Military Mess: CERCLA Liability and the Base Closure and Realignment Act, A

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I. INTRODUCTION

A SIGNIFICANTLY DIMINISHED Communist threat and America’s corresponding emergence from the Cold War have prompted the most substantial defense force reduction since the post-World War II period.\(^1\) With the chance of armed conflict reduced, the Pentagon is scrambling to decrease the size of its forces in conformance with significant military budget cuts.\(^2\) The fall of the Berlin Wall has prompted the diminution of the American arsenal and the rise of a substantially leaner peace-time military. The Pentagon already plans to reduce personnel requirements and slash procurement schedules.\(^3\) A smaller stockpile of military hardware and diminished personnel requirements mean that domestic military bases, which were once integral parts of national security, will become expensive government ghost towns. Consequently, the government must dispose of unessential military facilities. A major component of this military downsizing effort is the Defense Base Closure and Realignment Act of 1990 (the Act).\(^4\)

The Act prescribes the closing and realignment of a

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\(^1\) L.R. Jones, *The Pentagon Squeeze: The Changing Global Picture and Budget Cuts are Forcing Radical Changes at the Defense Department*,Gov’t Executive, Feb. 1992, at 47.

\(^2\) *Id.*

\(^3\) *Id.*

substantial number of domestic military bases as part of
the planned downsizing of overall military forces.\textsuperscript{5} In or-
der to recover closing costs and rebuild wounded local
economies, however, the federal government must sell or
transfer real property at each base site to the public sec-
tor.\textsuperscript{6} The ability of the federal government to transfer
base property to municipal and private control is severely
impaired by thousands of environmental hazards left be-
hind by military operations.\textsuperscript{7} Environmental cleanup at
these sites may delay cost recovery and redevelopment for
decades.\textsuperscript{8}

This Comment first explores the purpose of the De-
fense Base Closure and Realignment Act and the nature
of the environmental hazards left behind by the military at
domestic bases.\textsuperscript{9} Next, it reviews the framework of liabil-
ity under the Comprehensive Environmental Response
Compensation and Liability Act of 1980 (CERCLA)\textsuperscript{10} and
the danger of passing that liability to purchasers of base
land.\textsuperscript{11} After establishing this background, the Comment
then examines several ways in which municipalities and
private entities that take title to base land may protect
themselves from CERCLA liability. These protections in-
clude the innocent landowner defense,\textsuperscript{12} the govern-
ment’s limited waiver of immunity to suit under
CERCLA,\textsuperscript{13} the notice requirement for sale of govern-
ment land,\textsuperscript{14} statutorily mandated deed covenants,\textsuperscript{15} con-
tractual indemnity for environmental liability,\textsuperscript{16} and

\textsuperscript{5} Id.
\textsuperscript{6} See infra notes 32-54 and accompanying text.
\textsuperscript{7} Keith Schneider, Toxic Pollution Stalls Transfer of Military Sites, N.Y. TIMES, June
29, 1991, at 3A.
\textsuperscript{8} Marilyn Odendahl, Will Jefferson Proving Ground Really Close?, IND. BUS. MAG.,
\textsuperscript{9} See infra notes 19-75 and accompanying text.
\textsuperscript{11} See infra notes 76-110 and accompanying text.
\textsuperscript{12} See infra notes 124-28 and accompanying text.
\textsuperscript{13} See infra notes 152-84 and accompanying text.
\textsuperscript{14} See infra notes 185-98 and accompanying text.
\textsuperscript{15} See infra notes 199-201 and accompanying text.
\textsuperscript{16} See infra notes 202-18 and accompanying text.
several recent efforts by legislators to indemnify purchasers and expedite sale of military sites. Finally, this Comment looks at some of the potential long-run benefits that local communities and the defense industry as a whole may derive from base closures and related environmental cleanup.

A. THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT

The stated purpose of the Defense Base Closure and Realignment Act "is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." President Bush appointed the Commission on Base Realignment and Closure (the Commission), with the advice and consent of the Senate, to conduct studies that would identify those domestic military bases that should be closed or realigned for other use. Congress designed the Act to overcome three problems that had plagued other base closing efforts. First, the Act imposes a series of inflexible deadlines in order to give the process a degree of finality and to prevent protracted legal challenges from delaying closures. Second, the Act removes base closure recommendations from the political arena and makes them the responsibility of a nonpartisan commission. Finally, the Act attempts to minimize the opportunity for Congress to

17 See infra notes 219-58 and accompanying text.
18 See infra notes 259-70 and accompanying text.
20 National Fed'n of Fed. Employees v. United States, 905 F.2d 400, 402 (D.C. Cir. 1990) (holding that challenges to discretionary decisions under the Base Closure and Realignment Act are nonjusticiable). The Commission applied the following criteria in making its base selections: (1) current operational readiness; (2) availability and condition of land and facilities at both existing and potential receiving locations; (3) force requirements at receiving locations; (4) cost and manpower implications; (5) extent and timing of potential cost savings; (6) economic impact on the base area community; (7) community support at the receiving locations; (8) environmental impact; and (9) the implementation process involved. Id.
22 Id.
23 Id. at 959.
taint the closure selections with self-interested deals. This is accomplished by forcing Congress to deal with the closure package as a whole, without the opportunity to amend base selections.\(^{24}\) Thus, the Base Closure and Realignment Act provides an efficient vehicle for streamlining the nation’s military infrastructure.

In April 1991, the Secretary of Defense recommended the closure of fourteen domestic Air Force bases.\(^{25}\) The Commission recommended the removal of one of the bases from the list. Then it made recommendations to President Bush, which included closing forty-seven domestic military bases and realigning twenty-eight bases for other use.\(^{26}\) The President approved the commission’s recommendations on July 10, 1991.\(^{27}\) Congress held hearings on the commission’s recommendations pursuant to a provision in the Act that gives Congress an opportunity to disapprove of the Commission’s recommendations in their entirety.\(^{28}\) The House then rejected a motion to disapprove the recommendations.\(^{29}\) The Secretary of Defense, therefore, has two years from the date of the President’s approval to begin all recommended closures and realignments.\(^{30}\) All closure and realignment actions must be completed within six years.\(^{31}\)

The latest round of base closures is currently in the works. In March 1993, the newest base closure commission received the Pentagon’s list of military installations to be closed.\(^{32}\) The commission made additions to the list

\(^{24}\) Id. at 960.

\(^{25}\) Cohen v. Rice, 800 F. Supp. 1006, 1007-08 (D. Me. 1992) (holding that recommendation by Base Closure and Realignment Commission was not a final agency decision and therefore not subject to judicial review).

\(^{26}\) Jones, supra note 1, at 47.

\(^{27}\) Cohen, 800 F. Supp. at 1008; 27 WEEKLY COMP. PRES. DOC. 930 (July 15, 1991).


\(^{29}\) 137 CONG. REC. H6006-40 (daily ed. July 30, 1991). The House rejected Joint Resolution 308, which would have disapproved the base closure recommendations entirely. Id. at H6040.


\(^{31}\) Id.

\(^{32}\) Bruce W. Nelan, Ready, Aim, Shut Down, TIME, June 28, 1993, at 36.
and sent it to President Clinton. The President endorsed the commission’s list in July 1993. Since Congress failed to pass resolutions rejecting the entire list within 45 days, the list became law.

B. THE NEED FOR ACTION

Two factors make it imperative that the federal government execute its closure plan and transfer base sites to local communities or private entities as soon as possible. First, many of the communities that surround domestic bases have, for decades, depended on the bases and their personnel to support local tax bases and patronize area merchants. Redevelopment of base property will, in some cases, be essential to the revitalization of suffering local economies. Second, in closing military bases, Congress intends to save government dollars. The government will be unable to fully realize cost savings from base closures until base land can be sold to private developers or local governments.

1. Effect on Local Economies

As might be expected, the closure of domestic military bases will create great economic hardships for the communities surrounding each base. Many communities have been shaped by the expansion of American military infrastructure. Those communities, which have for decades existed symbiotically with military installations, are

33 Id.
35 Id. California Senator Dianne Feinstein sponsored Senate Resolution 114 to disapprove the list. Id. Feinstein cited underestimated environmental cleanup costs as one of several reasons for rejecting the commission’s list. 139 CONG. REC. S11,965 (daily ed. Sept. 20, 1993) (statement of Sen. Feinstein). The Senate nevertheless rejected the resolution by a vote of 83-12. Id. at S12,003-04.
38 Jones, supra note 1, at 48.
now facing the possibility of increased local unemployment, failed businesses, and deflated tax bases. In many cases, the economic opportunities realized when former military installations are made available for other use may soften economic devastation. Once military activity at these sites has ceased, the local communities can establish recreational, industrial, and residential areas. Such alternative uses will generate revenue and jobs that can counteract the effect that the loss of a military base has on the local economy. Only through "timely disposition" of former military sites and facilities can local economies experience full recovery.

Once transfer of base land has been completed, local governments will be free to redevelop the sites or to use existing military facilities to fulfill the pressing needs of the community. Many former domestic Air Force bases can be converted to commercial airports to satisfy the constant need for efficient and economical access to air travel. According to the FAA the number of congested major airports will increase from twenty-one to forty before 1999. In spite of enormous growth in commercial air traffic, airport capacity has not been increased to an adequate level. The shrinkage of military forces has unlocked new solutions to the public airport crunch. The closure of domestic Air Force bases in compliance with the Act has opened the door to faster and less expensive development of public commercial and industrial

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40 Id.
42 Schneider, supra note 7, at 3A.
45 FAA Still Considering Joint Use, Military Base Conversion, AIRPORTS, Nov. 21, 1989, at 547.
airports. Austin, Texas is one example of a base community that is trying to take full advantage of the loss of a military base. Austin plans to convert Bergstrom Air Force Base into a public airport. The city was considering other sites for a new airport when the Base Closure and Realignment Commission included Bergstrom on its closure list, making a better option available to the city. The Air Force has indicated that it will give seventy-five percent of the base land back to the City of Austin under the terms of an express trust, which guaranteed the return of the land to the city after the termination of military activity. Plans are also pending for conversion of George Air Force Base in Adelanto, California, to a commercial airport.

2. Closure Cost Recovery

Perhaps the best reason for the federal government to expedite transfer of military sites to the public sector is the need to generate revenue and recover some of the costs of base closure. The cost of implementing base closures is estimated at $5.7 billion for 1992 through 1997. Savings from base closures and realignments are estimated at $6.5 billion. The military could greatly increase total financial benefits by selling off former base land that is worth an estimated $1.9 billion.

II. EXTENT OF THE ENVIRONMENTAL PROBLEM

Conversion of former military bases will involve re-
moval of toxic hazards, including asbestos-containing buildings, underground fuel storage tanks, unexploded ordnance, hazardous chemicals, contaminated water tables, and, in some cases, radioactive hazards.\textsuperscript{55} Contamination at the Navy's Hunters Point Shipyard includes soil and groundwater polluted with fuel, PCBs, heavy metals, asbestos, and battery acid.\textsuperscript{56} Such environmental contamination is the product of decades of both military necessity\textsuperscript{57} and neglect during the Cold War.\textsuperscript{58} "[I]nstances that had unique military missions may manifest environmental problems that, while tolerable when balanced against the paramount necessities of maintaining national security, are impossible to reconcile with traditional private and commercial uses."\textsuperscript{59} Military bases are in some cases the site for some of the most severe environmental contamination in the nation. The National Priorities List (NPL) contains the EPA's hit list of the most dangerous waste sites in the country.\textsuperscript{60} Of the 116 federal facilities included on the list, ninety-five are military installations.\textsuperscript{61} Nine of the bases slated for closure are included on the NPL.\textsuperscript{62} Four of these sites relate to military aviation —

\textsuperscript{55} Intelligence, New Hampshire, AIRPORTS, Oct. 24, 1989, at 297.
\textsuperscript{57} Dilworth, supra note 41, at 15.
\textsuperscript{58} Schneider, supra note 7, at 3A.
\textsuperscript{60} Anne D. Weber, Misery Loves Company: Spreading the Costs of CERCLA Cleanup, 42 VAND. L. REV. 1469, 1473 n.25 (1989). The Superfund National Priorities List (NPL) was established for cleanup of the nation's worst environmental hazards. \textit{Id}. The EPA includes sites on the NPL when it determines that the sites "substantially endanger public health and welfare." \textit{Id}. Only NPL sites may receive Superfund cleanup financing. The EPA mandates that before an NPL site may be sold or transferred, cleanup operations must be complete. \textit{Id}.
\textsuperscript{61} Paul Hoversten, Some Military Bases Will Never Be Cleaned Up, USA TODAY, July 5, 1991, at 7A.
\textsuperscript{62} Fost, supra note 56, at 15. Superfund sites scheduled for closure include: Williams Air Force Base, Chandler, Arizona; Castle Air Force Base, Merced, California; Fort Ord, Seaside, California; Moffett Naval Air Station, Sunnyvale, California; Sacramento Army Depot, Sacramento, California; Treasure Island Naval Station/Hunters Point Annex, San Francisco, California; Loring Air Force Base, Limestone, Maine; Fort Devens, Ayer, Massachusetts; and Davisville Naval Con-
either Air Force or Naval Air Bases.\textsuperscript{63} Other closing bases, including Carswell Air Force Base in Fort Worth, Texas, may be added to the NPL when EPA inspections are complete.\textsuperscript{64} Whether or not a base is currently included on the NPL, environmental hazards and corresponding response costs may still arise.

The base closure commission used a six-year pay-back curve in selecting bases for closure.\textsuperscript{65} Savings from a base closure were to equal costs of closure within six years.\textsuperscript{66} Unfortunately, the commission did not allow for environmental cleanup costs in its original cost estimates because technically, the government must clean up environmental hazards, whether or not the base closes.\textsuperscript{67} Pressure from the federal government and from the private sector to transfer title to base property compels the government to expedite cleanup operations and triggers the need for immediate environmental cleanup.\textsuperscript{68} As a result of the omission of environmental cleanup expenses, the Commission's six-year payback estimates may be severely flawed. If so, much of the estimated savings from closing these bases may be lost due to the excessive cost of environmental cleanup.\textsuperscript{69}

\textsuperscript{63} Hoversten, supra note 61, at 7A.
\textsuperscript{64} Hoversten, supra note 61, at 7A. Contaminated air bases on the NPL include: Williams AFB (contaminated with heavy metals in soil, fuels and lubricants in ground water); Castle AFB (contaminated with nitrates and pesticides in water tables beneath and near base); Loring AFB (contaminated with solvents and other toxins that threaten water supply); and Moffett NAS (contaminated with metal wastes, PCBs, and solvents threatening water supplies and wetlands). Id. The Navy will retain responsibility for the environmental cleanup at Moffett NAS, which is estimated at $154 million over a 15 year period. Breck W. Henderson, NASA Plans to Take Over Moffett When Naval Base Closes in 1994, AVIATION WK. & SPACE TECH., Apr. 27, 1992, at 56.
\textsuperscript{66} Dilworth, supra note 41, at 14.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.

For example, the cost of cleaning up unexploded ordnance at the army's Jefferson Proving Ground may have been greatly underestimated. The commission estimated that closure costs would be recovered in six years. It may be impossi-
The Department of Defense (DOD) is authorized to deposit revenue from the sale of real property at domestic bases in a special closure account.\(^7^0\) Half of this fund may be used for cleanup and closing costs associated with the sales.\(^7^1\) Adequate cleanup funds will not be available in this account, however, until the government is free to sell land. The Pentagon budget for 1992 included $1.25 billion for environmental cleanup at all bases, even those unaffected by the Closure and Realignment Act.\(^7^2\)

In addition to a 1992 Superfund budget of $1.75 billion, President Bush requested an additional $1.3 billion for DOD environmental cleanup activities.\(^7^3\) This additional DOD funding comes directly from the nation’s general budget.\(^7^4\) In order to replenish its general fund, the government is likely to take advantage of CERCLA’s broad liability and enforcement provisions to pursue other parties for contribution to cleanup costs.\(^7^5\) The threat of assuming awesome environmental liability makes potential developers and local government officials hesitant to take title to military land.

### III. CERCLA LIABILITY

Potential liability for environmental contamination at former military bases is a real and substantial threat.\(^7^6\) If city governments or private entities accept title to the

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\(^7^1\) Jones, supra note 1, at 47.
\(^7^2\) Fost, supra note 56, at 15.
\(^7^4\) Id.
\(^7^5\) Id.
\(^7^6\) Roger N. Boyd, Who Pays for Superfund Cleanups at DOD-Owned Sites?, 2 NAT. RESOURCES & ENV’T, Spring 1986, at 11. Cleanup costs involving Superfund sites typically reach several million dollars. Id.
sites, they could be classified as potential responsible parties (PRPs) under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). This liability threat discourages the critical redevelopment of former base sites.

A. The CERCLA System

1. Background

Together, CERCLA and SARA form a statutory scheme for prompt cleanup of hazardous waste sites by allowing the Environmental Protection Agency (EPA) to take direct removal or remedial action to protect public health and the environment. Congress enacted CERCLA in 1980 to provide a means for response to the release of hazardous substances. The statute, as amended by SARA in 1986, provides for action by federal, state, and local governments, as well as private parties, to recover response costs.

Because it was enacted to combat vast contamination problems throughout the country, CERCLA is given liberal construction. CERCLA authorizes the EPA to re-

78 Jennifer Files, Base Closure in NH Offers Hard Lesson, DALLAS MORNING NEWS, Feb. 28, 1993, at 8A. Designation of a base as a Superfund site is "a deal-breaker, and they (companies) flinch and walk away." Id. (quoting Dick Martin, board member of the National Association of Installation Developers and executive director of the Castle Air Force Base Redevelopment Authority in Merced, California).
80 Barmet, 927 F.2d at 291.
82 United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (holding parent corporation liable as operator).
cover cleanup costs from PRPs. The statute is triggered by a release or threatened release of a hazardous substance that causes the government or a private entity to incur response costs.

2. The Nature of CERCLA Liability

CERCLA may hold PRPs liable for cleanup costs at a site, despite the fact that the particular PRP never contributed to the contamination. While CERCLA does not expressly impose a standard of strict liability, it does state that the standard of liability under the Act shall be the same as that imposed by section 311 of the Clean Water Act. Courts have construed this provision to apply strict liability to the cleanup of hazardous spills. CERCLA does not require imposition of joint and several liability,

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88 42 U.S.C. § 9607(a) (1988). PRPs may be held liable for the following costs:
(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id. § 9607(a)(4).

84 Id. A release is defined in the statute as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" with certain specific exceptions. Id. § 9601(22).

85 CERCLA defines a hazardous substance as any material falling into six categories of substances regulated by certain other environmental statutes. Id. § 9601(14).

86 Id. § 9607.


89 United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988). “We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme.” Id.; see Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989) (citing Monsanto); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983) (holding that the legislative history of CERCLA directly supports the application of strict liability).
CERCLA LIABILITY

but allows such liability in cases of indivisible injury.\textsuperscript{90}

CERCLA liability applies to four classes of persons: present and former owners of facilities, operators of facilities, generators of hazardous substances, and transporters of those substances.\textsuperscript{91} The legislative history of CERCLA supports the imposition of joint and several liability in indivisible harm cases.\textsuperscript{92} SARA does, however, allow the court to retain discretion when allocating costs.\textsuperscript{93} A PRP that has been held jointly and severally liable to the government may bring an action for contribution against other PRPs. In such cases, most courts will consider equitable factors in allocating costs between PRPs.\textsuperscript{94}

In order to establish a prima facie case for cleanup cost recovery under CERCLA, a plaintiff must prove that (1) the site conforms to the definition of "facility" under section 9601(9);\textsuperscript{95} (2) the defendant is a responsible person under section 9607(a);\textsuperscript{96} (3) a release or a threatened re-

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\textsuperscript{90} Monsanto, 858 F.2d at 171.
\textsuperscript{91} 42 U.S.C. § 9607(a).
\textsuperscript{92} 126 CONG. REC. 26,781 (1980). The House passed the Gore Amendment to the original CERCLA bill, which provided for the consideration of several equitable factors in apportioning costs between PRPs. The equitable considerations included: the ability to distinguish the wastes contributed by each party; the amount and toxicity of the wastes; involvement of each PRP in generation, transportation, treatment, storage, and disposal of the wastes; the degree of care exercised by each PRP; and the level of each PRP’s cooperation with the government. \textit{Id.} The amendment was intended not to require apportionment in all cases, but to give courts the discretion to apportion liability when equity compelled it. \textit{Id.} at 26,785. The Senate, however, did not adopt the Gore Amendment. \textit{Id.} at 31,965.
\textsuperscript{93} 42 U.S.C. § 9622(e)(3)(A). SARA authorizes the EPA to make a nonbinding preliminary allocation of responsibility (NBAR) between PRPs. \textit{Id.; see also Weber, supra note 60, at 1480 (recognizing that SARA allows courts to use criteria similar to that in the Gore Amendment when allocating cleanup costs between parties).}
\textsuperscript{94} Weber, \textit{supra} note 60, at 1481.
\textsuperscript{95} 42 U.S.C. § 9601(9).
\textsuperscript{96} (A) any building, structure, installation, equipment, pipe or pipeline . . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.
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\textit{Id.} § 9607(a)(1)-(4). Responsible persons include:

(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous sub-
lease has occurred; and (4) the release or threatened release has caused the plaintiff to incur response costs,\(^{97}\) which include removal and remedial action, as well as the EPA's cost of enforcing cleanup activities.\(^{98}\)

3. Potential Cost of Liability

Once liability conditions are established, a PRP can be held liable for all removal and remedial costs incurred by the federal or state government, as well as costs incurred by other persons.\(^{99}\) Additionally, PRPs may face liability for damage to natural resources and for health studies required under CERCLA.\(^{100}\)

B. Defense Environmental Restoration Program\(^{101}\)

Congress enacted the Defense Environmental Restoration Program (DERP) in 1986 to enable the Secretary of Defense to carry out all response actions for releases of hazardous substances at sites owned or under the jurisdiction of the Department of Defense.\(^{102}\) All activities of

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\(^{97}\) Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989).


\(^{99}\) Id. § 9607(a)(4)(A)-(B).

\(^{100}\) Id. § 9607(a)(4)(C)-(D).


\(^{102}\) Id. § 2701(c). The program's stated goals include:

1. The identification, investigation, research and development, and cleanup of contamination from hazardous substances, pollutants, and contaminants.

2. Correction of other environmental damage (such as detection
DERP must comply with CERCLA provisions concerning federal facilities. The program allows DERP to obtain response services from other federal agencies, use funds appropriated to the DOD for certain response actions, and issue surety bonds for response action contracts.

Notably, DERP policy fails to facilitate the rapid sale of former military sites that is essential to the success of the base closure program. The military is working to close bases as rapidly as possible so that sites can be redeveloped and sold as a source of revenue. DERP, on the other hand, has a “worst first” policy, much like that of the EPA Superfund, which calls for the most severe environmental problems to be tackled first. These two approaches are in direct conflict. Under the DERP scheme, moderately contaminated sites that could be restored rapidly must wait until the nation’s most severely contaminated federal facilities are cleaned up. According to DERP, over 8,000 domestic military sites will require environmental cleanup.

IV. SOLUTIONS TO LOCAL LIABILITY

The fear of inheriting environmental liability is impairing the ability of communities to recruit developers for

and disposal of unexploded ordnance) which creates an imminent and substantial endangerment to the public health or welfare or to the environment.

(3) Demolition and removal of unsafe buildings and structures, including buildings and structures of the Department of Defense at sites formerly used by or under the jurisdiction of the Secretary.

Id. § 2701(b).

103 Id. § 2701(a)(2); see infra notes 129-51 and accompanying text for discussion of CERCLA § 120.

104 10 U.S.C. § 2701(d).

105 Id. § 2701(f).

106 Id. § 2701(h)-(i).

107 Dilworth, supra note 41, at 15.

108 Id.

109 Id.

110 Id.
former base sites, and thereby foiling efforts by the federal government to expedite revenue-generating sales of military land. Several approaches have emerged that can, under the right circumstances, protect subsequent owners of military property from CERCLA liability and thus facilitate transfer of former base property. Compelling the United States government to assume liability for the environmental hazards that its military operations created is sometimes more difficult than one might think. It is not, however, an impossible task. For example, in *FMC Corp. v. United States* the district court held the federal government liable as an owner-operator for environmental response costs under CERCLA.

In *FMC Corp.* the plaintiff, FMC, sought a declaratory judgment and indemnification from the United States for contamination at a rayon manufacturing plant that FMC owned from 1963 to 1976. FMC had purchased the plant from American Viscose. During World War II the federal government, through the War Productions Board (WPB), took control of the American Viscose rayon plant. The WPB compelled American Viscose to convert the plant to the production of high tenacity rayon that was desperately needed in the manufacture of tires for the war effort. Prior to the war, the plant manufactured textile rayon. The WPB eventually required the facility to produce one-third of the nation's high tenacity rayon yarn. No machines at the plant were equipped to manufacture this product prior to the entry of the WPB.

The WPB maintained significant control over all aspects of the plant's operation including raw materials supply, labor management, product pricing, plant expansion, and development of product specifications. The government also owned a large portion of the equipment installed to convert the plant to production of the new product.

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113 Id. at 486-87.
During this period of government involvement, the operation produced a large amount of hazardous waste. Sulfuric acid, carbon bisulfide, and zinc contaminated waste were buried in unlined pits at the site. During the 1980s, carbon disulfide and arsenic were identified in the groundwater near the site. The EPA placed the site on the National Priorities List (NPL) in 1986. The EPA notified the Department of Commerce that in light of WPB activities during World War II, the Department, as WPB’s successor, was considered a PRP under CERCLA. The Department of Commerce denied being an operator of the facility and refused to participate in negotiations.

The court found that “[t]he government knew or should have known that the disposal or treatment of hazardous substances was inherent in the manufacture of high tenacity rayon yarn and that its production requirements caused a significant increase in the amount of hazardous substances generated and disposed of at the facility.” The court held that as a result of its activities at the plant, the federal government was an owner and operator as defined in CERCLA. The court found that there was a disposal of hazardous waste at the site during the time that the government was an owner of the facility and that there had been a release or threatened release that caused necessary response costs to be incurred. The court subjected the government to strict, joint and several liability under CERCLA. The FMC Corp. decision demonstrates that subsequent purchasers of land may obtain indemnification through the courts for environmental damage caused by federal government activity.

The prospect of protracted litigation, however, discourages potential purchasers from acquiring possible hazard sites. There are several defenses available to subsequent

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114 Id. at 485.
115 Id. at 486.
116 Id.
117 Id.
takers of land contaminated by government operations. These defenses are examined in the following sections.

A. Statutory Defenses

CERCLA provides only four enumerated defenses to liability for environmental contamination. In order to defend against liability, a PRP must establish by a preponderance that the release of hazardous substances was caused by an act of God, an act of war, an unforeseeable act of a third party, or a combination of any of these causes. CERCLA liability is not subject to common law defenses such as lack of causation. Only a minority of courts recognize equitable defenses, such as waiver and release. CERCLA does expressly provide, however, that liability may be avoided with proof that the release in question is authorized by a valid federal permit.

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119 Id.
120 Id.
121 42 U.S.C. § 9607(j).
122 Id. § 9601(10).
1. Innocent Landowner Defense

The first two defenses enumerated in CERCLA, act of God and act of war, have seldom been successfully asserted by PRPs. Arguably, only the innocent landowner defense has potential application to the purchase of former military base property. To assert the innocent landowner defense, a defendant must prove by a preponderance of the evidence that: 1) the hazardous contamination was caused solely by another party or parties; 2) the defendant and the responsible parties did not have a contractual relationship; 3) the defendant did not know and did not have reason to know about the contamination at the time of purchase; and 4) the defendant exercised due care with respect to the site.

The innocent landowner defense protects truly innocent purchasers of land who make reasonable efforts to discover hidden environmental hazards. To assert this defense, a purchaser must affirmatively demonstrate that it investigated previous ownership and use of the property "consistent with good commercial or customary practice in an effort to minimize liability." Purchasers of closed military installations, however, will have difficulty invoking this defense because in almost all circumstances they will know or could reasonably discover that a former military installation is the site for environmental contamination. Therefore, it is unlikely that this defense will be

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124 Theodore L. Garrett, Superfund Liability and Defenses: A 1992 Primer, 6 NAT. RESOURCES & ENV'T 3, 6 (1992); see United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (finding that heavy rainfall was not an act of God because it was foreseeable).


126 Weber, supra note 60, at 1478.


128 See Rosenberg, supra note 87, at 64 (recognizing that the "no reason to know" requirement of the innocent landowner defense has prevented many landowners, insurers, and lenders from successfully asserting the defense).
used successfully by cities or private entities that purchase base land.

2. **CERCLA Section 120**

Section 120 of CERCLA governs situations involving environmental hazard sites owned or operated by the United States. Prior to 1986, CERCLA lacked provisions that specifically addressed federal facilities. Section 120 was added in 1986 as part of the SARA amendments to address these sites. The amendment makes CERCLA applicable to any federal government enterprise to the same extent that it applies to private entities. Section 120 also establishes a comprehensive program for identification and cleanup of hazardous substances at federal sites. The administrative framework of section 120 is somewhat unique. Rather than compelling the EPA to take control of cleanup operations at federal sites, that responsibility is left in the hands of the government agency that operates the facility.

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130 Id. § 9620(a)-(j). Section 120 provides:

> Each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. . . .

> All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this chapter for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities.

131 Gaydosh, supra note 73, at 21.


133 42 U.S.C. § 9620(b)-(j).

134 Gaydosh, supra note 73, at 22.
This policy arises from an executive order\textsuperscript{135} that delegates CERCLA authority to executive agencies.\textsuperscript{136} Ordinarily, the EPA has authority to undertake response and enforcement actions when a hazardous release occurs. When that release involves a federal facility, however, authority to take responsive action is delegated to the executive agency with jurisdiction over that facility.\textsuperscript{137} This system leads to the anomaly of giving an executive agency that is a PRP at a hazardous site the authority for taking response and enforcement action.\textsuperscript{138} The EPA has authority to undertake removal action at a federal facility only in an emergency.\textsuperscript{139}

Section 120, however, imposes several requirements that seek to prevent an agency from abusing this power. First, no agency or department of the federal government is permitted to adopt rules inconsistent with those of the EPA.\textsuperscript{140} Thus, although an agency is free to administer its own cleanup operations, it must do so in accordance with established EPA policies and procedures.\textsuperscript{141} Additionally, section 120 establishes the Federal Agency Hazardous Waste Compliance Docket for tracking and publication of all information concerning hazardous waste sites at federal facilities.\textsuperscript{142} Pursuant to section 120, a list of all federal facilities included on the docket is published every six months in the Federal Register; additional information on those sites is available through the EPA.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{135} Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).
\item \textsuperscript{136} Id. This order also establishes a National Response Team (NRT) which includes "representatives of appropriate Federal departments and agencies for national planning and coordination of preparedness and response actions, and regional response teams as the regional counterpart to the NRT for planning and coordination of regional preparedness and response actions." Id. § 1.
\item \textsuperscript{137} Gaydosh, \textit{supra} note 73, at 22.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} 42 U.S.C. § 9620(a)(2).
\item \textsuperscript{141} Id. Responsible federal agencies are prohibited from "adopt[ing] or utiliz[ing] any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, and criteria established by the" EPA. Id.
\item \textsuperscript{142} Id. § 9620(c).
\item \textsuperscript{143} Id.
\end{itemize}
also mandates specific requirements and deadlines for assessment, evaluation, remedial investigations, feasibility studies, and remedial action at federal facilities.\(^\text{144}\)

Section 120 further imposes EPA control on government sites by requiring all responsible federal agencies to enter into an Interagency Agreement (IAG) with the EPA.\(^\text{145}\) IAGs give the EPA authority to review and select which remedial measures the agency will implement.\(^\text{146}\) Like private decrees, IAGs require the EPA to review and approve all response actions.\(^\text{147}\) IAGs, however, call for dispute resolution by the EPA administrator and limit the payment of penalties to available appropriated funds.\(^\text{148}\) The agreements also contain language that subjects response action to the integrated obligations of both CERCLA and the Resource Conservation and Recovery Act (RCRA).\(^\text{149}\) While CERCLA does not provide for development of a state program, RCRA involves state enforcement of corrective action, which is similar to CERCLA cleanup.\(^\text{150}\) This overlap creates friction between states and the federal government concerning cleanup operations at federal facilities.\(^\text{151}\)

a. Waiver of Immunity

Section 120(a)(1) has been held to constitute a specific waiver of the sovereign immunity of the federal government in those circumstances in which it would otherwise

\(^{144}\) Id. \(\S\) 9620(d)-(e).

\(^{145}\) Id. \(\S\) 9620(c)(2).

\(^{146}\) Id.

\(^{147}\) Gaydosh, supra note 73, at 22.

\(^{148}\) Id.

\(^{149}\) Id. RCRA prescribes standards for handling hazardous wastes, but it does not have the broad scope of CERCLA. Essentially, CERCLA targets sites on which environmental contamination is already present, while RCRA focuses on avoiding future contamination. Turkula, supra note 59, at 169.

\(^{150}\) Gaydosh, supra note 73, at 22.

\(^{151}\) Id. at 23. The EPA generally defers placement of a site on the NPL when RCRA corrective action is adequate. The federal government, however, has not applied this policy to federal hazard sites, claiming that state RCRA programs do not apply to federal sites on the NPL. Id.
be liable under CERCLA as a private entity.\textsuperscript{152} This waiver of immunity only applies to situations in which the United States is acting outside its regulatory capacity.\textsuperscript{155} When the EPA is engaged in environmental cleanup, the sovereign immunity of the federal government is intact.\textsuperscript{154} Section 120 amends section 107(g) to include a specific, limited waiver of immunity when the government acts as a private entity.\textsuperscript{155}

In addition to Congress and the courts, the executive branch has also expressed intent for the federal government to be subject to the same standards of environmental liability as would a private entity under like circumstances. During a 1988 campaign speech, then Vice President George Bush said, "I will insist that in the future Federal agencies meet or exceed environmental standards and that the government should live within the laws it imposes on others."\textsuperscript{156} In its statutorily mandated report, the Defense Base Closure and Realignment Commission acknowledged that the DOD was obligated to clean up environmentally contaminated sites at military bases.\textsuperscript{157} The commission promised that "[w]ithin the capabilities of technology and the availability of funds, DOD is committed to restoring closing bases to safe condi-


\textsuperscript{153} Azrael, 765 F. Supp. at 1246. The waiver of immunity under section 120 does not apply to situations in which the federal government "is acting in a regulatory capacity pursuant to CERCLA's cleanup provisions." \textit{Id.} at 1244.

\textsuperscript{154} \textit{Id.} at 1246.

\textsuperscript{155} United States v. Skipper, 781 F. Supp. 1106, 1111 (E.D.N.C. 1991). "There is no question that Congress expected government agencies to shoulder their proportionate share of CERCLA response costs when they have acted as owners, operators, generators or transporters. . . . Under CERCLA, the United States is to contribute its share when it acts in a fashion analogous to that of a business concern."

\textit{Id.}


tion." The Department of Defense Base Closure Account 1990 can be used to fund this environmental restoration.

At least two courts have addressed the government's limited waiver of immunity and held that under circumstances in which the government is acting as a private party, it should be held liable as one. In Key Tronic Corp. v. United States a private corporation sought contribution from the federal government for prejudgment interest, attorney's fees, and other costs incurred in establishing that the government was partially responsible as a generator for the contamination of a county landfill. The Air Force disposed of liquid chemicals at the Colbert landfill in Spokane County, Washington from 1975 to 1980. Key Tronic also disposed of similar materials at the site. In 1980, nearby drinking water wells were found to be contaminated with toxic chemicals. Key Tronic paid over $1.2 million in cleanup costs. Later, Key Tronic entered into a consent decree with the EPA and Washington Department of Ecology whereby the company would pay an additional $4.2 million in response costs. The Air Force entered a similar consent decree in which it agreed to pay $1.4 million for its share of cleanup at Colbert.

Key Tronic sued the government for contribution to both the $4.2 million and the $1.2 million amounts it had paid for cleanup. The trial court dismissed Key Tronic's claims against the Air Force for contribution to the $4.2 million settlement payment. The court, however, granted partial summary judgment to Key Tronic for contribution to the $1.2 million settlement that the company had incurred separately. The court held the Air Force liable under CERCLA to Key Tronic. The Air Force subsequently settled all of Key Tronic's claims except for

158 Id. at 74.
159 Id.
161 Id. at 868.
162 Id.
163 Id.
attorney's and investigator's fees and prejudgment interest amounts that the company incurred while it searched for other PRPs and pursued the recovery action.\textsuperscript{164}

The government contended that a general waiver of sovereign immunity, like that in section 120 of CERCLA, was insufficient to subject the United States to an award of prejudgment interest. The government asserted that an express congressional consent to an interest award was required in addition to a general waiver of immunity. The court distinguished this situation from the previous immunity case cited by the government.\textsuperscript{165} The court held that section 120 made it clear that Congress intended to waive sovereign immunity and to treat the government as it would any other private entity.\textsuperscript{166} The court further found that section 120 allows the plaintiff in a cost recovery action to recover prejudgment interest.\textsuperscript{167} Thus, the court held "that CERCLA allows prejudgment interest as an element of damages against the United States."\textsuperscript{168}

In \textit{United States v. Moore}\textsuperscript{169} the district court held that the

\textsuperscript{164} \textit{Id.} at 867. CERCLA does not specifically provide for recovery of a plaintiff's attorney's fees. \textit{Id.} at 869. Key Tronic, however, asserted that it was entitled to attorney's fees as enforcement costs that are recoverable as a necessary response cost. The court found that "absent specific Congressional intent to the contrary, CERCLA should be interpreted liberally to permit recovery associated with identifying potentially responsible parties and forcing those responsible parties to share their fair portion of the cleanup of a hazardous waste site." \textit{Id.} at 871.

The court went on to find that a private party may incur enforcement costs and recover its attorney's fees for pursuing a cost recovery action under CERCLA. \textit{Id.} The court said that if it "narrowly read the statute as the Government suggests, then even innocent purchasers of property who clean up hazardous wastes and subsequently seek recovery from the responsible parties would be unable to recover the entirety of the expenses incurred in holding the responsible parties accountable for their pollution." \textit{Id.} at 872. The court also read CERCLA language broadly so as to allow Key Tronic to recover costs it incurred in searching for PRPs and negotiating consent decrees. \textit{Id.}

\textsuperscript{165} \textit{Id.} The government relied on \textit{Library of Congress v. Shaw}, 478 U.S. 310 (1986), for its contention. The court, however, found the government's argument unpersuasive because the statute in \textit{Shaw} provided that the United States shall be liable for costs as a private individual, but did not make reference to prejudgment interest. \textit{Key Tronic}, 766 F. Supp. at 868.

\textsuperscript{166} \textit{Key Tronic}, 766 F. Supp. at 868.

\textsuperscript{167} \textit{Id.} at 868-69.

\textsuperscript{168} \textit{Id.} at 868.

government is subject to a contribution action in the same manner as a private party.\textsuperscript{170} The DOD allegedly sold cylinders containing a hazardous substance to Moore. The United States brought a CERCLA action against Moore for recovery of response costs for environmental damage caused by the cylinders. Moore then brought four counterclaims. Count I alleged common law tort and a Fifth Amendment taking, involving $75,000 worth of fire extinguishers removed during cleanup operations. Count II claimed breach of contract, breach of warranties, and violation of environmental laws surrounding the sale of the cylinders. Counts III and IV, respectively, asked for indemnity and contribution against the DOD.

The court agreed with the government that the two year statute of limitations in the Federal Tort Claims Act barred the tort claim,\textsuperscript{171} and that the Tucker Act\textsuperscript{172} precluded the court’s jurisdiction over the constitutional and contractual claims in excess of $10,000.\textsuperscript{173} The court also held that it lacked jurisdiction under the Contract Disputes Act,\textsuperscript{174} over contracts entered into on or after March 1, 1979.\textsuperscript{175}

The court, however, allowed the counterclaims under the doctrine of recoupment.\textsuperscript{176} The court stated that “by initiating this suit, the United States has consented to the assertion of counterclaims under the doctrine of recoupment.”\textsuperscript{177} According to the court, the counterclaim involving removal of the fire extinguishers met the test for recoupment since the alleged taking took place at the same time as the cleanup operations that were the basis of

\textsuperscript{170} Id. at 459.
\textsuperscript{173} Moore, 703 F. Supp. at 458.
\textsuperscript{175} Moore, 703 F. Supp. at 458.
\textsuperscript{176} Id. The court said that in order to sustain a counterclaim under the doctrine of recoupment, the counterclaim must “aris[e] out of the same transaction or occurrence which is the subject of the government’s suit and [seek] relief only to the extent of diminishing or defeating the government’s recovery.” Id.
\textsuperscript{177} Id.
the government’s suit. The court also found that although the contract, warranty, and environmental claims surrounding the sale of the hazardous cylinders qualified as claims for recoupment, they were effectively merged into the counterclaims for indemnity and contribution because the recoupment doctrine did not allow for affirmative recovery from the United States.\textsuperscript{179}

Finally, the court held that Moore’s counterclaims for indemnity and contribution were predicated upon CERCLA, which provided for federal rights of indemnity and contribution.\textsuperscript{180} The court found that since CERCLA "provides that the United States shall be subject to suit 'in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity,'" the DOD was subject to contribution in the same manner as a private party.\textsuperscript{181} The DOD argued that it was not subject to a contribution action pursuant to CERCLA\textsuperscript{182} because it had already settled with the EPA. The court disagreed, finding that the EPA-DOD settlement was not an administrative settlement under section 9613.\textsuperscript{183} Once again, the court imposed CERCLA liability on a federal government agency in the same manner as a private entity.

In the context of former military installations, the government is acting as an operator, and not as a regulator. When the government sells base land, it is acting as a private seller just as it was when the DOD sold the hazardous cylinders to Moore.\textsuperscript{184} Therefore, the courts should ultimately treat the DOD as a private party in accordance with

\textsuperscript{178} Id. at 459.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 459 (quoting 42 U.S.C. § 9620(a)).
\textsuperscript{183} Moore, 703 F. Supp. at 459. The court cited the fact that no administrative procedures had been followed in the agreement and no impartial arbiter approved the settlement. Id. Additionally, the court stated that a settlement between two federal agencies was not the sort of settlement envisioned by the statute. Id.
\textsuperscript{184} See id.
section 120 and impose environmental liability on it for the contamination of former military sites.

b. Notice Requirement

Section 120 establishes a scheme for the identification and cleanup of environmental contamination at federal facilities. Section 120 imposes notice and covenant requirements when the federal government transfers contaminated real property.\(^{185}\) The notice requirement of section 120 states:

[W]henever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.\(^{186}\)

Section 120(h)(1), therefore, requires any contract for the transfer of base property to include notification of any environmental hazards at the sites of which the government had knowledge.\(^{187}\) The statute further compels similar notice to be included in subsequent deeds transferring federal real property.\(^{188}\)

In 1990, the EPA promulgated a rule under this section that would have limited the notice requirement to only environmental contamination that took place "during the time the property was owned by the United States."\(^{189}\) The D.C. Circuit addressed this rule in *Hercules Inc. v. EPA*.\(^{190}\) Petitioners, who periodically contracted for the

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\(^{186}\) Id. § 9620(h)(1).

\(^{187}\) Id.

\(^{188}\) Id. § 9620(h)(3).


\(^{190}\) 938 F.2d 276 (D.C. Cir. 1991).
purchase of federal property, complained that the EPA rule was “contrary to the express terms of the statute, congressional intent, and the statutory scheme taken as a whole.” The EPA explained that it believed that section 120(h) was not meant to reach activities that occurred prior to government ownership because Congress was concerned with those federal facilities that dealt directly with the storage, release, or disposal of hazardous materials. The court rejected the EPA rule as a contradiction of the plain meaning of section 120, and held that the notice requirement extended to cover government property contaminated by prior owners.

The court recognized that such a construction could also reach the deed covenant requirements under section 120(h)(3). However, the court refused to allow such considerations to influence its decision and responded that “[i]f our construction of the statute imposes financial burdens on federal agencies beyond those that flow from other provisions of CERCLA, relief from those burdens must come from Congress.” Under the current notice requirement of section 120, a federal agency must provide to purchasers of government land notice of all hazardous substance activity of which the agency is aware, but the notice requirement is limited to that information contained in agency files. Thus, the military should be required to notify subsequent base land purchasers of any known activity involving hazardous substances, regardless of when it occurred.

c. Deed Covenants

Section 120(b)(3) may offer cities and private purchas-
ers protection against environmental liability for base sites. This section places requirements on deeds transferring property containing environmental contamination as follows:

[I]n the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, 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) to the extent such information is available on the basis of a complete search of agency files—

(i) a notice of the type and quantity of such hazardous substances,

(ii) notice of the time at which such storage, release, or disposal took place, and

(iii) a description of the remedial action taken, if any, and

(B) a covenant warranting that—

(i) 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, and

(ii) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.\(^{199}\)

Thus, under this provision, the federal government must warrant environmental cleanup at federal facilities transferred to other parties.\(^{200}\) This express provision should assure subsequent purchasers of domestic military installations that they will not be subject to liability for environmental hazards left behind by the military. As mentioned before, this covenant requirement will probably extend to all hazardous substance activity at the site known to the federal agency, regardless of who initiated the activity.\(^{201}\) At a minimum, if purchasers of govern-

\(^{199}\) Id. § 9620(h)(3).

\(^{200}\) Id.

\(^{201}\) See Hercules, 938 F.2d at 281 (indicating a construction of section 120(h)(3)
ment land are required to pay for cleanup, they should be able to maintain an action on such covenants against the deep pockets of the federal government. The promise of ultimate indemnification offered by a deed covenant, however, may not be enough to convince developers to risk incurring initial response costs and the cost of litigation. Nor will it expedite the cleanup of known hazard sites so that they may be sold and redeveloped.

B. INDEMNIFICATION AGREEMENTS

Purchasers of base land may also pursue contractual indemnification through private agreements between the parties to the sale. On its face, CERCLA appears to render agreements to indemnify PRPs from CERCLA liability unenforceable.\textsuperscript{202} Section 107(e) provides that

\textit{[n]o indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section.}\textsuperscript{203}

The very next sentence of the section, however, states conversely that "\textit{nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.}"\textsuperscript{204}

The courts have resolved this apparent contradiction to prevent such agreements from absolving parties of liability to the government, while enforcing indemnification agreements as between the parties to the agreement.\textsuperscript{205} Thus, private parties to a land transaction are free to transfer CERCLA liability by contract even though both are vulnerable as PRPs to enforcement action by the EPA

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{202}] Weber, \textit{supra} note 60, at 1493.
  \item[\textsuperscript{203}] 42 U.S.C. § 9607(e)(1) (1988).
  \item[\textsuperscript{204}] \textit{Id.}
\end{itemize}
\end{footnotesize}
under CERCLA. Contractual indemnification does not limit the liability of a PRP to the federal government under CERCLA. Such agreements can nevertheless provide a PRP with a means for recovering response costs paid under CERCLA. Since the federal government is a party to land transactions involving former military installations and, as such, is subject to the same liability as a private party, indemnification agreements with the DOD may provide additional protection for purchasers.

Contractual indemnification, when available, offers a PRP several advantages over subsequent actions for contribution. First, successful contractual indemnification is efficient. The PRP may obtain full recovery from one party in a single action, rather than engaging in lengthy and expensive searches for PRPs that may be liable for contribution. Additionally, the indemnifying party does not have to qualify as a PRP. Even a party that successfully asserts the innocent landowner defense to liability to the government may be held contractually liable under a valid agreement. Finally, a party is not protected from contractual liability by settling with the government. Indemnification actions are valid against both settling and nonsettling parties.

Courts are split as to whether contractual indemnification from CERCLA liability must be express. The determination of whether an agreement effectively shifts CERCLA liability between parties is a matter of contract

206 Weber, supra note 60, at 1493.
207 Id.
208 Id.
209 See supra notes 152-84 and accompanying text.
210 Weber, supra note 60, at 1494.
211 Id.
212 Id.
213 Id.
interpretation under state law. Generally, an "as is" warranty disclaimer, like those included in typical purchase agreements, will not transfer CERCLA liability from the seller to the buyer. Courts tend to narrowly interpret language designed to limit the exposure of an indemnifying party and thereby favor enforcement of indemnity agreements.

C. CONGRESSIONAL SOLUTIONS

In section 120, the government promises to eventually clean up its environmental mess. But with liability stakes as high as those in CERCLA, prospective purchasers are still justifiably reluctant to put themselves at risk without more assurances. This concern, along with the pressing need to expedite base land cleanup, has recently prompted Congress to direct legislation at overcoming the threat of CERCLA liability and facilitating transfer of base land to municipal and private developers.

1. Appropriations Bills

The Senate version of the National Defense Authorization Act for fiscal year 1993 (the Authorization Act) included several provisions designed to facilitate the cleanup and transfer of former military installations. The House passed a version of the Authorization Act that did not address these issues. The Senate insisted on its amendments and refused to pass the House bill. After

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215 Mardan, 804 F.2d at 1457-60.
217 Weber, supra note 60, at 1496.
218 Id.
220 Id. §§ 314-17.
ter a conference was held, both houses agreed to the amended version of H.R. 5006, and it was signed into law by President Bush on October 24, 1992.\textsuperscript{223}

a. Indemnification

The Senate version of the Authorization Act included a provision to enable local governments, private developers, and contractors to secure indemnification from the federal government for environmental liability arising from DOD activity at military bases.\textsuperscript{224} Section 317 provided that the Secretary of the Air Force indemnify and hold harmless the recipients of real property at military installations for releases of hazardous substances resulting from military activities at the base prior to closure.\textsuperscript{225}

Opponents in the House said this bill provided insufficient protection for future owners because any indemnification under this section was subject to the Federal Tort Claims Act (FTCA).\textsuperscript{226} The FTCA\textsuperscript{227} states that the United States cannot be held liable for injuries resulting from decisions made in pursuit of the national interest, even if the government acted negligently.\textsuperscript{228} Since the

\textsuperscript{224} S. 3114, 102d Cong., 2d Sess. § 317 (1992).
\textsuperscript{225} Id.

[T]he Secretary of Defense shall hold harmless, defend, and indemnify in full the persons and entities described . . . from and against all suits, claims, demands or actions, liabilities, judgments, and costs and other fees arising out of, or in any manner predicated upon, the release or threatened release of any hazardous substance or pollutant or contaminant as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

\textsuperscript{226} Id. § 317(b)(2). "No indemnification may be afforded under this provision which is not subject to and consistent with chapter 171 of title 28, United States Code, including any procedural requirements or defense." \textit{Id.}; see Brown, supra note 111, at 2 (advocating the elimination of any reference to the FTCA from section 317).


\textsuperscript{228} Id. No liability exists under the FTCA for "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." \textit{Id.}
military activity that led to environmental contamination of the bases would likely be protected under the FTCA, several members of Congress pointed out that such a limitation would ensure that local communities and businesses would not be indemnified.229

Representative Richard Ray proposed H.R. 4025, which would have modified section 317 to eliminate any reference to the FTCA and more fully indemnify subsequent purchasers of closed bases.230 The final version of the Authorization Act, as returned by the Conference Committee, included a provision like section 317 of the Senate bill.231 The Conference Committee, however, omitted any reference to the FTCA.232 Therefore, indemnification under the Authorization Act as signed by the President is not limited by the FTCA.233

Additionally, the conference version of the Authorization Act includes language similar to that in the original Senate version that prohibits indemnification of persons or entities to the extent that they contributed to any contamination.234 This language limits indemnification to only that liability that purchasers incur by innocently taking title to land contaminated by government operations, and does not offer parties a means for avoiding liability for their own environmental contamination.235 The Authorization Act, as amended in conference, indemnifies any state, political subdivision (including officers, agents and employees), or “[a]ny other person or entity that acquires such ownership or control” of former base prop-

229 Brown, supra note 111, at 2 (declaring that language in section 317 that made indemnification subject to the FTCA would indemnify “the federal government in virtually all cases of environmental contamination” because military action would probably be protected).


232 Id. at 60-62.


234 H.R. CONF. REP. No. 966, at 60.

235 See Brown, supra note 111, at 2 (stating that similar language in H.R. 4025 “appropriately” avoided indemnifying reusers of base land for their own environmental damage).
b. Environmental Pilot Program

The Authorization Act also includes a provision that lays the groundwork for later environmental restoration by establishing a pilot program designed to expedite environmental restoration at selected bases affected by base closure laws. As part of the program, the Secretary of Defense must select bases that represent "a variety of the environmental restoration activities required for facilities under the Defense Environmental Restoration Program and for military installations scheduled for closure under" base closure laws. The chosen sites must also represent environmental restoration projects of various magnitudes in order to facilitate participation by a full range of business sizes in restoration contracts.

The Secretary of Defense is authorized to use the pilot sites to develop an accelerated, streamlined program for environmental restoration, which incorporates "development and use of innovative contracting techniques," in order to expedite restoration activities. The Secretary of Defense is to carry out program activities in accordance with federal and state laws, while utilizing competitive procedures and considering experience and ability in selecting contractors for restoration projects. Representative Richard Ray initiated this program in an amendment to the original H.R. 5006.

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238 Id. § 323(b)(3)(A).
239 Id. § 323(b)(3)(B).
240 Id. § 323(c)(1).
241 Id. § 323(d)(1)-(3).
2. Community Environmental Response Facilitation Act \(^{243}\)

The Community Environmental Response Facilitation Act (CERFA) represents an attempt to combat environmental liability problems by severing usable land from environmentally contaminated areas and transferring to subsequent purchasers only the portions free from contamination, thereby facilitating redevelopment of the base sites.\(^{244}\) CERFA, which originated in the House,\(^{245}\) responds to the adverse effect of base closures on the economies of local communities and the impairment of transfer and redevelopment projects that have been created by environmental contamination.\(^{246}\)

CERFA amends CERCLA to require the federal gov-


\(^{244}\) Id.


\(^{246}\) H.R. CONF. REP. NO. 986, 102d Cong., 2d Sess. (1992). Congress found that:

1. The closure of certain Federal facilities is having adverse effects on the economies of local communities by eliminating jobs associated with such facilities, and delay in remediation of environmental contamination of real property at such facilities is preventing transfer and private development of such property.

2. Each department, agency, or instrumentality of the United States, in cooperation with local communities, should expeditiously identify real property that offers the greatest opportunity for reuse and redevelopment on each facility under the jurisdiction of the department, agency, or instrumentality where operations are terminating.

3. Remedial actions, including remedial investigations and feasibility studies, and corrective actions at such Federal facilities should be expedited in a manner to facilitate environmental protection and the sale or transfer of such excess real property for the purpose of mitigating adverse economic effects on the surrounding community.

4. Each department, agency, or instrumentality of the United States, in accordance with applicable law, should make available without delay such excess real property.

5. In the case of any real property owned by the United States and transferred to another person, the United States Government should remain responsible for conducting any remedial action or corrective action necessary to protect human health and the environment with respect to any hazardous substance or petroleum product or its derivatives, including aviation fuel and motor oil, that was present on such real property at the time of transfer.

Id. at 1-2.
ernment to identify land that is part of facilities that the federal government plans to close under a base closure law at which no hazardous substances or petroleum products have been stored, disposed of, or released.\textsuperscript{247} Once the head of the federal department or agency with jurisdiction over the site identifies uncontaminated real property at a site listed on the NPL, he must obtain concurrence in the identification from the Administrator of the EPA.\textsuperscript{248} Appropriate state officials must concur in the identification of contaminated property not included on the NPL.\textsuperscript{249} Requiring EPA concurrence in the identification of uncontaminated portions of Superfund sites serves two functions. Concurrence provides the certainty of EPA control over the identification process and simultaneously facilitates an independent assessment of the real property that potential investors will likely require.\textsuperscript{250}

Once the identification and concurrence process is complete, the uncontaminated land may be sold or transferred, provided that the resulting deed contains a covenant warranting that any subsequent response or corrective action will be conducted by the United States and a clause granting the federal government access to the site in order to conduct such action.\textsuperscript{251} Congress decided that the federal government should retain responsibility for conducting any remedial or corrective action

\textsuperscript{247} Pub. L. No. 102-426, § 3, 106 Stat. 2174, 2175 (1992) (amending 42 U.S.C. § 9620(h)). Identification of uncontaminated real property must at a minimum consist of a detailed search of federal government records, chain of title documents, and reasonably attainable aerial photographs. Additionally, officials must make a visual inspection of the buildings and structures on the real property in question and adjacent land. Officials must inspect all reasonably attainable federal, state, and local government records concerning adjacent land where releases have occurred. Finally, officials must interview current or former employees who were involved in base operations. The identification process must also include sampling when appropriate under the circumstances. \textit{Id.}

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} \textit{Id.}


necessatory to protect human health and the environment from the effects of any hazardous substance present on the land at the time it was transferred.252

Additionally, CERFA addresses the problem of remedial measures that take decades to completely remove environmental contamination. CERCLA requires that in order to transfer federal property on which a hazardous substance has been stored, released, or disposed of, the government must warrant that all necessary remedial action has been taken.253 CERFA amends section 120(h)(3) of CERCLA to provide that "all remedial action . . . has been taken if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully."254 The Act prevents long-term treatment operations from impeding the transfer of federal property.255 The amendment enables the government to transfer real property that is subject to long-term restoration procedures, such as ground water pumping and treatment, once the government has established that the treatment operation is operating successfully.256

It is unclear what incentives remain to compel the federal government to expedite cleanup of hazardous sites after they have been severed from base land and transfer of clean property has been completed.257 Like the indemnification provisions of the 1993 National Defense Authorization Act,258 CERFA attempts to alleviate the threat of transferred CERCLA liability that has thus far stifled redevelopment of closing bases.

252 Id.
255 Id.
256 Id.
257 See Schneider, supra note 7, at 3A.
V. OPPORTUNITIES AND BENEFITS OF BASE CLOSURE AND CLEANUP

There may be a bright side to the environmental legacies left behind by the military. It may be just what is needed to boost the economic slump brought on by the end of the cold war and the corresponding reduction in military spending. Many believe that environmental cleanup will represent a new strategic goal for the military. Overall, cleanup efforts could take as long as 30 years and cost up to $400 billion. This massive undertaking could provide jobs for many of those left unemployed by defense cut-backs. Additionally, the effort could provide incentives for development of new technology in the business of environmental cleanup.

Already, many military contractors are opening new environmental divisions to compete for government cleanup contracts. Such contractors are being forced to look for other fields in which they can apply their tremendous technological and managerial resources. The influx of competition and technology may transform environmental cleanup from simple removal and pump-out operations to truly innovative remedies. The entry of military contractors into the field of environmental cleanup is not, however, without impediment. Despite such optimistic possibilities, aerospace firms may hesitate to risk their corporate well-being on environmental projects since Congress is reluctant to provide liberal contractor indemnification.

In addition to changing the complexion of industrial technology, base closures may provide some surrounding

259 Schneider, supra note 7, at 3A.
260 Id.
261 Id.
262 Id.
263 Id.
265 Id.
266 Id.
communities with a new lease on life. In the past, some communities that were injured by the closure of a local military base have turned their misfortune into economic success. When Kincheloe Air Force Base closed in 1970, the surrounding community of Kincheloe, Michigan hired an economist, obtained federal grants, and focused its efforts on compensating for the loss of the base. The results included new businesses and nearly three times more jobs than those lost when the base closed.

Many communities affected by the latest round of base closures have begun plans to redevelop base sites. To be successful, however, any project of this magnitude requires direction and coordination. Some government officials say the effort lacks the direction it needs at this stage.

VII. CONCLUSION

We have seen that the extent of liability under CERCLA is substantial. Taking title to base land without protection from liability can subject a purchaser to the full cost of environmental cleanup even though the purchaser may have played no part in creating the contamination. This potential for devastating liability has impaired efforts to transfer base land to private and municipal entities and to facilitate development of new uses for the sites.

Prompt cleanup will be the key to redevelopment of base sites and to the corresponding revival of local economies. Representative George Brown has warned that communities affected by base closures must be able to acquire base property and convert it to civilian use in order to survive the loss of the base. Brown said, "[t]he key question is not whether the bases will be cleaned up, but

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268 Id.
269 See supra notes 32-51 and accompanying text.
270 Worthington, supra note 267, at C23.
271 See supra notes 55-75 and accompanying text.
272 See Dilworth, supra note 41, at 15.
whether they will be cleaned up to the extent necessary for their property to be sold upon closure.”

We have also seen a number of ways in which purchasers and other transferees may protect themselves from liability. One of these, the innocent landowner defense, is in all likelihood a dead end in light of the knowledge that purchasers will have about the existing environmental conditions at the bases. Clearly, the innocent landowner defense was created to protect only those purchasers who had no knowledge of prior contamination of their properties.

Congress, however, amended CERCLA to treat the federal government as though it were a private entity when acting outside its regulatory capacity. This ultimately provides the best protection for purchasers of contaminated sites. Section 120 of CERCLA waives the government’s sovereign immunity when it is acting as an owner, operator, generator, or transporter of hazardous wastes. Section 120 also offers protection to subsequent landowners in the form of notice and deed covenants placing liability on the government when its activities cause the contamination.

Obviously the government cannot expect the private sector to take title to land knowing it might be saddled with the price of the government’s negligence. Aware of this apprehension, Congress continues to pass bills that attempt to reassure potential purchasers and developers that they will be indemnified from this enormous burden. With the stakes so high, however, purchasers demand every possible guarantee.

Just as the potential price of environmental cleanup is monumental, the possible benefits to be gained from redevelopment of military installations are also substantial.

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275 Id. (quoting Rep. George Brown).
274 See supra notes 124-128 and accompanying text.
275 See supra notes 129-151 and accompanying text.
276 See supra notes 152-184 and accompanying text.
277 See supra notes 185-201 and accompanying text.
278 See supra notes 219-258 and accompanying text.
In an economy that has been wounded by the reduction in military spending, local governments have given priority to the redevelopment of base land in order to provide new jobs for citizens. Even the environmental cleanup operations themselves may provide opportunities to inject new vigor into the economy by providing jobs and improving technology.\textsuperscript{279}

Environmental cleanup at closing military bases will be an expensive and lengthy task. It is likely that the government will eventually pay for cleanup at the bases. If the bases are going to be redeveloped in time to compensate for their impact on the economy, the environmental liability issue must be settled quickly. The private sector must be confident that it will not be held accountable for the government's negligence.

\textsuperscript{279} See supra notes 259-270 and accompanying text.