: Should we caucus? (Laughter)

CHAIRMAN BACA: All right, Sam, you split the vote there. Any other comments?

MR. DAVIDSON: I do have one, a related sentence, it's the last sentence of the third paragraph. It says, "The task force recommends that EPA review the basis of the NPL listing process for Federal facilities." And I think that considering we deleted the middle paragraph that that one should come out as well.

CHAIRMAN BACA: Any opposition to deleting that?

MR. RUNKEL: Well, yes. I think -- see, that's why I had a little problem with the deletion previously. I mean, we still have a concern about the extent of delineating the base for the listing policy. I would object very strongly to precluding RCRA sites. Getting rid of that language, but getting into the delineation of the base itself, if we can get back into this discussion, we can discuss it here, we can discuss it back in chapter one. But, we do have a problem with that.

MR. GRAY: Are you talking about defining the sites, Brian?

MR. RUNKEL: I'm just concerned that we're not trying to do that through the back door, here.

MR. GRAY: There's a separate section that deals with that.

MR. DAVIDSON: In fact, we haven't had that discussion yet.

MR. GRAY: I would like to raise one question, though. Because I don't want what I said to be misconstrued. It is my understanding, and some other people may not agree with me, that simply because a NPL Federal facility is listed on the NPL,

does not necessarily mean that you cannot work out an agreement and allow the clean up to proceed under Section 3004 of RCRA or any other portion of RCRA that might apply. Is that not correct, Gordon?

MR. DAVIDSON: That is correct.

MR. GRAY: So they don't have to go through this process of not listing them in order to work out an arrangement to handle the clean up under the other statute if you so choose.

MS. McCRILLIS: Just a question, or a point of clarification, and it's a question to you, Gordon... If the site is on the NPL, though, if it's placed on the NPL, does EPA have the discretion to be able to delegate oversight remedy selection authority to a state?

I think I heard you say earlier that you don't. But I just want to --

MR. DAVIDSON: Let me explain how our listing policy works. That may clarify our view on this. And please drop in as appropriate. (Laughter)

Basically under our listing policy, each state, we shall list Federal facilities on the NPL regardless of their RCRA status. And generally then,

we will try to -- that these listings are often going to be comprehensive, and that we will try to enter into -- do what we can to enter into a three party interagency agreement under Section 120 of CERCLA, encompassing all the releases that we know of, because we think one document would work, we will coordinate through that document.

We go on in that policy to say, however, there may be some circumstances under which it makes sense to carve a site up, and to provide for -- allow for the state to proceed under its RCRA corrective action authorities for the clean up. And there is a difference there between delegating Section 120(g), remedial decision authority there. And basically, unless its inconsistent, is what we would want to do, we think it's appropriate to allow the state to proceed as the lead agency under its RCRA corrective action authorities for the clean up. And that's in our policy.

MR. GRAY: And there may be an opportunity for some sort of recommendation by the task force here, that that be done wherever possible in order to avoid these overlaps in proper coordination.

CHAIRMAN BACA: Lucy, you asked a question. Did he answer your question?

MS. McCRILLIS: I think, yes. I think you said, and let me just restate that, that if its delegated -- you could in theory delegate whether its listed on the NPL, or some portion of it that is listed on the NPL, to a state under, for instance, a RCRA program, and they can go ahead and take the lead, and do the remedy selection. And as long as that wasn't necessarily inconsistent with what you perceive to be your CERCLA obligation, you would have no problem with that.

MR. DAVIDSON: Well, it's not a delegation. They are -- the Federal agency would be cleaning up under an authorized RCRA corrective action program, which result we think would be consistent with what we had selected under CERCLA, but we are not selecting -- we are not selecting a remedy, nor is the state under CERCLA.

MR. GRAY: Which is the same rationale you have applied to the private sites we discussed earlier.

MR. DAVIDSON: Right. And that's -- 120(I),

I think, is an important provision.

MR. KUSHNER: Gordon, a question, though, with that process. Is it not really, as you say, it's not a delegation. Is it not actually a deferral, or a postponement of the CERCLA action to allow the RCRA work to proceed, and once that RCRA work is completed, there is a requirement then under CERCLA to come back in and investigate, or review the work done under RCRA for purposes of CERCLA to assure it meets CERCLA requirements?

MR. DAVIDSON: Well, what we would probably have to do is come back in and do a no action brought under CERCLA, so the clean up was sufficient.

MR. KUSHNER: So, it's not carved out truly under RCRA. It's just deferred, the RCRA work proceeds, and once the RCRA work is done, you come back again under CERCLA and review the work done?

MR. DAVIDSON: The way we would handle that is --

MS. SHIELDS: Presumably you wouldn't do that unless you figured that the RCRA clean up would be sufficient.

MR. DAVIDSON: And not only that, if I may

add, in fact there is one site which is a great case study for this. It just happens to be in the wrong state, is -- and that's not a slam on the state. They have been working very cooperatively. The state would proceed under RCRA authorities as the lead agency, such as overseeing the Federal facility. But we set up a coordination responsibility to ensure that EPA knew what was going on, but it would not have to get into a review, lengthy process.

Basically, we would be satisfied with the RCRA -- with the decision that was made for clean up under RCRA corrective authorities, ensures consistency with CERCLA, and then we do an IAG which has a no action brought, and we're done. And that's the way we tried to set it up. So we don't contemplate coming back in and overlaying the CERCLA process on top of that. That's not efficient.

CHAIRMAN BACA: Okay. I'm going to let Don speak, but I need to remind everybody that in six minutes we're going to be kicked out of this room and we're going to have to move upstairs, okay?

MR. GRAY: I think, having taken that other part out, it would be appropriate, maybe if Gordon can

work up the language, outlining the procedure to be followed wherever possible to eliminate the unnecessary duplication and overlap between the RCRA and CERCLA processes.

CHAIRMAN BACA: Could you come up with some language defining that?

MS. SHIELDS: This recommendation has to be rewritten anyway because of the changes that we made.

MR. GRAY: We really do want to find some way to do that.

MS. McCRILLIS: A point of note, I think the third paragraph beginning, "EPA is in the process," might be the vehicle by which what you have just described, Don, would happen. Through the EPA subpart K rule, Federal agencies, and I am aware the states have a similar recommendation that encourages EPA to use that vehicle to sort out the various situations we have just described.

MR. GRAY: I think to be consistent, Mr. Chairman, we also have to eliminate the last sentence on page 33.

CHAIRMAN BACA: Well, we would have. The last sentence defines recommendations, so that would

have been amended, Don. Why don't we break here.

(Whereupon, off the record from 4:55 p.m. until 5:20 p.m.)

CHAIRMAN BACA: For the record, go to page 33. We had a recommendation that that last sentence on the third paragraph be deleted. We never did take action on that. To delete it. Are we in agreement that we delete it?

MR. RUNKEL: That's fine with us. I -- again, I will raise again, and I know, I just don't want it kind of thrown back in our faces that we decided on the principle of reviewing the basis of EPA listing policy. Because we are going to bring that up under the NPL listing policy.

CHAIRMAN BACA: That's fine.

MR. RUNKEL: That's what I thought. That's what I thought. But I just wanted to make sure. I didn't want to accuse EPA of --

CHAIRMAN BACA: Okay, let's go to page 15.

MR. GRAY: Do you have the language, Gordon?

MR. DAVIDSON: Pardon me?

MR. GRAY: Do you have the language?

MR. DAVIDSON: Three quarters there. One

point of clarification. In this -- in the same paragraph that we just deleted, that sentence, the second sentence says, "One purpose of this rule is to resolve some of the confusion about how the NCP applies to Federal, non-EPA lead clean up actions." Does that mean at non-NPL sites?

I mean, it wouldn't -- that's non-EPA lead, in terms of the oversight authority. Is that what the -- ? But how the NCP applies to clean ups at non-NPL sites. Is that -- ?

CHAIRMAN BACA: It doesn't make sense.

MS. SHIELDS: It's just saying it the same way. Non-NPL.

MR. DAVIDSON: Federal non-NPL clean ups. It's not clear.

MS. SHIELDS: I agree. I'm with you.

CHAIRMAN BACA: So what's the -- ?

MS. SHIELDS: We're changing non-EPA lead to non-NPL, right? In the third line?

MR. DAVIDSON: And you delete lead. Say non-NPL clean up action.

MS. SHIELDS: It just says non-NPL.

MR. DAVIDSON: That makes a lot more sense.

CHAIRMAN BACA: Okay. While Gordon is working on his language. Oh, I'm sorry. We had another one.

MR. RUNKEL: I'm sorry, Tom. I think this one will not be any objection to. But we would like to have added before the findings and recommendations section a reference to an agreement that, in fact we just negotiated with the Navy for Seal Beach Naval Weapons Station, a process for dealing with the closure of non-NPL sites.

And you see a reference in our letter to you yesterday. Page four, the bottom of chapter four. I sat and spoke to the attorney here who is working on the case in the Navy, and the folks here working on it, too, so we have got some expert people who can talk about how this worked. And again, it would be more in the form of a recommendation that maybe this process be adopted elsewhere outside of California, since we just went through this.

CHAIRMAN BACA: Do you want language qualifying that?

MR. RUNKEL: Well, basically take the language -- we could add in, since you're talking

about EPA is in the process of developing regulations, where it starts in the letter, "In the past two years California has been negotiating with individual DoD branches," and from that point on just adding what is in this chapter four section.

CHAIRMAN BACA: I guess I'm agreeing with what you're saying, but I'm not understanding how we're going to do that.

MR. RUNKEL: Pull the language out of here.

CHAIRMAN BACA: Which language are you talking about?

MR. RUNKEL: In the letter.

CHAIRMAN BACA: This letter?

MR. RUNKEL: Starting right here. You just start there -- I would say, start on page four, chapter four, of our letter. The second paragraph, second sentence. From that point on.

CHAIRMAN BACA: " In the past two years California has been negotiating with"?

MR. RUNKEL: Yes. That would be a new paragraph, started on page 33, right before findings and recommendations. It seems to follow from the previous paragraph.

MS. SHIELDS: Presumably we weren't just talking about California here.

MR. RUNKEL: Yes. I understand. This is an example of how these issues are being addressed.

CHAIRMAN BACA: Anybody have any problem with that?

MR. PENDERGRASS: I have a question. It's not -- it's not written, really built into the report, when it talks about "we did this," and "we believe."

MR. RUNKEL: I leave it to your discretion how to --

MR. PENDERGRASS: That creates more -- you know, I have to try and change it, and I don't want to change -- I'm changing your language, and I can't be sure that I would change it and be consistent. And it's one more thing to do before Tuesday.

I would prefer to have you look at the draft, that's exactly the way you want it to be.

MR. RUNKEL: We'll just revise it accordingly.

CHAIRMAN BACA: Would you also send me more information on this?

MR. RUNKEL: Well, we have also got the

actual agreement, if you care to --

CHAIRMAN BACA: I would appreciate it. Thanks.

MS. SHIELDS: It's to be in the nature of an example, and then we suggest that this may be a prototype for other states to follow.

MR. GOODHOPE: Where California goes, we are to follow.

MS. SHIELDS: As long as California pays for the agreement. (Laughter)

MR. RUNKEL: In fact, after New York, California is the state we like to follow the most.

CHAIRMAN BACA: Okay, let's -- are we through with 33?

MR. GOODHOPE: Just some suggested language for paragraph four, the recommendation. I think, to look at it, -- it's

MS. SHIELDS: I think this, what's in here now, has been basically --

CHAIRMAN BACA: That'll be changed to be reflective of the test. That's in findings and recommendations. Okay? You're right. We'll get that corrected. That'll have to be consistent. Okay?

MR. GOODHOPE: Well, we offer it for what it is.

MR. DAVIDSON: One point. What I was drafting here would actually go into avoiding for RCRA CERCLA overlap findings and recommendations. While I can't provide some language, I would go into the chapter itself. The problem is I don't have the listing policy in front of me. I just want to make sure I'm consistent with it.

What I can give you is a proposal for the findings and recommendations, which we can then craft something back into to be consistent with that, if people seem to think that that's a good way to go.

CHAIRMAN BACA: Sam?

MR. GOODHOPE: Well, I thought we got rid of paragraph five. Are we on paragraph five?

MR. DAVIDSON: Yes.

MR. GOODHOPE: I thought the text to which this would be appended, or summarized earlier, didn't we delete that paragraph?

MR. DAVIDSON: We deleted the paragraph that led to that particular recommendation. All I am saying is, let's keep the title of that particular

recommendation, and change the approach.

MR. GRAY: My suggestion, Sam, is that we try to work out a recommendation encouraging them to work out these agreements to aid these clean ups and avoid overlaps.

MR. DAVIDSON: So what would be -- there would be nothing in there right now. What's in there now would be deleted, and the discussions on some proposed findings. Is everybody clear on -- ?

MS. SHIELDS: Are you ready to discuss the proposed language, or are you still crafting it?

MR. DAVIDSON: I have got about two sentences to go.

CHAIRMAN BACA: Why don't we go, then, to page 15? This is findings and recommendations.

MS. SHIELDS: That's the findings that flow from the rest.

CHAIRMAN BACA: Then that'll just be reflective of the text.

MS. McCRILLIS: Excuse me, Mr. Baca, I'm sorry. On page 33, the third paragraph beginning, "EPA is in the process of developing regulations," I guess there was some sense that this might be a

recommendation and, in fact, it isn't necessarily phrased that way. But it would then be a recommendation that would be translated down in the findings and recommendations section. So we might have another paragraph that would also be added into the avoidance of RCRA/CERCLA overlap?

MS. SHIELDS: That's what would be a recommendation?

MS. McCRILLIS: That this -- this regulation, how the NCP applies to Federal facilities dealing with non-NPL sites is a way to sort out the RCRA/CERCLA overlap. Offer that?

MS. SHIELDS: Well, if EPA is in the process of developing that, what are we recommending? That they continue to develop it?

MR. GOODHOPE: Mr. Chairman, on page 35, of our proposed amendments --

CHAIRMAN BACA: Okay, let's go to page 15 and finish up.

MS. SHIELDS: The problem is that Tom has said the findings and recommendations always get rewritten based on what is in the text. So, to the extent that you had proposed amendments to the

findings and recommendations, they are changing anyway.

MR. GOODHOPE: Then what I would propose is that what is now on our page 35 be added into the text earlier, maybe as a peg upon which EPA can hang a recommendation. So --

MR. GRAY: This was a total add on, it wasn't an amendment?

MR. GOODHOPE: Yes. This was very important to our Texas Water Commission.

MR. DAVIDSON: I have to read into one issue, Sam, is what is meant by equal partner, because of the remedy selection authority of CERCLA, which is clearly not delegable.

CHAIRMAN BACA: I also think we're getting into an area that hasn't been discussed by this committee. I think we're introducing a new -- this could be, Sam, a suggestion for future tasks?

MS. SHIELDS: For additional views, you mean?

CHAIRMAN BACA: Well, not additional views, but suggestions for future "considerations.

MR. GOODHOPE: We'll do that.

CHAIRMAN BACA: We could recommend it for a

future issue. This wasn't part of our discussions.

MR. GOODHOPE: Will we get a chance to read it --

MR. KUSHNER: I think that, in fairness of looking at item A that you suggested here, I think we actually addressed that in the long term monitoring. You know, in the previous one. So I think that's already in there to some degree about responsibility to DoD in our previous discussion. So, I think that one's in there. I think to some degree you have that in there already when you issue, for example, the permanent responsibilities that allow the transfer of land, and lenders and the purchasers to work out arrangements. So, I think it may already be included.

MR. GOODHOPE: Mozart's fifth. (Laughter.)

CHAIRMAN BACA: Let's go to page 15 and finish up on the NPL site boundaries.

MR. DAVIDSON: I'm sure can breeze through that issue quite quickly. Before we get into it, you might want to hear the proposed language that I have.

CHAIRMAN BACA: I do want to note that we got through Sam's last page.

MR. GOODHOPE: Now we're back to the main

body of our amendments.

MR. DAVIDSON: I drafted this generically, not necessarily being the recommendations section, or the text, it could go either way, depending upon how we fix it. But, this is rough. EPA's Federal facilities listing policy addresses abdication of RCRA CERCLA authorities at Federal facilities on the NPL. This policy provides the partnership of Federal NPL sites, the clean up of the state authorized RCRA corrective action authorities, where it makes sense technically and administratively, as long as the action required by the state is not inconsistent with the EPA CERCLA approach.

Application of this policy in appropriate circumstances may promote expeditious clean ups and reduce potential for application of overlapping laws. This policy contemplates close coordination of EPA, the states, and DoD, in all phases of clean up, and the implement -- in all phases of clean up pursuant to this policy. So, that's sort of --

MR. GRAY: Mr. Chairman, I think this can go in before the findings and recommendations, and then for an appropriate recommendation.

MR. PENDERGRASS: I can say, the way it's drafted, it fits best in the background section, in the discussion. I'm not soliciting any more draft recommendations that conform with these things. There is quite a bit of that to do.

So, if you can also do a recommendation that tracks that, that would be real helpful.

MR. DAVIDSON: I will do my best to solve the -- I can take a minute later on to type it up and distribute it.

CHAIRMAN BACA: I don't have any problem with that.

MR. KUSHNER: Gordon, could you just read what the criteria for carve out again? I missed that? Or, the considerations?

MR. DAVIDSON: Fairly broad. Where it makes sense technically and administratively.

MR. KUSHNER: I offer that maybe we could just add some statement that would make reference to discreet areas on the base? Which I believe is consistent with the listing policy you have, which addresses carve outs. So that we're not misleading people by carving areas where you have colegal -- or

RCRA unit, within a larger area of contamination.

MR. DAVIDSON: Well, what I wrote here I think is pretty consistent with policy. "This policy provides for carving out portions of NPL sites."

MR. KUSHNER: Discreet portions?

MR. DAVIDSON: I could put that in there. We could take a look at it. I mean, I don't people that are looking it are ready to --

CHAIRMAN BACA: Okay. Can we go on to page 15? NPL site boundaries? Any comments?

MR. DAVIDSON: We do have a proposal that we put out, which is very close to what's already in there. A couple of minor changes.

MR. PENDERGRASS: I was going to suggest that maybe the title should be changed to NPL site descriptions, which I think conforms with the discussion.

CHAIRMAN BACA: Jay, what was that?

MR. PENDERGRASS: I think the title should be changed to NPL site descriptions, rather than non-route. Because the whole discussion talks about site definition and site descriptions, after we have had the discussions with EPA about the correct way to

characterize it. And we just never changed the title. I think it is more accurate to say than site descriptions.

MR. RUNKEL: To me, boundary connotes more of a legal determination that that is the NPL site. A description seems to connote sort of, I don't know, connote that that is not really the NPL site, as the way you sort of have described it. Maybe I'm being overly picky here. I'm not trying to --

MR. PENDERGRASS: The point here is that there is no legal boundary, and that's the point that EPA made last time. We have had discussions over it, and they in fact do not -- giving boundary to the site. So, to the extent that it does connote legal boundaries, it is probably inaccurate to be giving the wrong impression.

CHAIRMAN BACA: I see what you're saying. What is the committee's wish, considering EPA's proposed recommendation?

MR. RUNKEL: We agree with EPA's clarification, what actually happens. Because it's my understanding that what is described currently in the report is not accurate, especially paragraph two,

where it talks about EPA continually reevaluating the definition of an NPL site. That apparently does not happen. I'll let Mr. Davidson speak to that.

Where we have a problem, a major problem with the counterproposal here is the last sentence of the current version. It has been deleted. And we did have this discussion in July, where I believe a majority of the task force, at least, did wish to have EPA reconsider the designations, as it says here, of entire military installations as NPL sites, and describe them using the source and extent of contamination as the guiding principles.

We would, in fact, want to add to that a sentence that would read, "The task force also recommends that EPA consider delisting those parcels which, during the response process have been determined uncontaminated, cleaned up, or remediated." And that is for the reason --

MS. SHIELDS: Is delisting an overly technical word to use? I think we have the same goal, which is to get to a point where we list -- where we describe the site, to use Jay's word, as narrow as the contamination is, so that places that are clean can be

transferred.

MR. RUNKEL: And be able to do that on the NPL.

MS. SHIELDS: But "delisting", I believe, is a term of art that refers to taking the whole site off the NPL. I would just use another word other than delisting.

MR. RUNKEL: Okay. Anything that would get to the result where, you know, with only one or two --

CHAIRMAN BACA: I like the language. Can you come up with a substitute for delisting?

MS. SHIELDS: Redescription or something.

MR. GRAY: This would be a substitute for the three paragraphs under the heading, "NPL Site Boundaries," or descriptions?

MR. DAVIDSON: I have a few comments on our proposal as it relates to Brian's comments here. I think the whole issue that we're really talking about is, we talked earlier about trying to get land back into the hands of private interests as quickly as possible, consistent with CERCLA. And I don't think -- I think everybody shares that goal. So we're

trying to see how this regulatory process is applied.

As was just stated, our approach at these facilities is to basically list on the NPL areas of contamination, to the extent the NPL listing is the extent of the contamination. One of the problems that may exist with trying to approach this situation of trying to identify clean areas and getting back into commerce quickly is that the time rule listing Federal facilities on the NPL, we generally have very little information about the extent of the contamination.

And we also think that makes sense, to be as comprehensive in our listing as possible, otherwise you get into a really piecemeal, potentially, RCRA CERCLA, or some other type of situation. And, one other problem we have at the time of listing is that often we have had problems with the quality of the information submitted to us during this preliminary assessment, site inspection. We don't have full information at the time. So there are some leaps of faith that have to be made in terms of the listing process, and some assumptions that are modelled.

So there are several suggestions. One is that we have talked earlier about this -- what did we

call it, the clean assessment document?

MS. SHIELDS: CPAD.

MR. DAVIDSON: One way to approach this is to look at that kind of a process to see if it makes sense, as we go through the RI/FS, and gain more information about the releases, make some definitive statements as we can about what's clean and what isn't. One reason for that is, when you're talking about changing the listing process, that's a regulatory process. That means you have to go back into the Federal Register, propose changes to the actual listing, take comments -- whatever the comments may say is obviously potential for litigation, to go forward with the final rule.

Well, you know, EPA is a fairly expeditious organization, but we don't crank these things out, you know, on a monthly basis. Now, if you take the scenario of 15, 20, 30 bases on the NPL, then you're seeing a lot of proposals and final rules on a piecemeal basis on a case-by-case situation. So, it may be that the regulatory process could, in fact, slow the determination of what's clean and what isn't, just by -- because of the way that we have to do

business.

So, I understand the concern. So, there are two ways to address this. The first way is in the initial characterization of the site. Put more resources into the up front PASI, particularly the SI phase, so that when the listing package is put together, we really have a much better idea of what's at the site. And if there are large tracks of uncontaminated land, that is much easier to deal with right up front, okay?

And so it may be that the initial listing, we can basically be clear in the listing package as to what is contaminated and what isn't. Part of our problem in being comprehensive is we want to make sure we got all the leases on there. I'll give you a practical example when we -- that's one recommendation.

And the site inspection, HRS model, proposed package, and some of the EPA from DoD could be as comprehensive as possible. It could be actually mini RI's, in a sense, being that you guys are moving out on this stuff, there should be a lot of technical data.

The second recommendation should be to look at the process of -- of more of administrative non-regulatory process, of making these clean, unclean determinations. And I do think we may get bogged down in the regulatory process if we try to it from the NPL listing package.

CHAIRMAN BACA: If you did it administratively, that's the best of all packages.

MS. SHIELDS: So you would basically adopt this CPAD document for sites that were never dirty? But you would use it as something less than going through delisting, and notice and comment, or something.

MR. DAVIDSON: I think EPA -- I think we could say that the course task force recommendation looks for this process. And one -- Mr. Gray earlier talked about consistency with other processes. We don't want to overlay something. But I think practically speaking, the lenders, the state, and everybody else who wants this land is going to want to know what's clean and what isn't. I think this is just one more thing we are going to have to do as a regulatory agency in cooperation with DoD.

So I think it's a reality, essentially. Some sort of process will need to be set up. So, yes, I think we would support looking at this as a way of addressing the -- the process of reviewing what's clean and what isn't as we try to make transfer and decent decisions.

CHAIRMAN BACA: Don?

MR. GRAY: I hear what you say, Gordon, and would that not necessitate deleting the last sentence on page 15 that says, "The task force recommends that EPA reconsider the designations of entire military installations as NPL sites, and describe newly listed Federal facility NPL sites using the source and extent of contamination as guiding principles for both.

But you started off by saying you didn't have enough information to do that at the listing stage.

MR. DAVIDSON: That's correct. The recommendations I think, from my perspective, would be that, one we are sure that the PA/SI packages that come in are high quality and comprehensive.

MR. GRAY: Do that, and add something along the line that you were talking about in place of --

MR. DAVIDSON: And that we look at a process for looking at clean/unclean, type of a thing.

MR. RUNKEL: If you do that, like Tom said, we are fully in favor of doing it administratively. But -- why can't you then, once you have made that determination, at that point reevaluate, if it's going to put out an NPL listing too, go back and redescribe the site at that point?

It may be that we're not ready to transfer anyway. And maybe the timing's going to be just about right. If we have gone ahead and made the initial determination administratively, and then you go to EPA and try to redescribe it, by the time you get to the process of redescribing it, maybe that's about when we're going to need to transfer it anyway, and that's the point where we're having problems.

You know, pragmatically, you deal with -- get rid of these properties, find lenders, or whatever, because they see it on the NPL. They see the type of base on the NPL. And in the real world that causes a lot of problems in terms of marketability. So, I mean, if you can guarantee to go back in, I understand your concern without getting the

data and update up front, and the states would share that concern, too.

We just want some process to be able to reevaluate these sites, or describe them.

MS. SHIELDS: Are you saying we have to go into the Federal Register and get notice and comment and all of that before you can --

Maybe there's a way, I know that we're hesitant to make statutory recommendations, but maybe there's a way of using the magic language that we talked about before, where we encourage Congress to consider this, or we may wish to consider setting up an expedited reevaluation process.

MS. SHIELDS: Well, I thought that's what Gordon was trying to do by his using a CPAD process. For sites that aren't on the NPL we're going to do a better job of defining them more carefully before we put them on the NPL.

MR. RUNKEL: That's great if we can do that. But I didn't get that impression --

MS. SHIELDS: I think we're agreed to that. The problem is when they are already on the NPL, as Fort Meade. Okay? That's all it says. Fort Meade.

And we will hypothesize that not all of Fort Meade is contaminated. Now, the question is whether it's more expeditious to go through a formal regulatory process of describing the real contamination on Fort Meade, or whether it's better to just issue these clean parcel slips for a certain forty square mile area, or another area that you would subsequently find out was clean.

I mean, the only downside is, it would still be on the NPL.

MR. RUNKEL: That's a big downside.

MS. SHIELDS: I would agree.

MR. DAVIDSON: That's the distinction I think we need to make. There might be a perceived -- there's a perception problem here. Because the legal definition of what's on the NPL is the presence of contamination. Okay? And what -- the question is, would the CPAD have enough force in effect for the lenders and people interested to say, "I'm satisfied enough. EPA bought off on it, state bought off on it, DoD bought off on it. I feel comfortable going ahead and making the transaction."

Because let's take Fort Meade, let's say there's widespread contamination. You know, you could

end up going back into the Federal Register on this given base four, five, six times. I mean, the average we have with DoD bases is between six and ten sometimes 12. We have 26 different actions at the arsenal going on.

So, I'm just saying we could really get caught up in that thing. And --

MR. GRAY: Could you really expedite it if you had to go through that process.

MR. DAVIDSON: A two phase process rather than a one phase process.

MR. RUNKEL: What I'm saying, though is, another option is, not really making the second phase, in effect a -- almost an automatic endorsement of the CPAD process. Do the CPAD -- determining it through delisting, whatever you want to call it, redescribing the base and the, you know, if Congress chose to revise, in this situation just for closing bases because of a special concern with redevelopment, mobile communities, economic health and that sort of thing, we chose to make a distinction for -- in this area such that, if the CPAD was agreed to by all the parties involving public comment, you could just

automatically go on an expedited, sort of automatic delisting, or whatever you want to call it. It wouldn't pay going back in if you went through the whole Federal Register process. Again, there's a statutory change involved there.

MR. DAVIDSON: Okay. Then that's a major distinction, because if you're talking about -- you still, without a statutory change or whatever, I'm not sure that statutory change -- we would have to go back into the regulatory process.

MR. PENDERGRASS: Well, I guess I have a question about that, because in the description of the process of the description -- in the description last time, Mr. Wyeth stated that when it's listed, there is only general information about the source and extent of contamination, that the tendency is to go broadly. And that you, in the listing of a site, it simply gives general markers that this is a facility, or whatever. And that there are no boundaries set, that no specific description, and that -- so that I don't think you need to go back into the regulatory -- you don't need to delist in order to change your description.

And that there was a discussion of what it was, and that the concept of what is included changes during the RFS, and all the way up to and including the ROD, that that's probably the point at which you have a firm idea of what is included, because you are thinking about what the source and extent of the contamination is. It didn't sound like you're changing, when you're doing that, clearly you're changing you idea of what the source and extent of contamination is throughout that process.

You haven't been going in and doing regulatory changes. So I don't see that it's any different, or that the task force is asking for anything different here. And there is no need to go through a delisting process. That what was described as the recommendation is the same thing. You're just talking about the description

It was mentioned to us that it was a description as part of the listing package, and that that is defined during the investigation stages. I think that what we're saying is that that should be defined also for Federal facilities.

MR. RUNKEL: And what's the vehicle for

letting the public know about that?

MR. PENDERGRASS: Well, that's why -- that's why this first paragraph has this additional, you know, requesting that the purchasers and lenders -- it's considered a problem, and so there is a recommendation in there that EPA should also make its evaluations known to potential purchasers and lending institutions. That was added to the recommendations section.

MR. DAVIDSON: And I think that's quite doable.

MS. SHIELDS: Do you think it's -- my reaction to that is, why should EPA do that? Why shouldn't the bases, whose interest it is in more than anybody else's to publicize the fact that "the North 40" is free and clear. Why -- ?

MR. RUNKEL: Because the public's not going to trust that as much as hearing it from EPA.

MS. SHIELDS: But if it says, "EPA has freed up -- ." I don't care. I mean, if you can do it, that's fine. But I just -- it just seems to me a burden on EPA that EPA shouldn't have to bear.

MR. GRAY: Maybe I'm wrong, but my

understanding is that what happens here is, you go through the RI/FS process, and define the narrow area where you describe the property that needs to be remediated. And then you go through the ROD process, and decide on a remedy. And that sort of process in itself, then, defines the smaller contaminated areas. But it doesn't take the rest of the property off the NPL, obviously.

MR. KUSHNER: But also keeping in mind, too, there could be several, or many, RI/FS's going on, and many ROD's at a particular installation describing different areas of contamination. So you can't focus just on one RI/FS that will define the entire area of contamination.

MR. GRAY: But the rest of the property will be excluded if it is not included in any of the contaminated areas to be remediated.

CHAIRMAN BACA: Lucy?

MS. McCRILLIS: Could not a possibility be that EPA, if it described that, is what happens in a -- generically. That that would be out, then, in the public arena. And it would say things like, "We -- we refine our site as we move along the process." That

would establish the principle out there in the public arena, and then all that would need to happen would be to let the RI/FS, and EPA, and the states buy in on it. It would be the vehicle for actually making on a site specific basis, those more difficult decision -- those qualifications, and tailoring of the actual site.

MR. DAVIDSON: That's right. I think we say this, though, on page 15. The second paragraph says, "The task force heard EPA testimony that we continually reevaluate the definition of an NPL through a dynamic process after listing, modifying the site description based on new knowledge of the extent of contamination."

And we have the public participation, the outreach efforts, the proposed plan, the ROD processes. And obviously we are going to be very sensitive interest in the property, so we will make sure that we fully clarify, this is what we know, this is what is we know the contaminants to be, and, at some point hopefully we can together start making these statements, "We know there's nothing over here."

And this is not subject to the covenant

120(H)(iii).

MS. SHIELDS: How do we get to that point, because that's what we need to do, is be able to tell the base commanders, that once the determination has been made, and there is redefinition, that this place is not dirty. There never has been anything stored, or disposed, or whatever here.

MR. DAVIDSON: Don. I knew where you were going. But what we talked about earlier, this criteria and guidance that we developed jointly on these clean determination statements, that seems to be the process where we would get out and make these determinations.

MS. SHIELDS: That's where you have cleaned something up. This is slightly different, in that you haven't done any cleaning. All you have done is decide there isn't any clean up that needs to be done, because it has never been dirty.

MR. DAVIDSON: I had a little slightly different understanding, but if that is the way that we were talking about it earlier, then I would propose that that process be considered to include making determinations of --

MR. GRAY: I'm very confused. I know we specifically went through two things. One, a process of establishing criteria for designating uncontaminated areas, and then another one for, what's left of these areas of concern. Isn't that what we did this morning? That's what I thought I heard.

MS. SHIELDS: I thought I heard that too.

MR. RUNKEL: Actually we did. We did.

MR. DAVIDSON: Bob, I would suggest that that process be used to make these determinations.

CHAIRMAN BACA: We have three proposals before us. What's here, California's suggestions, EPA? How do we pull them all together?

MR. RUNKEL: We can live with what's here. This is fine, what's here. What we don't want to see is this sentence -- deleting this last sentence. So, we do object very strongly to EPA's proposal that that last sentence be included.

MS. SHIELDS: What's the last sentence.

MR. RUNKEL: "The task force recommends that EPA reconsider the designations." We want to make that that is done. Frankly I have heard twice -- two different, once off the record and once on the record

about the second paragraph. Once off the record I heard that EPA doesn't do that. That's wasn't actually --

CHAIRMAN BACA: Gordon, using that language, can we include some of your language to answer?

MR. DAVIDSON: Let me take a look at it, but the language here sort of infers that it is a regulatory process, and we are to go back in and look at all our rules that we use for listing NPL sites. And that's -- I don't want --

MS. SHIELDS: Let me suggest a slight abbreviation. "Recommends that EPA use this dynamic process you have described up here, to modify the site descriptions of military installations on the NPL, and describe newly listed Federal facility NPL sites in the first place, in a more confined way".

MR. GRAY: To the extent possible.

MS. SHIELDS: Yes. To the extent possible.

MR. DAVIDSON: Wait a second. I need to consult.

MR. CARR: Isn't the real point that what we need to do is clarify the understanding of the community in terms of the actuality of bill about

safety that is listed on the NPL. And I think the first half of that sentence probably comes close to doing that. It's the second half of it that seems to me kind of --

MS. SHIELDS: Because you're saying you have got to get it on the NPL, even with ones that aren't there now. Quickly. Before you get to a point where you can define it more accurately. And the reason for that is so you don't get conflicting cleanup activity going on.

CHAIRMAN BACA: Well, Bob, her modification. I think that adds a lot of clarifying.

MS. SHIELDS: But they're still worried about the last part. I think we have agreed on the first part of the sentence.

MR. RUNKEL: They're saying that the clean site -- this clean site document, or whatever, cannot be done quickly enough that the NPL listing would have to occur before then. It can't wait --

CHAIRMAN BACA: What's an administrative approach to solving that problem, and a nonlegal one.

MR. RUNKEL: Which problem?

CHAIRMAN BACA: The wording problem.

MR. DAVIDSON: Making sure the descriptions are done properly the first time. The site descriptions. That would be --

MR. RUNKEL: I think you're saying you can't do that.

MS. SHIELDS: That's the problem.

MR. DAVIDSON: Let me go back to one of my first proposals. First proposal is for bases that are to be listed on the NPL that were not on the NPL, that DoD ensures we get high quality listing packages, as comprehensive as possible. That way, when we do characterize a site that we appeal on, we can hopefully have a much better idea than we do now when we go through this process what's actually on there, including areas that are clean.

If it's possible in doing that, that if we do find areas -- large areas that are not clean -- that are clean, that we could just not have that as part of the listing package. Okay? So, that would be the first recommendation, to improve the upfront part of the scoring process.

MR. CARR: I think that works.

MR. DAVIDSON: In terms of once you get on

the NPL, we recommend that there be a process that doesn't indicate that we have to go back into the regulatory process, but a process, as you go through the RI/FS, further define the extent of contamination, i.e., the boundaries of the NPL site, that we assure full and expeditious disclosure of this information to interested parties.

We can actually the consider -- the task force can consider -- time it to some sort of joint process where we make these determinations of clean and unclean.

MR. GRAY: I want to make sure I understand. One of the reasons that you couldn't be more precise in defining sites earlier on is that at that stage you don't have any soil samples, you don't have any ground water samples, you don't have the data you need. All you have to go on is a record review, and interviews of current and former employees, and that sort of thing. And the hazard ranking process is employed to determine where certain activities went on that resulted in a release to the environment.

But you may in that process find there are large areas of the base where none of that activity

went on. Is that what you're saying?

MR. DAVIDSON: Let me clarify that. That's partially correct. The site inspection guidance does contemplate field samples. Okay? And using existing technical information from RCRA wells, or whatever, that they went out there. So, if you look at the new NRS approach, it does suggest that DoD, in this case, should, when they put their package together, should actually be out there sampling. So we have a pretty good idea of what's going on.

Let me give you a practical example of why we feel uncomfortable with messing around too much with the comprehensive approach of listing. Mather Air Force Base we listed three or four years ago. We listed a small portion of it. Once we got into the RI/FS, we found widespread contamination. We decided then to go back in and relist all these other areas on there.

Then it just became a very burdensome process, and it had some crazy regulatory and enforcement type complications for both of us. And we had just a small portion of it on the NPL. So, our Region IX particularly felt very strongly that it made

sense to initially list on a comprehensive basis to ensure that your IAG would then be as comprehensive as possible.

I think we can set up an administrative process, not a regulatory process, that gets the word out as we go through the RI/FS. We can get that information out to people. Now, if the lenders and these people need some sort of formal stamp of approval by joint parties, we can contemplate a process to do that.

MR. RUNKEL: Just, Gordon, what we need to prevent, though, because I have been looking to see how it works is, your office of general counsel, and we did have it described to us as a very, very conservative office, that's the way their talk would be. And I got the impression from the discussion with that gentleman that they just list the entire site because they just don't want to take any chances that they miss something.

If you're saying that you're going to be willing to reevaluate that sort of blanket policy once you start getting better information from DoD, that's fine. But I'm a little concerned that some very very

conservative attorneys over there are not going to be willing to do that. And they're not going to ever be satisfied with DoD's information. They're going to always think it's not adequate.

And so I think we're going to, you know, we don't want to get into a position where they just automatically list military bases when you do have good information.

MR. DAVIDSON: I don't think that really addresses the issue head on. The issue in my mind is not -- is the perception that -- of land that one wants to buy is an NPL site. And that perception is what needs to be addressed rather than --

MR. RUNKEL: I agree, if you can do that. You're not going to get around that perception. You're just not going to. That's the way the business community operates. They want certainty. They wonder why, if it is clean, then why is it on the NPL? Why don't you redescribe it?

MR. DAVIDSON: Well, that's what I'm talking about. The process where --

MR. RUNKEL: Why not do it up front?

MS. SHIELDS: Can you answer that it's not

because --

MR. RUNKEL: We don't have the information.

MR. DAVIDSON: What if you start getting the information quicker?

MS. SHIELDS: Because that delays its listing.

GEN OFFRINGA: One of the problems is resources, too. Recognize only a small percentage of the DoD bases are ever going to be selected for closure and disposal. And so, the more information we provide, the more investigation we have to do. The more we have to stand there to try to attack it. It'll be enormously expensive. So, what we really need to focus on is just that subset of base closure bases that are on the NPL site list. They can come up with the system that you are describing. Otherwise it's just too enormous --

MR. DAVIDSON: I would suggest stating here very clearly that DoD be as comprehensive as they can up front in developing -- packages, so that we can be as precise as we possibly can in what we list.

MR. RUNKEL: But I think what we're saying is that it's irrelevant. It's not going to matter.

That's what the Major General is saying, is that it's better maybe just to quit trying to get all that information up front. You're not going to get it to satisfy EPA or anybody. You might as well just list it. And then, once it's on the NPL, target those sites for developing the information as quickly as possible. But immediately go into the RI/FS process.

GEN OFFRINGA: Obviously, we're going to give you the best we have. But to really do what you want to do, I'm not sure we can resource that.

MR. RUNKEL: That's a point well taken.

CHAIRMAN BACA: What's wrong with the language? I guess, it is a moot question.

MR. RUNKEL: I don't see a problem with that last sentence, still. Again, I don't think it's saying -- I mean, if you want to clarify, you want to put a statement in there that you don't want to go back into the regulatory process, we can look at that. We're willing to compromise on that.

I don't want to have to go through the regulatory process, either. The states don't want to.

CHAIRMAN BACA: I don't think it says that.

MR. RUNKEL: I don't think it does, either.

MS. SHIELDS: Getting paranoid on us, Gordon?

MR. DAVIDSON: Probably. But -- is there another way to describe this without using this language? I mean, I think we're --

MS. SHIELDS: We can state it in terms of a goal. Our goal is to ensure that clean property is not restricted or made undesirable as a result of overly inclusive NPL listing.

MR. PENDERGRASS: Well, you could say the task force recommends that EPA -- I'd have to have my counsel here to actually propose -- "the task force recommends that EPA, to the extent possible, exclude clean areas from the NPL listing?"

MS. SHIELDS: And do that as soon as possible.

MR. PENDERGRASS: Well, I mean, in the subsequent listings.

MR. DAVIDSON: Okay. I want something in there, but that's going to be based on the information we have at hand. I also want something in there that would say it's a matter of general policy. Comprehensive listings, in terms of getting all the releases on the NPL is what is behind our policy. So,

it's a balancing act. I don't want to send a message right now that we are going to reconsider a comprehensive listing process.

When I say comprehensive, that means all the releases on the base.

MR. PENDERGRASS: That's not what it says, though. You've got that --

MR. DAVIDSON: Well, it can be read that way. That's --

MR. PENDERGRASS: You've got that as the first sentence of this paragraph --

CHAIRMAN BACA: Do you know that you're doing that now?

MR. PENDERGRASS: EPA attempts to ensure that all areas of contamination are within the site description.

CHAIRMAN BACA: You're about to put Pearl Harbor on your NPL list by going out and aggregating all the sites there.

MR. PENDERGRASS: There's a good reason for that. There's no relationship to any of the sites. And none of them individually would qualify.

MR. DAVIDSON: That's why I came up with the

Mather example. There's two reasons for doing that. One is that we don't have very good information initially. And two, we normally find as we get into the study phases of these things that there is more contamination than we had anticipated or known up front. And instead of going back and relisting stuff, or going back and modifying IAG's, we think it's better to try to be as comprehensive as we can up front.

MR. RUNKEL: I still don't see anything wrong with that sentence. And frankly, I did hear earlier here this morning that EPA is not really continually reevaluating the definition. And we want assurance that that's done. So, we want either a recommendation, assuming that you're not doing it now. Or, if you are doing it now, we want an assurance that it's going to continue.

And frankly, I am a little concerned that that's not going to get done. The states are very concerned about that.

MR. GRAY: I'm in the position where, I have to say, I just don't think you should do this just for the sake of trying to placate lenders at closing

bases, because whatever you do, is going to be applicable throughout the Superfund program. Which includes private sites, as well as military facilities, and other Federal facilities that continue to operate. And I just don't think you can change a whole listing policy to placate potential lenders at closing base sites.

MR. RUNKEL: We're not changing it though.

MR. GRAY: Well, that's what it says.

MR. RUNKEL: It doesn't. It just says "redescribe." Redescribe, reconsider. If you want to get rid of reconsider, we have no problem with that. "EPA redescribe the site descriptions."

CHAIRMAN BACA: Or how about just consider the designation?

MR. GRAY: But they can't use the source and extent of contamination as the guiding principle except to the extent that they have data.

MR. RUNKEL: Well, that's what we're saying. Describe, as the source of the data shows that a redescription is necessary.

MR. JONES: Let me ask a question. Does EPA have any criteria already drawn up which would address

the issue of what would be satisfactory to you in order to make a decision other than requiring a full investigation and inspection, formal type of approach?

In other words, do you have a checklist that says, if you have this amount of information, and it is comprehensive, then you can make a determination as to whether or not this property, based on the information available, should or should not be included in the national priorities list. Is there anything like that at all that exists?

CHAIRMAN BACA: They have an HRS, which is a scoring system.

MR. JONES: But he says, as long as he gets adequate and good information --

MR. DAVIDSON: We have guidance out there to describe what sort of information we need to determine whether or not a site, a facility, or portions of the site or facility weren't listed on the NPL. Now, we do use an aggregation policy on some of the bigger sites.

MR. JONES: But there are certain instances when it would not be necessary to have a full fledged

investigation and testing going on, isn't there? Based on the guidance and criteria that you have presently developed?

Because, let me put it this way. If you have to get into a full fledged investigation and inspection, the process is not going to be accelerated. We are working on a case right now involving Bellmead, a Federal supply depot in New Jersey. It's on the National Priorities List. It takes an extended period of time to go through those investigations and inspections, and testing, and whatnot.

What I'm saying, is there a possibility of drawing up criteria where this, in situations where it's so obvious it would not necessarily have -- you would not have to go through that.

MR. DAVIDSON: We do that. It's in the preliminary assessment stage. We have what we call a NFRAQ determination. It's not further remedial action. No further action required listing process.

MR. JONES: Well, maybe we don't have a problem here.

MR. DAVIDSON: I think the problem we're

getting at is that a good number of these facilities will have enough contamination on the site to warrant listing. Because, no matter how you characterize what's actually put on the NPL. And it's -- I don't think it's a process that needs to be changed. I just think it needs to be understood what we do.

And the fact is, when we're putting these things on the NPL, we're dealing with limited information. It's not until you get into the RI/FS and study phase that you really know what your extent of contamination of an NPL area is.

MR. RUNKEL: All I'm saying is, I have no problem with you adding a sentence saying you don't feel like you're getting enough information. I have no problem with you clarifying the sentence saying that we're not going to monkey with the regulatory process. But I want a firm commitment that you are going to go through and redescribe these facilities.

How many facilities have you redescribed? How many military bases have you redescribed that the public knows about?

MR. DAVIDSON: Let me ask what you mean by redescribe?

MR. RUNKEL: Redescribe. Mather Air Force Base is not the entire base. Like -- that it's 20 operable units, versus the entire base?

MR. DAVIDSON: Sure. We do that all the time. We do that in the process of the RI/FS. That's the whole point.

MR. PENDERGRASS: To the extent that it was described, and I think it's consistent with what you're saying, it was simply the point was to make that public, and I think -- I don't think that using the source and extent of contamination as guiding principles was not intended to mean that you had perfect information.

It may be there's a qualifier that goes there, you know, consistent with the available information. I mean, the point here was that, in the paragraph above it, "continually reevaluating the definition and modifying the site description based on new knowledge," that that was a recommendation that that would be done so that you're using that principal source and extent of contaminations, guiding principle, and that you reevaluate it, redescribe, as new knowledge. And sometimes there may be more --

you're talking about Mather, that you're going to include more areas.

MR. RUNKEL: I understand your point, Gordon. I think is that you see the term reconsider or reevaluate as a -- as a -- as an order or mandate that you actually go out, you don't think you have to on these military bases, and start reevaluating them right now.

And we're not saying to do that. We say, do it in the normal process. And in fact, this using the source and extent of contamination doesn't refer back to the original listing. And that's getting at your issue. That's not how I read it. It's getting back at the redescription process. So, at that point, after you have listed it, you have got the burden in your favor.

MR. DAVIDSON: I think we're getting close here. But, being sensitive to my concern to reconsider the designations. Why don't we say something like, "The task force recommends that EPA, DoD, and the state, assure that as information is gained through the RI/FS, that this information is shared, and explained to the public and all interested

parties who are interested in buying or leasing the land."

MR. RUNKEL: That doesn't get at the site description issue. It sort of -- indirectly, I understand.

MR. GRAY: But that's what I think we were doing this morning. We were talking about identifying the uncontaminated area. I don't think EPA has any discretion. EPA's has to operate within the administrative procedure act. And if EPA has listed the whole site, they can't go back and change it without going through the prescribed process.

MR. RUNKEL: That's what I'm asking --

MR. GRAY: I understand. But I don't know how else you can do it except to identify the uncontaminated portions the way we were talking about this morning. And then make that information available. And I don't think anybody disagrees with doing that.

GEN OFFRINGA: The key issue is the mechanism by which we inform the public, and how do we generate one that has public confidence. So, when I want to sell the golf course at Fort Ord which is on

the NPL site, which I know is not contaminated, I can convince all these guys that --

MR. GRAY: You used a lot of pesticides on that. (Laughter)

MR. DAVIDSON: Well, how do we do that, though? Because, we can't do anything beyond what we know in the RI/FS. And if there's an agreement that it's not conducive to expeditious transfers, don't go back into -- to keep going back into the regulatory process.

GEN OFFRINGA: Well, the first case, when we get a base that we're going to close, that gets priority, and it gets squished down, because everybody wants to close it as quickly as possible.

So, you're going to have a much more rapid RI/FS process for resources put on it. So therefore, as you redescribe the extent of the contamination, you're going to automatically generate the uncontaminated areas. Now the key is, what kind of mechanism do we use to inform the public what we have now determined as we go through this process -- we don't want to change the process -- that we now have found this large area, and we have conclusively

determined that it is no longer contaminated. Or it never was.

MR. DAVIDSON: I believe our existing process does that.

MS. SHIELDS: And what would that be? How would you, right now, say the golf course on Fort Ord is not included. How would you say that in your present process?

MR. DAVIDSON: Once you get to the R -- okay. Let's assume that the golf course is considered within this operable unit area that we're studying. Going through the sample we find out that there is no contamination on the surface, nor under -- subsurface contamination. When we get to the remedy selection phase, or we are trying to select our remedy, they we will describe exactly what it was trying to do.

But all the way through that, we are putting out public information, having public hearings, and describing to people exactly what we know. What the concentrations are. What the proposed plans are. I mean, it's a --

MS. SHIELDS: He needs something so that he can sell the golf course now, instead of waiting until

the remedial action is _____.

MR. DAVIDSON: Then we go back to what Sam said earlier about proving the negative. Okay? So, this is a different process. It is not an NPL regulatory process. That's what I was trying to get into earlier.

We may need -- the task force may want to recommend that EPA, DoD, and the states look at establishing a process for determining when lands and are clean and conveyable to transfer --

MS. McCRILLIS: Yes. I think we did that.

MR. DAVIDSON: That's what I'm saying. Tying us back to that particular process.

MS. SHIELDS: To that CPAD business. This discussion has come totally full circle to where we were.

MR. DAVIDSON: Because we do not, general, right now, sit there and say, "This is clean." What we say is, "This is dirty."

GEN OFFRINGA: Yes. That's right.

MR. DAVIDSON: Okay. All right. And to get to the point of saying, "This is clean," probably

means doing things beyond the scope of the NCP. It will probably mean that you guys have to get out there and start taking samples, and drilling holes in areas that we may not otherwise require you to do, to prove, to show, to the satisfaction -- that's the point.

The point is not the regulatory process on the NPL listing. So, if you get to go back -- tie this back to what we talked about this morning. As a proposal to consider, I think that might get to your concerns.

GEN OFFRINGA: Because we would be willing to drill on the golf course in order to prove as quickly as possible it's not contaminated, because we're interested in the cash flow. And the communities are interested in getting the golf course.

MS. SHIELDS: That's right.

GEN OFFRINGA: And what we need, is when we reach that point, we have done the drilling, and everybody agrees that it's clean, then we need some kind of a way to go to the public that will give them confidence, and generate money for investment.

MR. DAVIDSON: Then you'll have to go throught the RI/FS to be able to have that assurance,

even in the CPAD document.

MR. RUNKEL: Well that, what we need to talk about is, plenty of information is needed. And when it is needed, timing is critical here, obviously. So, what it may entail, and this is maybe what the recommendations ought to be, is that we look at what additional work may need to be done, or what additional process.

Because what people want is some determination by the regulatory agencies that, darn it, this is clean. You can use it without liability. That's the issue. Not the NPL things. So, it's part of taking action to prove this negative, if you will. And I would suggest, just from my knowledge of what goes on out there, that it may require setting up an additional set of procedures to do it.

MR. GRAY: Presuming you do that it would be delisting of a portion --

GEN OFFRINGA: Can we come up with something called an interim finding as we go down through the--?

MR. DAVIDSON: I think we have an answer here. On the top of page 16 is, in transfer of uncontaminated parcels, this talks about developing a

criteria. It should say, "DoD, EPA, states should develop a specific criteria." Okay?

This is the process we are talking about, so we can have the determinations to give the letter to someone else to ease the determination that this is clean land. So, what we need is in the body of this text a lead into that. Okay? And, I don't think that that last sentence does that.

MR. RUNKEL: Let me ask you a question. Say you do this. And you make this determination. It's all hunky dory. And some lender comes up to you that writes to the EPA and says, "Okay, through this determination you say that it's clean land." Does that mean that portion of the property doesn't belong on the NPL? The lender just writes -- and they're not trying to be legalistic. They're saying, "It no longer belongs. You can in effect redescribe it. It doesn't belong in the NPL."

It's not saying, "Get it off the NPL through a regulatory delisting process." It just wants to know in reality, that portion has been through what the process is being taken off the NPL. Are you going to, or will you be able to write back to OGC, sign off

on the letter, or are they going to sit there and qualify it to death and say, "Well, it's still on the NPL, blah, blah, blah," and some lender is going to say, "Oh my god," because he has got some attorney telling him, "You're still maybe on the hook. You're going to have a problem." That's a real world question.

MR. DAVIDSON: I can't speak for the office of general counsel, so I can't say is I believe that they would have several questions. The answer to that question depends on the viability of the process that's established in the criteria, okay?

What I think they would say, what I hope that they would say is that if this is a -- this process is a real one, has meaning, and it's clear from the process that this area was not contaminated, I would say that they would probably be able to say this was not part of the NPL.

MR. RUNKEL: Can they legally say that?

MR. DAVIDSON: I can't speak for --

MR. GRAY: Not without a formal delisting.

MR. RUNKEL: That's where this delisting is becoming a relevant issue. That's where, as much as

I hate to have to go back to the regulatory process, I tried to get away from that for a while. Gordon convinced me of it. I still come back to that, because it may be relevant to a lot of people in the business community.

And you find no sympathy for them, because they are redevelopers.

MR. GRAY: I think it's not worth the argument and time we are putting on it because, first of all, it's already clear that the lenders are not liable unless they are activity involved in the management of the property. And they are all busily trying to get Congress to change the law so they won't be liable under any circumstances, as long as they simply hold a fiduciary interest in the property.

You know, it's like Mark Twain said about bankers, the guy loans you an umbrella when the sun is shining, but at the first drop of rain, he wants it back. (Laughter) I mean, it's a lot of time and effort to spend just in terms of the lender issue.

MR. RUNKEL: It's not just lenders. It's the local redeveloping agencies. It's more than just the lenders. It's a lot of different folks.

MR. DAVIDSON: Well how about if -- here's a proposal, possibly. Go into this paragraph. To the second to last line, "As a result, when an entire installation is listed, large areas of uncontaminated lands are often included." The proposal would be, "to ensure the expeditious transfer of uncontaminated land. EPA, DoD, and the state have developed a means to communicate the information, collect it, then confirmation of those areas which are not contaminated."

This goes back into -- maybe, tie it back to the process we talked about earlier. And then, that fits in with this transfer of uncontaminated parcels paragraph.

CHAIRMAN BACA: That follows from the first part of that discussion, but it doesn't address the NPL site issue. How does it become a non-NPL?

MR. DAVIDSON: What designation are you looking for? I mean, the question is, what's on the NPL, is the extent of the contamination on the base. And if you go through the RI/FS, and you continue to clarify where that extent of contamination is, the more you know, the more you know about what's not

contaminated. And this is what we're trying to get to. To set up a process so we can -- the regulatory agencies and the DoD state this area is clean, and has not been contaminated.

CHAIRMAN BACA: How do you then list Norton? What is the NPL site on Norton?

MR. DAVIDSON: I don't understand the question.

CHAIRMAN BACA: As opposed to where the clean area is. Now the NPL is the base, the installation. The facility.

MR. DAVIDSON: That's because we have listed it with little information, okay? And the policy approach that we want to be as comprehensive as possible so we can address all the releases on the site.

CHAIRMAN BACA: How do you now back up to say it's lower 40, whatever....

MR. DAVIDSON: Is clean.

CHAIRMAN BACA: Is dirty, or clean.

MR. DAVIDSON: What you want to say is that the lower 40 is clean. What we're proposing is to set up a process where the regulatory agencies with DoD do

that. As we get the information. This means to develop a criteria so we're comfortable with how much knowledge we need, and the timing in which we make it. It's not an NPL listing/regulatory issue. It's a clean/unclean issue.

MR. RUNKEL: As much as I hate to say it, Tom, I come back to making, at least from our perspective, we wouldn't be opposed to pushing Congress to set up some process where, after you did that whole administrative process, just the description of Norton could be just like, in effect. It could just be changed. I'm sure there are other analogous situations out there in regulations, where description and lists are modified just sort of automatically.

It would become this long, you know, involved regulatory process. I bet there are. GSA deals with that, like black listing and things like that, where it just can be almost automatically done. You have your list of parties that are suspecting --

MR. JONES: Once it's on the National Priorities List, is there some way or another we can get specific guidance from EPA that says, "Parcels X,

Y, Z, etc., etc., are no longer on the priorities list, and you can proceed with the disposal." That's what we're trying to -- it's either yes you can, or no you can't.

MR. RUNKEL: And I just am in the position, an OGC attorney is sitting there, not willing to get off, not willing to bite the bullet. I guarantee they're not going to want to.

MR. KUSHNER: Gordon, let me ask this question. There is a process for removing sites from the NPL, that you complete your RI/FS, or you complete the study. You have a finding that there is no contamination. You issue the no action ROD. Once the no action ROD becomes effective, I understand you can go back through the Federal Register, administrative procedures, to give public notice that you are removing that portion of the base from the NPL. Is that not correct?

MR. DAVIDSON: That's an excellent question. Let me see if I can find the answer. First of all, we have never delisted a Federal facility from the NPL. We have to delisted Superfund sites, which are not quite the same, which is the source of some

concern.

The question is, can you apply NPL deletion criteria on a unit specific basis at a facility? Does that make sense? Rather than continue to go back into the regulatory and keep changing where the lines are.

MR. RUNKEL: And we would argue that there is enough of a reason for expediting base closures -- and I'm just looking for Congress to decide -- enough of a reason in our view because of the economic considerations, the livelihoods of these people out there, the reality that this land might not be as marketable, as valuable, that that would be needed. That you have a different system in effect for delisting. And Don does not agree with that.

MR. KUSHNER: One point I would make, and please correct me if I am wrong, but the perception I had is that, you know, once the listing occurs and an RI/FS process is under way, we should know, or have a pretty good idea as to what -- by the time we are ready to do the no-action ROD, and after we have studies the clean areas, we will know what parcels are clean.

We will know, I think, what parcels we are

ready to transfer to the private sector, such that I don't see this as a repeating process, every time, you know, a little bit here, a little bit there, this is clean, that's clean. We should know pretty much in bulk what is clean, such that we need to go in one time, maybe twice, at the -- as an exception.

We should be able to go in one time with what we know is clean, based on a no action ROD, and then back through the public comment, Federal Register process, and have those sites delisted, assuming we can delist parcels of what has been listed.

CHAIRMAN BACA: That's a concern, Gordon, is how do you delist the parcel? I get a lot out of this universe called upbase.

MR. KUSHNER: I think what I'm hearing is that the mechanism that may be able to do that, as was mentioned earlier this morning would be that, you know, that process of actually the RI/FS. When you have drawn -- when you go through and you have that information available, you can then move from that stage and say, "All right. These are the ones that are contaminated, these are the ones that are not contaminated," that should be your information to

remove it.

So I don't see this as maybe -- as a delisting type, you know issue. More of a process to do that. So, in keeping with that, maybe the point is that we consider the designation, maybe what it would be -- along the lines of, you know, as information warrants. Because the next point after we go at the end, we talk about the new listing should be based on the source and content of the contamination. And maybe what you want to do is carry that idea back a little bit into the first part of the sentence, reconsider -- maybe it's not reconsider, but review the source and extent of the contamination as you're listing.

MS. SHIELDS: If we throw in some alternatives like delisting, or redescription, whichever is appropriate and most expeditious or something. So that you have got your delisting when that's going to be as fast as anything else. And maybe in some circumstance it would be. And in a case where you say that's going to raise all kinds of problems -- that's the only way out of this.

MR. DAVIDSON: From the legal perspective,

you don't delist clean areas. That's the problem we have here. That's the root of the listing process. You list dirty areas, okay?

MS. SHIELDS: Yes, but you have got to admit, you have got a lot of clean areas that are listed, because of the way that you list the site in the first place.

MR. DAVIDSON: I agree. Well, that's an assumption.

MS. SHIELDS: Well, you said, we list it comprehensively, because we get comprehensive data.

MR. DAVIDSON: Exactly right.

MS. SHIELDS: Nobody is blaming you for that. The question is, how do we get out of this muddle?

MR. DAVIDSON: That's why -- well, the muddle seems to be that a tremendous amount of importance is put on this NPL thing, when that may not be the process for getting out of this box. What do the lenders and the people who are concerned need to know?

MS. SHIELDS: They have got all the guarantees known to man with these sites. They should have a lot more ease on these sites. They have the United States Government on the hook to clean up

anything that's still dirty.

MR. RUNKEL: So why can't they have the assurance -- and why do they have to have this thing on the NPL? Why can't the government do its job as effectively -- make it clear that it's no longer -- we don't doubt that it's clean.

MR. KUSHNER: Let me just -- maybe, rather than phrasing it in the context of, can we delist parcels, maybe we should look at it as to whether we can go back and redefine the site?

MS. SHIELDS: That's what we have been talking about.

MR. KUSHNER: Through the public kind of process.

MR. DAVIDSON: That's a morass, and I don't think that solves the problem.

GEN OFFRINGA: Part of it is the way we go about the process. You know, when we're looking, we start our RI/FS's, we're concentrating on the dirty areas. Maybe what we need to do is turn it inside out, and concentrate initially on finding the clean areas. And if we change that emphasis, that would go a long ways toward giving the public the perception

that what we're out there finding are clean areas, and not, areas that -- not trying to define the extent of the dirty area.

Then if we have some way, call it a certificate of clean, or something. If we define those areas, we could get --

MR. DAVIDSON: I think that's an approach that's more amenable to the existing system we have. I think we would be willing to say that to the extent that DoD has provided comprehensive information through the site inspection that would clearly show that there are large tracts of uncontaminated land, then we can adjust the listing process to list those areas that we know are dirty.

But right now we just don't have that. A practical example, Tom, when we get out there, we find a lot more crap than what we thought. And it doesn't make sense to come back and list more sites. Or get into all this RCRA CERCLA stuff.

CHAIRMAN BACA: As Anne said, we're not blaming you for the approach. It's just, how do you back down to make some sense out of what is truly contaminated.

MR. DAVIDSON: That's why we shouldn't focus on the NPL listing/delisting process. We should focus on a process for determining what is clean.

MR. RUNKEL: You need both. That's what I -- I have to say I have come to that conclusion. I hate to say it. But, it's not like it's going to be doubling the process, but both are needed. With a limited number of closing bases on the NPL, why can't we -- why would it take that long. And if Pete really thinks you have go in, maybe, one time.

MR. DAVIDSON: For what, delisting? Once you know how long that's going to be.

MR. RUNKEL: Especially if they know, it's going to be in their interest, in the interest of the party that want to redevelop, or the local community, to not push to have delistings until they're ready to do it one time. Because then they're going to have to go back through it --

MR. DAVIDSON: Okay. Let me give you Fort Ord as an example. The final RI/FS schedule is not due until 1997. That's the point that we can go back in and change and delist it. Delist the site for clean areas. That's not acceptable.

GEN OFFRINGA: We don't want to wait that long.

MR. DAVIDSON: The other alternative. There's three to six OU's out there, depending upon how you look at it. Would be to go through three to six rule makings. And you can't transfer -- no one's -- everybody's going to wait for this rule making to go through? That complete defeats the process that we're talking about, expediting clean up and expediting --

I think we need to look at a different avenue than focusing on the NPL rule making process.

MS. SHIELDS: All right. Then what about using the CPAD designation?

MR. RUNKEL: I think everybody agrees here that that's needed regardless.

MR. GRAY: So maybe you could just add that in, right at the end of that first --

MR. RUNKEL: That's great.

GEN OFFRINGA: Tom, would DoD and EPA be willing to, on base closure sites, to concentrate our resources initially on defining the clean areas, which means by inference, you're going to delay the

definition of the dirty areas in order to parcel -- because it's a process of elimination. That's all the RI/FS is.

CHAIRMAN BACA: In fact, that's what we're going to do, to define what we consider the clean areas.

GEN OFFRINGA: But that's a change in the whole way we do business.

MR. DAVIDSON: General, that is -- I think EPA could do that, if it could also say that it's not slowing any of its oversight work on the dirty areas. That there has been an additional source of resources, or whatever there's going to be there. The clean slot, you know. But that everything else is moving apace. But that's -- we can't say that right now.

Particularly when I found out -- we can't do that. Okay? We cannot, based on the oversight resources we have right now, move a slug of that over to -- proving the negative, when we have known areas of contamination. I would think it's a resource issue. Because otherwise we would be faced with the question of having answered the question, and it's a good question, why are you focusing on areas that are

not a risk to human health and the environment, when there are known areas?

CHAIRMAN BACA: I would think by concentrating on the dirty areas, you are separating out the clean areas.

MR. DAVIDSON: I was trying to answer the general's question, why don't we move our focus initially to looking for clean areas.

GEN OFFRINGA: I understand that.

CHAIRMAN BACA: We're going to spend the resources to do that. But what are you saying, that you can't react to our findings?

MR. DAVIDSON: Right now I'm saying that it may be a problem. This whole base closure thing is going to be a big work load for the regulatory agencies.

MR. RUNKEL: I propose, since I don't know where DoD is going to take the program, but I propose -- we have made some progress here in terms of agreement to CPAD. I think that can be very useful, especially if we publicize throughout the RI/FS process, publicize the results, EPA's involvement in that publication, both DoD and the states, to the

local entities. Do that. I think everyone should agree to that now.

I'm still uncomfortable. I can see it two years from now, and maybe I'll be proved wrong, that that's going to be enough. And you could have these slimy lenders coming back, just like they're doing with lender liability issues in general claiming, we need further clarification, further assurances. And, you know, then you're going to have it thrust upon you. And maybe you're saying, well, it's worth the risk.

I guess where we would come down, where I would go back and talk at NGA, and do it in the form of a supplemental recommendation is, I think we might recommend that Congress set up some kind of expediting delisting process for military bases, because there is enough of a need here. And it's a limited enough universe. And I don't need everybody else to -- you know, we can take a vote on that and try to put it in the report, but I don't feel that we need to, even if could win the vote ram this through.

So, if that -- if you all want to do the same thing, you can do that.

MR. DAVIDSON: I'll tell you what I'll do, Brian, is that if we can get some language here that focuses more on the process and not the outcome designation, and that feeds into that next paragraph there, I will go back on Monday morning and get with our people in the office general counsel, and our other listing experts, and sit down and share this conversation with them, and articulate the high degree of concern regarding the meaning of NPL listing, and see if there is anything that can be done.

MR. RUNKEL: Well, that would be useful. We can have it state in here that EPA will attempt to determine whether parcels can be delisted. Is that -- are you looking at that?

MR. DAVIDSON: No. That's what I don't want to have in here. That goes all the way back to what I want to say, is --

MR. RUNKEL: Just whether you would be allowed to, not that you have to actually go back in and do it, through the regulatory process, but whether you would even be allowed to, getting back to Pete's question.

MR. DAVIDSON: Let me talk to my people. I

don't want to commit to that right now. I want to focus on the CPAD process, some other way of doing business like that. But I will go back and talk to our folks, see if there's any flexibility there. I mean, we have another week or so, in case there's going to be some changes.

MR. RUNKEL: I guess -- I don't know if there's any other support here for making a legislative recommendation. I know you're hesitant just as a policy to do that in this report. So, we can throw that out for the moment, but --

CHAIRMAN BACA: We need as a committee to at least take a vote, and if you want to submit a minority report to EPA, that's fine.

MS. SHIELDS: I don't know what would be voted on.

MR. RUNKEL: Voting that the task force would recommend that Congress look into -- consider -- may wish to consider an expedited delisting process.

CHAIRMAN BACA: I guess I would vote to retain the language that's here. I think that does it.

MR. RUNKEL: I would, too.

CHAIRMAN BACA: Sam?

MR. GOODHOPE: All I would say is, maybe we can have some language, without legislation it's going to be impossible for EPA to resolve this delisting program. Put some language in like that.

CHAIRMAN BACA: Let's try a vote. Okay?

MS. SHIELDS: The problem is, I don't think this is a statutory problem. Where is it in the CERCLA that says EPA has to run their delisting the way they're running it now?

MR. RUNKEL: You're right. I'm just saying that we would ask Congress to, in effect, -- we could change that.

MR. GOODHOPE: Without legislation, or without regulatory -- change in regulatory --

CHAIRMAN BACA: Let me propose that we accept the language that's here. Okay? That we accept the language that's here. Take a vote? All in favor of accepting....?

MS. SHIELDS: Wait a second. I don't know what language we're talking about. We have got Gordon's -- that's supposed to substitute for something here.

CHAIRMAN BACA: No. I'm talking about what is here. I'm talking with no changes, as you read it here, staring with, "The task force heard in EPA testimony, etc.," and then accept the next paragraph without change. In this report.

MR. DAVIDSON: It seems to me that we might want to have some different language in here while we discuss this a little further. This is a big issue. And I think, to be honest with you --

CHAIRMAN BACA: We're not getting there. That's the problem.

MR. DAVIDSON: Well, Tom, we're not getting there right now, but I'll tell you something. I think the problem is that there is a misunderstanding of how this process works. And that's the problem. The problem is, we don't have all the information everybody wants right now.

If we start going through this regulatory process, that's the wrong focus. What do writers need to know? They don't need to know that we're going through the regulatory process to look at the NPL boundary, because that's not the issue. They want to know whether or not something's clean.

That supports setting up a different way of doing business, but not going into the regulatory process.

CHAIRMAN BACA: See, this doesn't say the words. "The task force recommends that EPA reconsider the designation of entire military installations as NPL sites, and describe newly listed federal facilities NPL sites using the source and extent of contamination as a guiding principle."

MS. SHIELDS: It doesn't say you have to do it tomorrow.

MR. DAVIDSON: Let me say -- well, take the phrase, "reconsider the designations of entire military installations as NPL sites." I mean, that's a very strong inference that that's the regulatory listing process. Okay? That's the first problem. Let's just focus on that for a minute. There's something we can come up with that speaks to a process by which the parties will try to address this issue, in terms of getting information out to the public as we get it.

MR. PENDERGRASS: Can I ask if it helps to change it from, "to be reconsidered the description of

an entire military installation as an NPL site."?

MS. SHIELDS: That would be better, wouldn't it?

MR. DAVIDSON: Say that again?

MR. PENDERGRASS: Reconsider the description of an entire military installation as an NPL site.

MR. DAVIDSON: That's softer.

MR. PENDERGRASS: It gets you away from there's a strong inference that we're talking about the listing process per se, and that it could be done for -- you know, that you describe --

MS. SHIELDS: And if we added in, "and describe newly listed Federal facility NPL sites using the source and extent of contamination as the guiding principles for both, to the extent possible," or something in here.

MR. GRAY: If you want to add "to the extent that the relevant information is available to do so". Generally, they don't have it at that point.

CHAIRMAN BACA: Okay, to the extent that the relevant information is available.

MR. GRAY: Necessary to do so is available.

CHAIRMAN BACA: Necessary to do it is

available.

MR. GRAY: To do so is available.

CHAIRMAN BACA: Okay. Did you get that language?

MR. PENDERGRASS: No. Because everybody else was --

MR. KUSHNER: Up above, reconsider the description, and then at the end of the last sentence, it would be the guiding principles, to the extent that the relevant information is necessary to do so -- to the extent that the relevant information necessary to do so is available.

MR. DAVIDSON: Say that again?

MR. KUSHNER: Okay. To the extent that the relevant information necessary to do so is available.

MR. DAVIDSON: Read me the whole thing, please.

MR. KUSHNER: Okay. I'll read the whole -- "The task force recommends that EPA reconsider the description of entire military installations as NPL sites, and describe newly listed Federal facility NPL sites using the source and the extent of contamination as the guiding principles, to the extent that the

relevant information necessary to do so is available."

MR. CARR: Striking the "for both."?

MR. KUSHNER: Yes.

MR. CARR: Can I suggest we strike the word entire, you said the description of military installations as NPL sites?

MS. SHIELDS: I think that sounds like we don't want them on the NPL.

CHAIRMAN BACA: The recommendation was that we strike "entire".

MS. SHIELDS: That sounds like we want to keep them off the NPL. Reconsider the description.

CHAIRMAN BACA: That's right. I think you need entire. That's the problem. Okay?

MR. CARR: The reason for my concern is that, I think that the argument can be made that we don't currently describe the entire installation as an NPL site.

CHAIRMAN BACA: But we do. We list.

MR. CARR: That's right -- but we --

MS. SHIELDS: But they say that isn't really what that means. That's the problem.

CHAIRMAN BACA: I think description is where

we want to be. Describe.

MS. SHIELDS: Can I make?

CHAIRMAN BACA: One more?

MS. SHIELDS: Well, Gordon has rewritten two paragraphs, for a better description of what happens now than what we have got here. I would propose that we take this finely crafted last sentence that we just worked out, and add it to Gordon's description, and make that this section.

We didn't have any problem with how Gordon had rewritten it. It just stopped too soon.

CHAIRMAN BACA: Right. Exactly.

MR. DAVIDSON: How about this. This will flow from it. "As a result, when an entire installation is listed, large areas of uncontaminated land may be treated initially as part of the site to the extent the information is available at the time of listing, the task force should recommend that EPA conform its description of the listing consistent with the -- ." Do you see what I'm trying to get at?

MS. SHIELDS: So, in effect, you would be turning this last sentence around so that it fits more here, and we could use the same language, I think.

"To the extent that the relevant information is available at the time of listing, EPA should describe newly listed Federal facility NPL sites using the source and extent of contamination as the guiding principle, and the task force recommends, that EPA reconsider the description of military installations that are already on the NPL."

CHAIRMAN BACA: I can buy that.

MR. CARR: Can you say existing instead of -- is that intended to refer back to existing military installations on the NPL.

MS. SHIELDS: I think if you say, "We will reconsider the description of military installations that are already on the NPL." Okay? Can we agree with that?

CHAIRMAN BACA: I can buy that.

MS. SHIELDS: Did we get that?

MR. DAVIDSON: I would like one more sentence added. And this will help us in future listings, if we said, "To the extent possible, DoD will supply us with as comprehensive a listing as possible of the NPL site."

MS. SHIELDS: You'll agree with that.

MR. DAVIDSON: You see, the problem is, we're under a lawsuit right now, a CLF suit. And, frankly, one of the problems that we're having is the extent of information that has been supplied to us. You folks are trying very hard. But it's a complicated procedure, and we're not getting complete information. So, we're often finding we're having to go back three or four times. That's a big delay.

What I will do with this, okay? This is obviously a very important issue to EPA. I will take this back, and I will run it through everybody, and I will sell it if I can. To explain to them what the problems are. Otherwise, I can't -- I mean, you can vote and I can slam dunked --

MS. SHIELDS: Well, Gordon, you may be forced to do some additional views.

CHAIRMAN BACA: Again, you need to sell it.

MR. DAVIDSON: I will go back and see what people think about it.

CHAIRMAN BACA: It's got to be in the report.

MR. DAVIDSON: I want to see -- I'd like to see the final language first before we have the vote.

MR. RUNKEL: I prefer, Tom, that we have the

vote now.

CHAIRMAN BACA: He's going to rewrite it, and then she's going to read it, and then we're going to have a vote, I guess.

MR. GRAY: I like Gordon's suggestion to add an addition sentence about DoD providing as complete a listing package as possible, because the more complete that package, the more --

CHAIRMAN BACA: I conceded to do that.

MR. GRAY: Oh, I'm sorry. The greater the extent to which that information will be available. That sort of puts an obligation on both sides, so to speak, to do a better job so that we can accomplish this.

MR. DAVIDSON: Do we want to say anything in here about a process, because that feeds into the next paragraph?

CHAIRMAN BACA: I guess I wouldn't mind including language that nails down a process, because I think there is confusion out there as to what the process is.

MR. DAVIDSON: We have already agreed that it's --

CHAIRMAN BACA: The process is in.

MR. PENDERGRASS: Can I go back? The -- currently in the book there are three paragraphs. EPA's suggestion is two. I think the first paragraph needs to stay in there. It describes, first, the process the task force went through. But the second sentence sets up the problem.

CHAIRMAN BACA: Okay. We'll keep the first paragraph. Include this.

MR. PENDERGRASS: The next two.

CHAIRMAN BACA: Are you about ready to read?

MS. SHIELDS: The only thing I don't have is this last sentence. All right. Gordon's two paragraphs at the end of the second one.

"To the extent that the relevant information is available at the time of listing on the NPL, EPA should describe newly listed Federal facility NPL sites using the source and extent of contamination as the guiding principle. And the task force also recommends that EPA reconsider the descriptions of military installations that are on the NPL. The task force observes that it will speed up this process if DoD provides well documented and comprehensive site

descriptions."

CHAIRMAN BACA: Draft HRS scoring packages.

MS. SHIELDS: Observes that it will be beneficial to proper description, or something, the NPL sites, if DoD provides what?

MR. DAVIDSON: Comprehensive.

MS. SHIELDS: Comprehensive.

MR. DAVIDSON: HRS scoring packages.

MS. SHIELDS: HRS scoring packages.

MR. DAVIDSON: Oh, okay, preliminary assessment site inspection information.

MS. SHIELDS: Instead of HRS? Preliminary?

MR. DAVIDSON: Assessment site inspection information used for the HRS -- for listing purposes.

MS. SHIELDS: The HRS for listing purposes. Okay.

CHAIRMAN BACA: Do you want to read it one more time?

MS. SHIELDS: Okay. "The task force -- ," this is at the very end. "The task force observes that EPA's ability to describe the site by using this guiding principle that we have just set up -- "

MR. PENDERGRASS: The contaminated portions

of the site.

MS. SHIELDS: "To describe the site by the contaminated -- by its -- " Okay. "The task force observes that EPA's ability to describe the contaminated portions of the site will be enhanced if proper descriptions of NPL if DoD provides -- " okay, I have got this sort of mixed up.

Okay. "The task force observes that EPA's ability to describe the contaminated portions of the site will be enhanced if DoD provides comprehensive PA/SI information for listing purposes." Okay? Is that on the recorder and I don't have to write it again?

CHAIRMAN BACA: I take it we want your draft.

MR. DAVIDSON: Could you read it one more time?

MS. SHIELDS: Okay, the whole thing. Gordon's two paragraphs. "To the extent that the relevant information is available at the time of listing on the NPL, the task force recommends that EPA describe newly listed Federal facility NPL sites using the source and extent of contamination as the guiding principle, and the task force also recommends that EPA

reconsider the descriptions of military installations that are on the NPL. The task force observes that EPA's ability to describe the contaminated portions of the site will be enhanced if DoD provides comprehensive PASI information for listing purposes." Applause? (Applause)

CHAIRMAN BACA: All in favor? I would like the record to reflect that DoD accommodated EPA.

MR. DAVIDSON: And EPA appreciates that.

MR. GRAY: We all accommodated California.

CHAIRMAN BACA: The vote was unanimous for the record. Okay. Are we through with 15?

MR. GRAY: One concern on page 15, and through the first paragraph, we were talking about the protective function of zoning. And I think there were some comments by myself and other members about this, that there should be language in here recognizing that zoning classifications are not a substitute for but a complement to lease or deed covenants, since zoning can be changed at any time by the local zoning authority.

CHAIRMAN BACA: How about the following language? "Zoning should not be relied on as the sole

vehicle to prevent inappropriate use of the land."

MR. GRAY: Well, I think, take out the word "sole," or what -- ?

CHAIRMAN BACA: As the vehicle. Okay? "Zoning should not be relied on as the vehicle to prevent inappropriate use of the land."

MR. PENDERGRASS: Well, I mean, you do rely on it partially.

CHAIRMAN BACA: That's why I like sole.

MR. PENDERGRASS: It is one of its functions. It's true it can be changed. And so, you don't rely on it solely. But I do think that's one of the functions.

MR. GRAY: All I'm saying is it should not be a substitute for having effective covenants in the deed, or the lease, or whatever --

MS. SHIELDS: It's already by law, so --

MR. GRAY: Well, why are we going through all this stuff about zoning, then?

MR. PENDERGRASS: Because it provides one more forum for the public, and it provides a way for a discussion of what's appropriate use, so you can make sure that everybody knows what's an appropriate

use for it. And it does provide another mechanism of making sure that there aren't inappropriate changes made in the land use.

CHAIRMAN BACA: I think sole, because it is a vehicle.

MR. PENDERGRASS: It's only there as another layer, but it is another layer.

MR. GRAY: Is we put the "sole" back in, will it be good?

CHAIRMAN BACA: Yes. That's be good. I have got Gordon's proxy.

MR. RUNKEL: My crack legal staff back here raises the very basic question, I couldn't give you the answer either, but, does the Federal government unusually -- don't they usually contend that Federal property is not subject to local zoning laws?

MR. JONES: Until such time as it leaves government ownership, local zoning laws do not apply. But the appendices with regard to zoning and other things, need to be revised.

MR. PENDERGRASS: That is covered at the top of this as discussed in appendix seven. Local governments must be given the opportunity to zone the

property.

CHAIRMAN BACA: Okay.

MR. JONES: We're going to have to go throught the appendices.

CHAIRMAN BACA: We'll go through them. Let's go to chapter two.

MR. GRAY: Mr. Chairman, can I just raise an inquiry? My car is about to be locked up for the weekend. The parking garage is going to close at 8:00.

MS. SHIELDS: Yes. We have got to get out of here by 8:00. You can have my proxy to go through all the appendices you want.

CHAIRMAN BACA: We're very close.

MR. KUSHNER: To make a correction, the appendices were designed not to be, if you will, a body of the report, but basically a factual -- so you may be able to correct that separately.

MR. JONES: Yes. We could correct and submit that. Okay?

CHAIRMAN BACA: Okay? Chapter two?

MR. GRAY: Will page 17 be automatically adjusted to reflect what we have just done?

CHAIRMAN BACA: Yes. Chapter two? Eighteen? Page 18?

MR. EDWARDS: Mr. Chairman, the State of Texas has a proposal to change the fourth sentence in the second paragraph on page 18. It's in our package. On page 25 of our --

CHAIRMAN BACA: Does anybody have any problem with scratching delegated from substituting authorized?

MS. SHIELDS: I have a change. The second sentence, we have fought this battle before, so it shouldn't come as any surprise. The second sentence of the chapter should be deleted. It's the Rocky Mountain Arsenal issue.

CHAIRMAN BACA: You're wanting to delete because of the nature of RCRA and CERCLA?

MS. SHIELDS: Yes. Because the --

CHAIRMAN BACA: Okay. Any problem with deleting that sentence?

MS. McCRILLIS: Can I just ask, is that also true for non-NPL sites that are cleaned up? No?

CHAIRMAN BACA: Only CERCLA.

MS. McCRILLIS: Okay. But we have in the

past, started a CERCLA clean up, following the NCP at our non-NPL sites. And so, I was just wondering if that is true across the whole board.

MS. SHIELDS: It's an issue that we do not need to -- I don't see the point in saying that sentence here. We have a clear district court decision in Colorado that says that at an NPL site, its jurisdiction under RCRA has been ousted. So I don't want to leave the impression that this sentence does, that its jurisdiction would not be ousted.

MR. PENDERGRASS: It doesn't go to that.

MS. SHIELDS: What is it there for?

MR. PENDERGRASS: It's there for this situation, that in fact, and maybe you can say a non-NPL -- and also the district court decision says that the court's jurisdiction is ousted. It doesn't say that RCRA doesn't apply. It says it doesn't have any jurisdiction over it. Because the waiver, this 113, says we're gone.

But it doesn't say that RCRA doesn't apply, that RCRA may apply, who knows? But I -- I mean, this is only there to set up what the issues are. Why you are discussing these things.

CHAIRMAN BACA: Does it hurt by leaving it out?

MR. RUNKEL: Well, how about a statement that the states believe that that is true, and clarify where the difference of opinion is.

MR. EDWARDS: We can do it in the supplemental, but I don't see why here it hurts to clarify that the states believe this. We're going to win the vote if we vote on it. But I'm just saying that somewhere in the record we would like reflected that the states, despite this one court opinion, we still believe that this whole thing can be resolved in our favor.

MS. McCRILLIS: I would also ask, what then? I see that as being the heart of the reason why this chapter even exists.

CHAIRMAN BACA: Well, I would like to move on. We're not going to resolve anything. I propose that we delete this sentence. All in favor?

MS. SHIELDS: I'm just not sure what the sentence means. RCRA in my view applies at a CERCLA site through the ARAR process. For a state, a RCRA-type statute applies in the same way. If that's all

you mean, say it. But I don't think that's all this means.

CHAIRMAN BACA: No. That's not all, you're right.

MS. McCRILLIS: I guess, what about the situation where the site is being cleaned up under RCRA now, and then it's added on the NPL? What does that do?

MS. SHIELDS: If what you're talking about is an ongoing RCRA facility at site that is being cleaned up under CERCLA you may have that situation. I just -- I don't think that's what this means.

So, I don't think it provides any clarity to anything, it just mucks it up. So, take it out, is my suggestion.

MR. RUNKEL: I think there's disagreement.

CHAIRMAN BACA: There is disagreement.

MR. RUNKEL: Right, that there is disagreement, that an NPL site subject to CERCLA could also be subject to state hazardous waste requirements if CERCLA RCRA --

CHAIRMAN BACA: Wasn't doing the job. Let's take a vote.

MR. DAVIDSON: Wait. Is there compromise language? I mean, the fact is, the issue is one of overlapping laws, and whether or not that has an impact on slowing things down. Is there some language here we can say, I guess that point without talking about -- instead of saying by being regulated under those statutes? Just a little finessing job, I guess.

But the idea is how things overlap, and how to maintain some confidence. Some compromise position on some things are best.

CHAIRMAN BACA: Are you thinking of a substitute word for "regulated"?

MR. DAVIDSON: That the nature of RCRA CERCLA, there may be dispute regarding how these laws apply.

MR. GOODHOPE: Who wanted this out? Well, one thing I was thinking about, let me go back to the discussion we had, and I don't want to reopen the discussion, but is there anyway of speeding up the process of delisting, whatever you want to call it, by handing it over to the state and having the state take care of the problem of uncontaminated --

MR. DAVIDSON: There's a can of worms.

MR. GOODHOPE: It may be that, you know, believe it or not, states don't always get in the way. Maybe states can have a positive function mixing up facilities. That may be a minority opinion here.

CHAIRMAN BACA: Why don't we move on.

MR. RUNKEL: Vote it out if you want, and then we can talk about it.

MS. SHIELDS: Because you have got the points that you want to make further on down in the body of it.

CHAIRMAN BACA: All in favor of deleting the sentence starting with "Because," and ending with "statutes," indicate by raising you hand. Four. Those against? Three. One abstention.

Okay. We delete it. Any other comments on page 18? Page 19? I do have one clarification, after section 3004(u), include an 3008(h), do I have the right citation. We're on page 19, the paragraph starting with Section 120(i).

MR. DAVIDSON: Can we back up. I'm sorry. The sentence on the bottom of page 18, the last sentence that starts with, "The NCP contains the Federal regulations governing responses," putting

those two sort of -- My people just say that that's redundant to what's already in there.

CHAIRMAN BACA: I agree. It's not necessary. Any objection? Deleting at the end of page 18, "The NCP contains the Federal regulations governing releases of etc."

MR. DAVIDSON: Only because of its redundancy.

CHAIRMAN BACA: It doesn't add anything.

MR. PENDERGRASS: That's true. But people never ask for it to be defined and tell us what it was.

CHAIRMAN BACA: We'll delete it. Lucy? The paragraph starting with Section 120(i), second line from the bottom.

MS. SHIELDS: I have a rewrite for that whole sentence.

CHAIRMAN BACA: Okay. Let's hear your rewrite.

MS. SHIELDS: It might be -- the second sentence of the 120(i) paragraph would read, "Section 120(i) states only that RCRA requirements apply generally to Federal facilities; it does not change

the manner in which those requirements would apply through the CERCLA ARAR's process."

CHAIRMAN BACA: I think that takes the garbage out. Any problem with that?

MS. SHIELDS: "Section 120(i) states only that RCRA requirements apply generally to Federal facilities; it does not change the manner in which those requirements will apply through the CERCLA ARAR's process."

CHAIRMAN BACA: Any problem with that?

MS. SHIELDS: "Section 120(i) states only that RCRA requirements apply generally to Federal facilities; it does not change the manner in which those requirements will apply through the CERCLA ARAR's process."

CHAIRMAN BACA: Any problem? No? So adopted. Okay. Does that delete the rest of that sentence there, the rest of the paragraph?

MS. SHIELDS: That takes care of this paragraph.

CHAIRMAN BACA: Okay. Delete the rest of the paragraph.

MS. SHIELDS: That rewrites that second

sentence, which is the rest of the paragraph.

CHAIRMAN BACA: Okay. Then you don't need my correction. Any other comments on 19?

MS. SHIELDS: One minor -- we thought you should stick in formal before guidance on the fourth line from the bottom.

CHAIRMAN BACA: Formal guidance without formal guidance?

MS. SHIELDS: Yes. In that sense.

CHAIRMAN BACA: Any problem with that?

MS. SHIELDS: Presumably they have some guidance. It's just a rule that they provide the formal guidance.

CHAIRMAN BACA: Any problem with that? I would just add in formal.

MR. RUNKEL: What does formal mean?

MS. SHIELDS: Well, rule. A rule is a formal guidance.

CHAIRMAN BACA: Promulgated guidance.

MS. SHIELDS: In the absence of a corrective action rule, the states are without formal guidance on how to implement corrective action.

MR. RUNKEL: Let me repeat for the record,

the issue was that instead of the word "formal" use the word "promulgated" because that's used in the NCP.

CHAIRMAN BACA: Promulgated guidance? Does anybody have any problem with that? We'll accept it. Any other comments?

MR. DAVIDSON: Yes. One. The one sentence that starts, "Because EPA has not yet promulgated a final rule," "EPA currently sets clean up standards for corrective actions under RCRA on a case-by-case basis." I kind of recommend that that sentence be deleted only because that doesn't really address what the corrective action rule is going to do anyway.

It's like the NCP, it doesn't give you clean up standards. It gives you a process for determining how the clean up is cleaned, which takes accounts on a case-by-case basis. So it really doesn't -- it's not accurate.

CHAIRMAN BACA: Any problems with deleting it? Deleting "EPA currently sets standards?"

MR. DAVIDSON: What we want left in "EPA currently sets clean up standards for corrective standards under RCRA on a case-by-case basis." Leave that in.

MS. SHIELDS: So you take out the first clause.

MR. DAVIDSON: Yes.

MR. DAVIDSON: Can you guys go with that?

MS. SHIELDS: Start the sentence with "EPA currently sets -- "

CHAIRMAN BACA: "Current sets clean up standards." Any problem with that? Okay, we'll accept it. Any other comments on page 19? Page 20.

Lucy, do want to explain? Staff has a couple of recommendations.

MS. McCRILLIS: I'll try to be quick about it. On the first paragraph, first incomplete paragraph, it talks about differences in determining clean up standards, and so on. The issue isn't necessarily that they are different standards. That doesn't have to be the problem if we can solve it by saying that as long as you have remediated a site under RCRA, that as a routine course of matter we won't ask it to be reexamined under CERCLA, and vice versa.

So that we don't necessarily have to drive for identical processes, but what we do need to drive

for is just that you don't have to redo it under one if you have done it legitimately under the other law.

CHAIRMAN BACA: Okay. Give us your language.

MS. McCRILLIS: Okay. The language would read, beginning the sentence, third line down, "In order to minimize -- "

CHAIRMAN BACA: Is everybody there?

MR. DAVIDSON: What page are we on? I'm sorry.

CHAIRMAN BACA: We're on page 20. The first incomplete paragraph at the top, third line. "In order to minimize -- "

MS. McCRILLIS: "In order to minimize the problems encountered and result in time delays as a result of the different procedures and standards, the task force recommends that EPA, to the extent possible, promulgate policy that recognizes that remedies selected under one authority will not, as a matter of rule, be reconsidered under the other authority." Or something to that effect.

CHAIRMAN BACA: And delete the rest.

MS. McCRILLIS: That's right.

MR. RUNKEL: Perhaps we could add a footnote

to that? Footnote? I think what she is referring to is some language that's been worked out, again in California, between the Navy and the state on RCRA CERCLA integration. We have some language from an actual agreement here.

But we could just refer in a footnote that this is already being done so people don't think it has never been done in the past.

MR. DAVIDSON: We have some of them on the streets.

MS. McCRILLIS: For CERCLA. You have guidance going one way. You do not necessarily have RCRA guidance going the other way.

MS. SHIELDS: I think the problem with that is that RCRA is only one of the ARAR's that applies in a CERCLA clean up. And so, you can't -- we can't unilaterally amend CERCLA here to say, "The only thing we'll consider is RCRA."

MR. GOODHOPE: Anne is exactly right.

MS. SHIELDS: I don't think you --

(Laughter)

MS. McCRILLIS: I guess the only observation I would make, and you may be right, it's just that

Gordon, you all have issued guidance that I think says exactly that. That under CERCLA, that if a RCRA clean up action has occurred, the agency will not, as a routine course of matter, reexamine the clean up, or make you redo the clean up, if it was done under RCRA.

MR. DAVIDSON: What document does that involve?

MR. CARR: That's in a memo that came out about a year or so ago, and we supplied a copy of it to the task force to gather comments.

MR. DAVIDSON: What's the name of the memo, Bob?

MR. CARR: I think it's called, "The Clean Up of Final NPL Site under RCRA."

MR. DAVIDSON: Particular to Federal facilities. Perhaps we could reference that memo.

MR. RUNKEL: And the footnote.

MS. McCRILLIS: It was referenced somewhere in this report.

CHAIRMAN BACA: Okay, Jay, reference that memo, and we'll leave the language as is.

MR. GRAY: Mr. Chairman, I really have to go. The issues that were of concern to me have been

resolved. My intention is to vote for the adoption of the report, but I may want to have some additional views.

CHAIRMAN BACA: Okay. Thank you. Okay, I would like to propose two deletions. The second paragraph, clean up execution, delete that last sentence, "In order to minimize." It's a repeat of what's above.

MR. PENDERGRASS: Well, yes it is, because they are two different things. I mean, it's a repeat of what was under the section about clean up standards, and it's repeated here because we are talking about the way that it's executed.

MS. SHIELDS: That's right. They are slightly different.

CHAIRMAN BACA: All right. Okay. We'll leave that in. And how about, under generic clean up, second paragraph, the second paragraph under generic clean ups, delete the last sentence.

MR. DAVIDSON: The first paragraph in that section, under generic clean up?

MS. SHIELDS: The second paragraph, right? The one about innovative technology. You don't want

to do any of that?

CHAIRMAN BACA: Well, it's, wait a minute.

MR. DAVIDSON: I'd like to keep that in there.

CHAIRMAN BACA: I do too. Now I take it back.

MR. DAVIDSON: So we do agree.

MR. KUSHNER: I think the key with that is the point that the way the current system is right now, the innovative technology actually has a possibility of slowing down the process. And there is some concern. So we have got to find a way of bringing the innovative technologies --

CHAIRMAN BACA: It doesn't say that you can't do that, though. We still always have the option of doing that.

MR. DAVIDSON: I would like to keep it in there. I just think it's --

CHAIRMAN BACA: Well keep it in. Any other comments on page 20?

MS. McCRILLIS: The technology issue.

CHAIRMAN BACA: That's what this addressed. Page 21? The last one? Come on guys, we're almost

there.

MR. RUNKEL: We have two proposals -- recommendations to propose. I don't know if you want to wait until we get to 22?

CHAIRMAN BACA: We're not talking 22. These findings and recommendations will be reflected.

MR. RUNKEL: We're adding them.

CHAIRMAN BACA: You can't add. You can only take away.

MR. RUNKEL: We've only got 20 minutes. Okay.

CHAIRMAN BACA: What are you proposing?

MR. RUNKEL: Okay. The first one to get written out, here. What we have just been discussing. "The task force recommended that integration of CERCLA clean up process and RCRA substantive requirements may be done by agreement between the regulatory agencies and DoD." It's being done, I know. That's what we were talking about.

CHAIRMAN BACA: Anne?

MS. SHIELDS: I'm sorry. I didn't mean to interrupt, but where are you talking about?

MR. RUNKEL: Just adding a --

MS. SHIELDS: I don't have any problem with that.

MS. McCRILLIS: Is that prospective? I guess what I was suggesting here was that, what if it has already happened? What if a RCRA corrective action has already occurred? How would it be dealt with as opposed to -- I mean, I agree completely with what you're saying. But I see it as being a prospective kind of thing, not necessarily what if this is the case? I don't know if that's --

MR. RUNKEL: I don't see it as wrong.

CHAIRMAN BACA: You are proposing?

MR. RUNKEL: That that recommendation be adopted.

CHAIRMAN BACA: All in favor of accepting it? All opposed? It's unanimous.

MR. RUNKEL: The final recommendation is that, with respect to Federal facility agreements, that the recommendation read, "The task force believes that there may be a need to amend Federal facility agreements or similar clean up agreements between regulatory agencies and DoD as soon as possible to address base closure related issues."

CHAIRMAN BACA: Isn't that an option we have?

MR. RUNKEL: We would like to have that endorsed in the report. That they go back, in order to prevent a conflict between the task force and --

CHAIRMAN BACA: Could we write it that "The task force suggests that the amending of could expedite." Any problem with that?

MR. RUNKEL: That's fine.

CHAIRMAN BACA: All in favor? Aye? Any more on 21?

MR. GOODHOPE: I think it's going to -- we could go on to 22, but that's a recommendation that we would suggest, therefore, instead of going on to 22, we put on 20, is the recommendation that we made on page 26 of our package. Or we could leave it to our staff to find a more appropriate spot for it.

MS. McCRILLIS: This is what, I guess, what I was just mentioning earlier, "EPA should develop guidance recognized in order to avoid duplication. Corrective action taken under RCRA should be incorporated under the remedy section -- "

MR. GOODHOPE: I think that's a great idea.

CHAIRMAN BACA: Gordon, do you have any

problem with that?

MR. DAVIDSON: I have to think about it for ten seconds.

MS. SHIELDS: I mean, it puts a burden on you to develop guidance. Is that what you want to do get them to consider it in the remedy selection process. All this -- the development of guidance -- ?

MS. McCRILLIS: The EPA guidance, -- that's what it does. I think that's what it does.

MS. SHIELDS: What guidance?

MS. McCRILLIS: The guidance we were talking about. That memo. If that is what it does.

MS. SHIELDS: It's already there.

MS. McCRILLIS: It's already there.

MS. SHIELDS: So don't talk about developing it, then.

MR. EDWARDS: Mr. Chairman, if I may, this language came from the Texas Water Commission. Their complaint is that when a state type RCRA site is placed on the NPL, that EPA is ignoring the body of data the state has developed. It should refer to this in its enforcement process. And we just ask that they go to the state agency to get all their data.

MR. DAVIDSON: Well, I think that's an excellent recommendation. I also think we ought to be doing that. And guidance -- the state incorporating concept. We could say, "The task force recommends that EPA -- "

MS. SHIELDS: "Go back and read the statute."

MR. DAVIDSON: "Go back and read the statute." No. I mean it's just an acknowledgement that this is the right way to handle the situation of the transition. I mean -- some language. I don't want to say we should develop guidance --

MS. SHIELDS: Endorses -- "The task force endorses EPA's guidance -- " whatever the name of it is.

MS. McCRILLIS: If I may, just one more thing. What is not there is the counterpart. Is the guidance going the other way. Saying that if you cleaned it up under CERCLA, then it won't, as a matter of course be reexamined under RCRA corrective action. That is missing.

CHAIRMAN BACA: How about this language? "EPA ensure guidance exists which recognizes...."

MR. KUSHNER: You missed half the works.

"EPA ensure that guidance exists that recognizes that in order to avoid duplication of effort," and the rest of the sentence.

MR. DAVIDSON: Okay. How about this. "The task force recommends that in order to avoid duplication of effort, EPA consider corrective actions undertaken with RCRA permits."

MR. KUSHNER: "EPA consider corrective action undertaken under RCRA order or permit in the RCRA selection process."

MS. McCRILLIS: But then the other way, too. "Then, similarly, EPA should develop guidance recognizing the CERCLA clean up remedy under RCRA." I don't know if we already said it, but that's basically the essence.

MR. PENDERGRASS: But you would not do a RCRA corrective action if a CERCLA remedial --

MS. McCRILLIS: Remedial action has occurred -- or, you know, has occurred at a --

MS. SHIELDS: When you have had a CERCLA clean up -- ?

MS. McCRILLIS: When you have had --

MS. SHIELDS: Some state is trying to go

back and undo that CERCLA clean up, and insist that it be done? Who is doing that?

MR. KUSHNER: I think we do have the reverse in the context of FFA model provision for RCRA CERCLA integration, because the language says that what we do under this agreement, the FFA shall be deemed to satisfy the requirements of CERCLA, RCRA, etc. So, although the policy hasn't been issued, the FFA, the agreements we enter provide for that.

MS. McCRILLIS: But this could occur at a non-NPL site, where we have done CERCLA clean up actions pursuant to our 120 obligation and DERP --. We have done clean up actions consistent with the NCP. And then RCRA corrective action comes in and reexamines the cleanup issue.

MS. SHIELDS: RCRA has already applied to the CERCLA clean up through the ARAR process, unless you have waived it.

MS. McCRILLIS: Right.

MR. KUSHNER: Suppose they are coming back again, after we are all finished, and saying, "Now we want to apply the RCRA activities again."

MS. SHIELDS: Who is?

MR. KUSHNER: That's what the chief -- which is the state, Georgia?

MR. DAVIDSON: Can you make it a generic statement that everybody should incorporate everybody else's work while there is a state of transition?

MR. GOODHOPE: Just be nice to each other.

MR. DAVIDSON: That's it.

CHAIRMAN BACA: I would like one final vote that we would accept the report as amended.

MR. DAVIDSON: Before we vote? Sorry. We have got this RCRA CERCLA overlap language. Can I read it? And then there's a recommendation to feed into it. Say, "EPA's Federal facilities listing policy addresses the application of RCRA and CERCLA authorities at Federal facilities on the NPL. This policy provides for a three party IAG, which would identify and carve out -- squeeze out -- the three elements of the facility to be cleaned up under state authorized RCRA corrective action, where it makes sense technically and administratively, as long as the action required by the state is not inconsistent with EPA's CERCLA approach. Application of this policy in appropriate circumstances may promote expeditious

clean ups, and reduce the potential for conflict between CERCLA and RCRA. This policy contemplates close coordination among EPA, the states, and DoD, in all phases of the clean up of closing bases."

CHAIRMAN BACA: We're with that.

MR. DAVIDSON: Now, can we go back in -- that would go where we had the avoiding potential conflicts section.

CHAIRMAN BACA: Anybody have any problem with that?

MR. DAVIDSON: You might want to focus on this.

CHAIRMAN BACA: We're going to vote here in a minute.

MS. SHIELDS: I may have to provide clarification that this does not give up EPA statutory responsibility to make a remedial action decision.

MR. DAVIDSON: I think that's very important. It does give an opportunity to look at that, consistent with our policy --

MR. GOODHOPE: Is it on the table or not on the table?

CHAIRMAN BACA: It is on the table. Do you

want to look at it and get back to us Monday?

MS. SHIELDS: I'll --

CHAIRMAN BACA: I'll hold the record open for this issue. We will rely on Anne.

All in favor of accepting this report as amended? Raise your hand? It's unanimous. You guys did a great job. (Applause)

(Whereupon, the task force adjourned at 7:55 p.m.)

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

DATE: Sep 27, 1991 **VOTING NO.** 1

SUBJECTS: Goodhope amendments, p. 14 "State environmental agencies..."

TASK FORCE MEMBERS	YES	NO
MS. SHIELDS		X
MR. E. JONES		X
MR. DAVIDSON		X
MG OFFRINGA		X
MR. ~~XXXXX~~ RUNKEL	X	
MR. GOODHOPE	X	
MR. GRAY	X	
MR. BACA		X
TOTAL	3	5

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

DATE: Sep 27, 1991 **VOTING NO.** 2

SUBJECTS: Goodhope amendments,p. 33 "In its notice..."

TASK FORCE MEMBERS	YES	NO
MS. SHIELDS	X	
MR. E. JONES	X	
MR. DAVIDSON	X	
MG OFFRINGA	X	
MR. ~~BROCK~~ RUNKEL		X
MR. GOODHOPE	X	
MR. GRAY	X	
MR. BACA	X	
TOTAL	7	1

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

DATE: Sep 27, 1991 **VOTING NO.** 3

SUBJECTS: Sep 18 Draft, p. 15, 3rd paragraph, " To the extent that relevant information is available..."

TASK FORCE MEMBERS	YES	NO
MS. SHIELDS	X	
MR. E. JONES	X	
MR. DAVIDSON	X	
MG OFFRINGA	X	
MR. ~~STROCK~~ RUNKEL	X	
MR. GOODHOPE	X	
MR. GRAY	X	
MR. BACA	X	
TOTAL	8	0

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

DATE: Sep. 27, 1991 **VOTING NO.** 4

SUBJECTS: Sep 18 draft, p. 18, 1st paragraph, " Because of the nature..."

TASK FORCE MEMBERS	YES	NO	
MS. SHIELDS	X		
MR. E. JONES	X		
MR. DAVIDSON	X		
MG OFFRINGA	X		
MR. ~~STRUCK~~ RUNKEL		X	
MR. GOODHOPE		X	
MR. GRAY			NV
MR. BACA	X		
TOTAL	5	2	

DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE

DATE: Sep 27, 1991 **VOTING NO.** 5

SUBJECTS: On Report as Amended

TASK FORCE MEMBERS	YES	NO
MS. SHIELDS	X	
MR. E. JONES	X	
MR. DAVIDSON	X	
MG OFFRINGA	X	
MR. ~~STROCK~~ RUNKEL	X	
MR. GOODHOPE	X	
MR. GRAY	X	
MR. BACA	X	
TOTAL	8	0