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Redeveloping The Department of Defense's Inventory of Contaminated "Government-Owned Contractor-Operated" Facilities

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ARTICLES

REDEVELOPING THE DEPARTMENT OF DEFENSE'S INVENTORY OF CONTAMINATED "GOVERNMENT-OWNED CONTRACTOR- OPERATED" FACILITIES

Robert M. Howard

INTRODUCTION

After twelve years and four rounds of military base closures since 1988, there is substantial evidence that the Department of Defense ("DoD") did not overstate its early predictions of billions of dollars in annual base savings.¹ Similarly, despite dire economic predictions from affected communities, the vast majority of communities surrounding closed bases have successfully rebounded from the departure of a major DoD employer.²

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1. DEP'T OF DEF., THE REP. OF THE DEP'T OF DEF. ON BASE REALIGNMENT AND CLOSURE 1 (Apr. 1998) (statement from William Cohen, Secretary, Dep't of Def.).

2. See Paul Taibl, *Def. Dep't Jobs in Transition*, BUSINESS EXECUTIVES FOR NAT'L SEC. SPECIAL REP. 11-12 (Feb. 1999).

When the last of the four rounds of base closures is completed in 2001, DoD expects to have spent \$23 billion in the closure and cleanup process, and saved \$37 billion in base-related costs, for a net short-term savings of \$14 billion.³ After 2001, DoD expects to enjoy \$5.7 billion in annual savings,⁴ having achieved a twenty percent reduction in domestic bases from 1988 levels.⁵ In addition, two-thirds of the sixty-two communities surrounding major base closures have reduced unemployment rates to levels at or below the national average.⁶ The Base Realignment and Closure (“BRAC”) process has been so successful that during the last three years of his tenure Defense Secretary William Cohen recommended at least two additional rounds of closures, a move that Congress consistently opposed.⁷ The Bush administration has proposed additional base closures, and Senator John McCain has sponsored a bill for two additional rounds of base closure in 2003 and 2005.⁸

The impressive BRAC record stands in stark contrast to DoD’s uneven performance in transferring its remaining inventory of less than seventy-eight “government-owned and contractor-operated” (“GOCO”) plants.⁹ To be clear, GOCOs are not “military installations” as defined by federal law and are not subject to the BRAC process or federal transition assistance. GOCO plants are unique creatures of statute that historically operated either rent-free

3. NAT’L SECURITY AND INT’L AFF. DIV., U.S. GEN. ACCT. OFF. (“GAO”), *MILITARY BASES: STATUS OF PRIOR BASE REALIGNMENT AND CLOSURE ROUNDS 3* (Dec. 1998) [hereinafter 1998 GAO Report].

4. *Id.* at 3.

5. *Id.* at 2.

6. *Id.* at 3.

7. *Nation in Brief: Cohen Urges More Base Closings*, ATLANTA J., Apr. 2, 1998, available at 1998 WL 3685798.

8. Otto Kreisher, *The Bush Budget: More Bases Targeted as Defense Waste*, SAN DIEGO UNION-TRIBUNE, Mar. 1, 2001, available at 2001 WL 6445701.

9. See NAT’L SEC. AND INT’L AFF. DIV., GAO, *ENVIRONMENTAL CLEANUP: INCONSISTENT SHARING ARRANGEMENTS MAY INCREASE DEFENSE COSTS 2-3* (July 1994) [hereinafter 1994 GAO Report]. As of 1994, there were 78 GOCO facilities within the federal inventory. The GOCO inventory included approximately 27 Army, 11 Air Force, 19 Navy and 21 Defense Logistics Agency facilities. *Id.* at 3.

or under favorable leases with various contractors supporting DoD's industrial needs.¹⁰

Like the 451 military bases closed or realigned under the BRAC laws in the last twelve years,¹¹ the financial costs of maintaining GOCO facilities outweighs their declining strategic value. This has prompted DoD to declare that most GOCO plants are "excess" to its needs and are suitable for transfer to non-federal ownership. The strategic decline of GOCOs is related in part to the fact that most contractors have moved to more modern privately owned facilities where they enjoy greater flexibility in manufacturing products both for DoD and for non-military commercial applications.¹²

Because GOCO plants are typically aged and tainted with significant environmental contamination from long-defunct industrial practices, the commercial market for such plants is extremely limited, thereby adding to the government's difficulty in disposing of these properties. In response, DoD has attempted to strongly encourage its current contractors to buy these outdated facilities, with very limited success. For example, DoD has occasionally threatened contractors with plant closures and government cost recovery actions under the federal Superfund law, notwithstanding the fact that (i) the government consistently controlled and owned the GOCO facility and (ii) the current contractor may be the eighth or ninth operator in a long lineage of contractors to have operated the facility over the last fifty years. Because the law supports their position, few contractors have capitulated to the government's threats to buy an outdated facility, and progress in divesting these facilities has slowed.

A better solution to DoD's problem of disposing contaminated GOCO facilities is to model the disposal process after the successful BRAC program. Capitalizing on the success of BRAC at larger DoD installations, various communities with GOCO facilities have successfully brokered a BRAC-style solution to the problem of

10. See 10 U.S.C. § 2667(a)(4) (1994) (allowing the Secretary of a military department to lease department property upon such terms as he considers will promote the national defense).

11. 1998 GAO Report, *supra* note 3, at 2.

12. See generally 48 C.F.R. § 45.302-6(e) (1999) (inserting clause § 52.245-10 into facility acquisition contracts); 48 C.F.R. § 52.245-11(e)(1) (1999) (placing regulations and restrictions on facilities' uses, such as limiting commercial production at GOCO plants to 25% of the contractor's workload).

disposing of GOCO facilities. The government, forfeits short-term sales revenue from a potential plant sale, but reduces its long-term carrying costs. As discussed herein, since 1995 at least nine GOCO facilities have been transferred under special federal legislation at no cost to local municipalities for purposes of promoting economic redevelopment.¹³ This falls short of the approximately thirty-five economic development conveyances since 1993 of closed military installations.¹⁴ BRAC's proven track record of substantial federal savings at DoD bases provides compelling justification for using a similar approach to DoD's industrial plants.

Historically, the process by which the government has divested GOCO facilities has been inconsistent and cumbersome, in part because the level of local municipal interest in obtaining these aging and contaminated federal facilities has varied. Furthermore, the more familiar BRAC laws adopted in the late 1980s and early 1990s do not expressly govern GOCOs.¹⁵ However, with the increasing number of BRAC success stories, the arguments in favor of a no-cost GOCO facility conveyance have gained momentum over the last five years with local municipalities. Moreover, Congress has been receptive to authorizing a no-cost conveyance to interested communities on a case-by-case basis.¹⁶ In the process, local communities and former GOCO contractors do not inherit the government's environmental liabilities.

I. HISTORY OF GOCO FACILITIES

GOCO facilities are the product of World War II-era legislation. Federal law does not consider these plants to be "military

13. See discussion *infra* Part V.B, Table B.

14. See K. Podagrosi, *Economic Renewal: Community Reuse of Former Military Bases*, DefenseLINK 3 (Apr. 21, 1999) (former Rentoul, IL mayor notes sixteen special transfers are pending), available at <http://www.defenselink.mil/pubs/reuse042199.html> (last visited Apr. 5, 2001).

15. The Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2623 (1988) completed the first round of BRAC closures. The last three rounds in 1991, 1993 and 1995 were government by the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (codified as amended at 10 U.S.C. § 2687 (1994) (governing the last three rounds of BRAC)).

16. See discussion *infra* Part V.B.

installations.”¹⁷ GOCO facilities are federally owned industrial reserve centers built mainly in the 1940s and 1950s to ensure rapid and continuous weapons manufacturing capacity for DoD during wartime. Given decades of heavy manufacturing activities at these GOCO plants, the facilities invariably confront environmental issues associated with long-defunct manufacturing practices.¹⁸

GOCO facilities were originally operated pursuant to the authority of the National Industrial Reserve Act of 1948.¹⁹ According to the Act’s legislative history, the industrial reserve program was designed to overcome the problems of industrial demobilization after World War I and the loss of readily available industrial wartime capacity, which had to be rebuilt during World War II at much greater expense and with significant time delay.²⁰ During World War II, the government was forced to build 1,200 industrial plants between 1940 and 1944 with an average construction time of 18 to 24 months.²¹ The industrial reserve legislation authorized DoD to retain a critical mass of industrial capacity under federal ownership and control, while at the same time offsetting the future maintenance costs through rent-free “facility use” agreements with private industry.²²

The superseding Defense Industrial Reserve Act of 1973²³ authorizes the Secretary of Defense to regularly review the inventory of DoD industrial reserve facilities and retain or dispose of “excess”

17. See 10 U.S.C. § 2687(e) (1994). A military installation is defined as a

base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, which is located within [the United States and its territories]. Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

Id. BRAC also excludes facilities that do not have at least 300 “direct-hire, permanent civilian employees of the Department of Defense.” *Id.* § 2687(e)(2).

18. See Benjamin L. Ginsberg et al., *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONTRACT L.J. 169, 195 (1994).

19. National Industrial Reserve Act of 1948, Chs. 810, 811, 62 Stat. 1225 (1948).

20. RETENTION OF NATIONAL RESERVE OF INDUSTRIAL PRODUCTIVE CAPACITY, S. REP. NO. 1409, at 3 (2d Sess. 1948).

21. *Id.*

22. *Id.*

23. 50 U.S.C. §§ 451-455 (1994).

government-owned plants.²⁴ Historically, the government preferred to dispose of the excess industrial reserve properties through the General Services Administration (“GSA”), subject to a recapture or national security clause provision.²⁵ However, the government may waive such an encumbrance to facilitate the disposal of the excess federal property.²⁶ Unless special legislation exempts a specific GOCO facility from the traditional property disposal laws, GSA controls the disposal process and is required to obtain “fair market value.”²⁷

II. DoD’S ENVIRONMENTAL LEGACY AT GOCO FACILITIES

As with the closure of military bases under the BRAC laws, DoD has traditionally assumed the cost of environmental cleanup at both its active and former industrial reserve plants. Only in extreme circumstances, where a contractor engaged in reckless conduct or violated then-relevant standard manufacturing practices or DoD directives, would contractor liability potentially arise under standard DoD “facility use” contracts.²⁸

Within the next three to five years, DoD will continue to divest and transfer to communities and non-federal owners its remaining GOCO industrial reserve facilities. In the aftermath of harsh criticism in 1997 from the General Accounting Office (“GAO”) over DoD’s escalating cleanup costs at approximately seventy-eight remaining GOCO facilities,²⁹ DoD proposed, with almost no success, that various government contractors voluntarily enter into “cost sharing agreements” to help fund the cleanup of GOCO facilities.³⁰

24. 10 U.S.C. § 2535(b)(1)(A)-(B) (1994).

25. See 32 C.F.R. § 644.354(a) (1999).

26. See 41 C.F.R. § 101-47.306-2 (1999).

27. 41 C.F.R. § 101-47.305-1(a) (1999).

28. See discussion *infra*, Section IV.A.

29. NAT’L SECURITY AND INT’L AFF. DIV., GAO, ENVIRONMENTAL CLEANUP AT DoD: BETTER COST-SHARING GUIDANCE NEEDED AT GOVERNMENT-OWNED, CONTRACTOR-OPERATED SITES 2 (Mar. 1997) [hereinafter 1997 GAO Report]. DoD cost projections to remediate GOCO facilities have increased steadily from \$1.4 billion to \$3.6 billion.

30. See DEP’T OF THE NAVY, OPNAVINST 5090.1B, § 15-5.28, ENVTL. AND NATURAL RESOURCES PROGRAM MANUAL (Nov. 1994) (“Absent special contractual provisions to the contrary, Navy policy shall

In 1996, GAO reported to Congress that potential transferees of military bases uniformly rejected cost sharing with the government to complete cleanup.³¹

Most GOCO contractors understand that as agents of the government they are not responsible for environmental cleanup for having operated DoD weapons plants under government supervision. As discussed more fully herein, the government's environmental liability at its current and former GOCO facilities is a function of statute, government contracts, and court decisions. Unless the government contractor or transferee of a GOCO facility voluntarily agrees to assume certain liabilities for business or other purposes, a growing body of authority will require DoD to remain solely responsible for past and future cleanups at GOCO plants. The record is reassuring for future owners or operators of a GOCO plant. To date, no municipality or non-federal owner has been held liable to complete the cleanup of releases attributable to former DoD activities at any GOCO or BRAC facility.

If DoD contemplates enacting involuntary cost-sharing programs, it would likely be an inadequate solution. Despite GAO pressure on DoD to reduce the government's costs at GOCO facilities, involuntary cost sharing is inconsistent with: (i) the applicable standard facility use contracts in effect at the times of releases, which relieve the GOCO contractors from incurring the costs of environmental restoration and allow contractors to obtain reimbursement for such costs; (ii) prior DoD funding practices at other active and excess industrial reserve plants; (iii) federal legislation under CERCLA³² and; (iv) well-settled court authority imposing cleanup obligations under government contracts squarely upon the government.³³

At nearly all GOCO facilities, including the former Naval Industrial Reserve Ordnance Plant ("NIROP") in Pomona, California, the Calverton Naval Weapons Industrial Reserve Plant ("NWIRP") on Long Island, New York and the Fridley NIROP in

be to require GOCO contractors to pay for any and all cleanup costs associated with their operation of Navy facilities.").

31. See NAT'L SECURITY AND INT'L AFF. DIV., GAO, MILITARY BASE CLOSURES: REDUCING HIGH COSTS OF ENVIRONMENTAL CLEANUP REQUIRES DIFFICULT CHOICES 19-20 (Sept. 1996) [hereinafter 1996 GAO Report].

32. 42 U.S.C. §§ 9601 *et seq.* (1994).

33. See discussion *infra* Part IV.C.

Minneapolis, Minnesota, DoD has remediated or is in the process of restoring the facilities at full cost to the U.S. government. There is no authority for the proposition that GOCO contractors or non-federal transferees of an industrial reserve facility may be held retroactively liable for the remediation of nearly sixty years of defense-related activities. Where DoD has raised such an argument, courts have consistently rejected it as an unfair attempt by DoD to penalize GOCO contractors (and their successors) for the alleged "sins" of national defense activities.

III. INCREMENTAL IMPROVEMENT IN TRANSFERRING CONTAMINATED BRAC MILITARY INSTALLATIONS

In 1988, Congress designed a process to overcome (at least temporarily) certain obstacles enacted earlier by the legislature to halt base closures.³⁴ In so doing, Congress also sought to immunize the closure of economically important military installations from local political pressure.³⁵ In 1988, Secretary of Defense Frank Carlucci convened an independent federal advisory commission to recommend domestic bases for closure and realignment. The so-called 1988 Base Closure Commission recommended the closure or realignment of 145 installations,³⁶ which led to a public outcry of political retaliation. Congress not only proceeded to validate the 1988 Commission's recommendations, it took additional steps to insulate the closure process in anticipation of even more base closures in the future. Congress subsequently enacted the Defense Base Closure and Realignment Act of 1990, which was signed by

34. See Ginsberg, *supra* note 18, at 195. In 1977, Congress placed severe restrictions on the executive branch's authority to divest itself of military bases. In reaction to the planned closure of Loring Air Force Base in Maine, Congress enacted legislation, formerly codified at 10 U.S.C. § 2687, to effectively prevent DoD from closing any major bases. The law required the Secretary of Defense to provide Congress and the public with prior notice of a base closure and a detailed justification. Congress then had sixty days to halt the closure effort.

35. See Pub. L. No. 100-526, § 201(1), 102 Stat. 2623 (1988) (codified as amended at 10 U.S.C. § 2687 (1994 & Supp. 2000)) (granting the secretary of defense the power to close all bases recommended for closing by the Commission on Base Realignment and Closure).

36. See Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 337 (1991).

President Bush on November 5, 1990.³⁷ The 1990 BRAC legislation formally established the Defense Base Closure and Realignment Commission to complete the comprehensive review of the nation's domestic military installations.³⁸ The 1990 Act contemplated three additional rounds of base closures in the non-election years of 1991, 1993, and 1995, and provided the procedures to accomplish this unpopular task.³⁹

The 1991 Commission recommended twenty-six major base closures and nineteen realignments. The 1993 Commission recommended twenty-eight major base closures and thirteen realignments.⁴⁰ The final round of 1995 Commission recommendations impacted 146 domestic installations, including thirty-three major base closures, twenty-six major realignments and twenty-seven changes to prior base closure decisions.⁴¹ The 1995 recommendations were expected to begin no later than July 1997 and were to be completed by July 2001.⁴² In 1995, DoD projected that the net savings for the 1995 closures alone would amount to \$18.4 billion over the next twenty years.⁴³ The military installations impacted by the four rounds of BRAC closures are, for the most part, contaminated properties tainted with the same industrial legacy as the roughly 500,000 non-DoD contaminated "brownfield" properties nationwide.⁴⁴

Complicating the straightforward transfer of contaminated federal property are the stringent environmental requirements of section 120(h) of CERCLA, which requires that surplus federal property be cleaned up before conveyance by deed to non-federal owners.⁴⁵

37. Pub. L. No. 101-510, § 2901 *et seq.*, 104 Stat. 1485, 1808 (1990) (codified as amended at 10 U.S.C. § 2687 (1994)).

38. *Id.*

39. *Id.*

40. DEP'T OF DEF., BASE CLOSURE AND REALIGNMENT REP., Table 1 (Major Base Closure and Realignment Recap) (Mar. 1995) [hereinafter 1995 BRAC Commission Report].

41. *Id.* at 23-27.

42. *See* Pub. L. No. 101-510, § 2904(a)(3)-(4) (instructing that closures shall commence within two years of the closure decision and be completed six years later or by July 2001 for the 1995 closures).

43. 1995 BRAC Commission Report, *supra* note 40, at 3.

44. *See* E.G. Geltman, *Recycling Land: Encouraging the Redevelopment of Contaminated Property*, NAT. RESOURCES & ENV'T 3 (Spring 1996) (suggesting that 500,000 brownfields exist nationwide).

45. 42 U.S.C. § 9620(h)(3)(A)(ii)(I)-(II) (1994).

Thus, although hundreds of bases had been designated for closure in the early years of BRAC, conveyances to base redevelopers lagged considerably because the environmental issues at the federal installations were typically the most daunting to resolve in a timely manner. Few environmental problems could be resolved within the six years allowed by law to close a base. Prior to 1993, the BRAC process was considered "broke."⁴⁶

In 1992, Congress enacted the Community Environmental Response Facilitation Act ("CERFA"),⁴⁷ which amended CERCLA in an effort to overcome the inherent delay in cleaning up a contaminated federal facility before conveyance could take place. In particular, Congress permitted federal installations to be "parcelized" into contaminated and non-contaminated plots, allowing the non-contaminated parcels to be conveyed more expeditiously.⁴⁸ In July 1993, President Clinton also weighed-in with a five-part plan to revitalize base closure communities.⁴⁹ President Clinton's plan for "Revitalizing Base Closure Communities" called for the following:

(1) Property disposition procedures that give higher priority to economic redevelopment of the affected community through expeditious disposal to "local redevelopment authorities";⁵⁰

46. See K. Podagrosi, *supra* note 14, at 3 (reporting how the former mayor of Rantoul, IL near Chanute Air Force Base notes Congress and President took steps to improve BRAC around 1993).

47. Pub. L. No. 102-426, § 3, 106 Stat. 2174, 2175 (1992) (codified as amended at 42 U.S.C. § 9620(h) (1994)).

48. See *id.*

49. DEP'T OF DEF., DOD BASE REUSE IMPLEMENTATION MANUAL § 1.3 (Dec. 1997).

50. The National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 103-160, § 2903(a), 107 Stat. 1547, 1927 (1993), corresponds to section 2903 of Subtitle A of Title XXIX of the National Defense Authorization Act of 1994, codified part of the President's plan by giving DoD the authority to transfer at less than fair market value real or personal property at a closing base to a "local redevelopment authority" established by a State or local government (and recognized by the Secretary of Defense) for purposes of "developing and implementing a plan for managing" base redevelopment. DoD is further authorized to undertake an "Economic Development Conveyance," whereby a closing base is transferred for no consideration whatsoever if the facility is located in a rural area or the Secretary finds that the closure will have a "substantial adverse impact" on the local economy. DoD promulgated regulations to determine eligibility for an Economic Development Conveyance at 32 C.F.R. § 175.7 (e)-(f) (1999). See also BASE CONVERSION AGENCY, AIR

(2) Fast-track environmental cleanups that contemplate the investment of federal cleanup money at installations where cleanup could be accomplished sooner; and the appointment of facility-specific BRAC Cleanup Teams composed of military, state and EPA representatives who would share responsibility for developing and implementing BRAC Cleanup Plans;⁵¹

(3) The appointment of transition coordinators at major closing bases to work directly with the community and the local redevelopment authorities as ombudsmen to reduce red tape;⁵²

(4) Easier access to transition and redevelopment assistance for workers and communities; and⁵³

(5) Economic development planning grants to base closure communities.⁵⁴

Much of the five-part plan was subsequently adopted into law.⁵⁵ In response to public pressure in favor of revitalizing communities affected by BRAC Commission's closure decisions, in 1993 Congress also enacted the Base Closure Community Assistance Act to allow below-market or no-cost transfers of BRAC facilities to local redevelopment authorities.⁵⁶ With this dramatic shift in policy, few BRAC facilities were conveyed for consideration after 1993. In October 1999, President Clinton signed the FY 2000 defense budget that, (1) increased the opportunities for local redevelopment

FORCE, HOW CAN AN ECONOMIC DEVELOPMENT CONVEYANCE (EDC) BE OBTAINED? (1997).

51. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 103-160, §§ 2901(6), 2911 (1993).

52. *See id.* § 2915. Less than one week after President Clinton announce his five part plan, DoD named senior military officials to serve as transition coordinators at every major base. *See Podagrosi, supra* note 14, at 6.

53. *See id.* § 2901(2)-(3) (stating that helping displaced employees from these military installations is in the best interest of the United States).

54. *See* Pub. L. No. 103-421, § 2(e), 108 Stat. 4346, 4352 (1994) (codified at 10 U.S.C. § 2687 (1994)). In October 1994, Congress also enacted the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, which exempted most BRAC closures from the much-criticized Stewart B. McKinney Homeless Assistance Act.

55. Senator David Pryor (D-AR) proposed much of the five-part plan as an amendment to the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2903 *et seq.*, 107 Stat. 1547, 1909 (1993) (also known as the Pryor Amendment).

56. Pub. L. No. 103-160, §§ 2901(7), 2903(a).

authorities to obtain bases for no consideration, (2) provided that the proceeds from any sale or lease of the former base are to be reinvested by the local redevelopment authority into the installation itself (and its infrastructure) for at least the first seven years, and (3) ensured that the local redevelopment authority accepts control of the property promptly.⁵⁷ Since 1993, approximately fifty-one bases below market economic development conveyances are pending or have been completed.⁵⁸

Congress's first effort to indemnify a transferee of a closing BRAC installation occurred in 1991 at Pease Air Force Base. Congress enacted a special bill designed to indemnify the State of New Hampshire and potential lenders against pre-existing environmental contamination at the base.⁵⁹ Thereafter, Congress sought to adopt a standard "one size fits all" indemnification provision to address closures generally in the National Defense Authorization Act for Fiscal Year 1993.⁶⁰

BRAC section 330 is drafted broadly enough to apply to entities that acquire ownership of the closed military installation (e.g., local redevelopment authorities) and any lessee (private contractors), lender or assignee. It has overcome serious barriers to the transfer of contaminated military bases to non-federal control. However, the statutory indemnity does not apply to GOCO facilities.

Congress had determined a statutory indemnity was necessary to transfer BRAC installations because the fear of inheriting environmental liabilities inhibited the ability of local redevelopment

57. See National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 2821, 113 Stat. 512, 853 (1999).

58. Podgrasi, *supra* note 14, at 3.

59. National Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511, § 8056(a)(1), 104 Stat. 1856, 1887 (1991).

60. Pub. L. No. 102-484, § 330, 106 Stat. 2315, 2371, 2373 (1992), [hereinafter BRAC § 330], as amended by Pub. L. No. 103-160, 107 Stat. 1547, 1745 (1993). The relevant portions of BRAC § 330 provide that the Secretary of Defense shall, hold harmless, defend and indemnify in full [transferees] from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum and petroleum derivative as a result of Department of Defense's activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

authorities to obtain capital.⁶¹ In order to address CERCLA's strict and several liability provisions that stalled BRAC conveyances, the government agreed to indemnify future transferees for environmental liabilities arising from ownership or operations at the closed installation.⁶²

IV. DoD'S ENVIRONMENTAL LIABILITY AT GOCO FACILITIES

Whereas future owners and operators of BRAC installations enjoy the protection of a statutory indemnity under BRAC section 330, GOCO facilities enjoy (i) pro-contractor facility use contracts, (ii) statutory assurances of government cleanup, and (iii) favorable case law.⁶³ Standard facility use contracts during the last five decades, and the relevant provisions of the Defense Acquisition Regulations and superseding Federal Acquisition Regulations incorporated into these contracts, do not impose liability on GOCO contractors for changing environmental laws, long-defunct industrial practices, or the environmental legacy of aging DoD facilities.⁶⁴ The federal procurement rules have never been read, absent extraordinary circumstances of contractor misconduct, to impose environmental liability on GOCO contractors retroactively. Even DoD grudgingly admits that the Federal Acquisition Regulations would allow GOCO contractors to be reimbursed under facility use contracts for

61. See 1998 GAO Report, *supra* note 3, at 56. Congress authorized DoD to indemnify future owners to facilitate lease and transfer of property.

62. See R. Wegman & R. Bailey, *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 *ECOLOGY L.Q.* 865, 918-21 (1994) (citing BRAC § 330). As early as 1992, the government recognized that any serious prospect of transferring bases would be undermined unless DoD was authorized by statute to provide adequate indemnity protection for transferees of contaminated military installations. In response, Congress enacted legislation in 1993 to overcome the Anti-Deficiency Act for all BRAC installations. The Anti-Deficiency Act, 31 U.S.C. § 1341 (1994), limited the ability of executive branch officials to enter into contracts for future payment of money in advance of (or excess to) existing congressional appropriations. Thus, DoD's ability to contractually indemnify parties for future liabilities at closing bases was expressly limited in the absence of express congressional action for such future indemnification. See 31 U.S.C. § 1341(a)(1)(A)-(B) (1994).

63. See discussion *infra* Parts IV.A-C.

64. See discussion *infra* Part IV.A.

environmental cleanup costs, absent “contractor malfeasance.”⁶⁵ The cleanup costs would then be passed on to the government through forward pricing of goods and services, rendering the cost of goods and services to the DoD more expensive and making the government ultimately responsible for the cost of cleanup at its plants.

A. Facility Use Contracts Do Not Impose Liability on Contractors for Environmental Remediation

The terms in the standard GOCO facility use contracts are generally consistent among GOCO plants and have not changed significantly over time, particularly on environmental issues. GOCO facility use contracts, from the 1940s through the 1980s, establish a consistent and favorable rule that GOCO contractors shall be held harmless for environmental degradation at government-owned facilities and any resulting damages to the property of third persons.⁶⁶ As a general proposition, a GOCO contractor assumes no risk of loss or damage to the GOCO facility (which would include environmental degradation), unless the contractor failed to procure government-required insurance, the damage related to the failure to comply with the provisions of the facility use contract, or the damage arose from willful misconduct or lack of good faith.⁶⁷ In addition, the GOCO contractors could seek reimbursement for various non-insured liabilities and damages to third parties arising out of the contractor’s performance of the government contract.

Three standard Federal Acquisition Regulations (“FAR”) provisions shape the historical allocation of environmental risks at GOCO plants: (1) “Liability for Facilities,”⁶⁸ (2) “Insurance—

65. See 1997 GAO Report, *supra* note 29, at 43 (citing Letter of Sheri W. Goodman, Deputy Undersecretary, Dep’t of Def.).

66. See *id.* at 1-6. Historically, military departments have had difficulty shifting environmental cleanup costs to contractors because, among other things, cleanup costs are reimbursable under government contracts); *Id.* at 43 (citing Letter of Sheri W. Goodman, Deputy Undersecretary, Dep’t of Def. explaining to the GAO the difficulty in recovering costs from GOCO contractors because environmental cleanup costs incurred by contractors are reimbursable under the Federal Acquisition Regulations).

67. See 48 C.F.R. § 52.228-7(e) (1999).

68. *Id.* § 52.245-8.

Liability to Third Persons;”⁶⁹ and (3) “Indemnification of the Government.”⁷⁰ These standard procurement regulations for GOCO facility use contracts remained basically unchanged over twenty years from the 1960s through the promulgation of the FARs in 1984.⁷¹ The standard “Liability for Facilities” provision provides that the GOCO contractor “shall not be liable for any loss or destruction of, or damage to, the facilities or for expenses incidental to such loss, destruction or damage”⁷² Although FAR 52.245-8, which is incorporated by reference into facility use contracts, recognizes certain limited exceptions to the general rule of contractor nonliability, releases of contamination to the environment during industrial operations are not among them, especially where DoD has controlled the contractor’s industrial and environmental management practices as far back as the 1940s.

B. Statutory Covenants of CERCLA Section 120(h)

In addition to favorable contract provisions, federal law squarely imposes cleanup obligations on DoD. As a general proposition, the federal Superfund law provides certain statutory assurances of the government’s commitment to complete the remediation of environmental contamination at DoD and non-DoD federal facilities. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA),⁷³ which, among other things, amended CERCLA section 120 and imposed specific environmental warranties on the federal government. These warranties must be expressly included within the deed conveying the federal property to the nonfederal owner.⁷⁴

69. *Id.* § 52.228-7.

70. *Id.* § 52.245-11.

71. See Mark J. Connor, *Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?* 131 MIL. L. REV. 1-54 (1991).

72. 48 C.F.R. § 52.245-8(b) (1999). Prior to 1984, the contract regulations provided that the contractor “shall be reimbursed for certain liabilities to third persons not compensated by insurance or otherwise.” Defense Acquisition Regulation (“DAR”) 7-203.22 (1980). After 1984, this provision was amended to comply with the Anti-Deficiency Act’s bar against imposing liability on the federal government in excess of available Congressional appropriations. See 31 U.S.C. § 1341 (1994).

73. 42 U.S.C. §§ 9671-9675 (1994).

74. *Id.* § 9620(h)(3) (contents of deeds).

Specifically, CERCLA section 120(h)⁷⁵ sets forth requirements and procedures that all federal agencies must follow to transfer real property to non-federal ownership where there is (or has been) environmental contamination.⁷⁶ Since the addition of CERCLA section 120(h) fifteen years ago, the federal government has transferred hundreds of formerly contaminated properties to non-federal owners. The four rounds of BRACs alone involved the closure and realignment of 451 bases, approximately 205 of which required environmental cleanup.⁷⁷ DoD has in fact identified over 5,300 potentially contaminated sites at the BRAC facilities.⁷⁸

The "primary purpose of section 120(h) was to ensure that property contaminated by the federal government is environmentally restored by the federal government before being conveyed outside the federal government."⁷⁹ Accordingly, for at least the last fifteen years, CERCLA section 120(h)(3) has mandated that all deeds transferring federal real property where hazardous substances have been stored, released, or disposed of, contain the following covenant: "[A]ll remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken before the date of such transfer."⁸⁰

Of note, CERCLA section 120 provides only certain limited government warranties of its own cleanup activities; it does not purport to indemnify future owners of federal property. In fact, the Anti-Deficiency Act⁸¹ instructs that the government cannot, absent an act of Congress, indemnify private parties. The Act prohibits executive branch officials from entering into indemnity agreements and committing future appropriations absent express congressional authorization. In 1989, in a rare exception, the Navy agreed to contractually indemnify a contractor at the former St. Louis NWIRP for any environmental liabilities if it agreed to purchase the federal

75. *Id.* § 9620(h).

76. *Id.*

77. See 1998 GAO Report, *supra* note 3, at 25, 53.

78. See 1996 GAO Report, *supra* note 31, at 4.

79. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, GUIDANCE FOR EVALUATION OF FEDERAL AGENCY DEMONSTRATIONS THAT REMEDIAL ACTIONS ARE OPERATING PROPERLY AND SUCCESSFULLY UNDER CERCLA SECTION 120(h)(3) 2 (Aug. 1996).

80. 42 U.S.C. § 9620(h)(3)(A)(ii)(I) (1994).

81. See 31 U.S.C. § 1341(a) (1994).

property.⁸² The Navy now considers the St. Louis indemnity to be an aberration and probably unenforceable under the Anti-Deficiency Act and has declined to enter into similar agreements. Consistent with the Anti-Deficiency Act, CERCLA section 120(h) does not include a BRAC-style indemnity; it is limited to a statutory covenant that the government will undertake all necessary cleanup activities to protect human health and the environment.

To date, GAO reports that DoD has incurred in excess of \$9 billion in environmental cleanup costs at BRAC installations and approximately \$3 billion at GOCO facilities.⁸³ GAO predicts that DoD will likely incur \$2.4 billion in environmental cleanup costs until federal and state authorities determine that DoD has restored its BRAC installations and further cleanup is not necessary.⁸⁴ As GAO states, “[e]ven though the Congress has established a 6-year period for closing a base, there are no statutory deadlines for the cleanup process.”⁸⁵

CERCLA section 120(h)(3) further requires the government to include in the deed other enforceable representations, including the obligation by the government to undertake additional cleanup after transfer, as necessary.⁸⁶ Procedurally, DoD must obtain state and EPA concurrence that the federal government has completed all required cleanup before DoD cleanup activities can be terminated, either before or after conveyance.⁸⁷ This statutory warranty applies to all DoD, non-DoD, Department of Energy (“DoE”), BRAC and GOCO real property.⁸⁸

82. The contractor, McDonnell Douglas Corporation, was indemnified by the DoD for potential environmental liabilities arising from pre-existing contamination at the St. Louis NWIRP facility in order to complete the contractor’s purchase of the facility. This September 18, 1989 “Environmental Indemnity Agreement” pre-dated the enactment of CERCLA section 120(h)’s covenants.

83. See 1998 GAO Report, *supra* note 3, at 46-58; see also 1997 GAO Report, *supra* note 29, at 2-3.

84. 1998 GAO Report, *supra* note 3, at 5.

85. 1996 GAO Report, *supra* note 31, at 5.

86. 42 U.S.C. § 9620(h)(3)(A)(ii)(II) (1994).

87. *Id.* §§ 9620(f), 9621(f).

88. *Id.* § 9620(a).

As shown in Table A below, the federal government has disposed of over 5,300 properties during the last five years.⁸⁹

Table A
ANNUAL DISPOSAL OF FEDERAL PROPERTY

Fiscal Year	Number of Federal Properties Disposed
1999	242
1998	1597
1997	1775
1996	1176
1995	581
Total	5371

Within the DoE alone, eighty-four contaminated facilities are currently listed as “subject to CERCLA section 120.”⁹⁰ Moreover, over 97 major BRAC military installations, closed and transferred to local redevelopment authorities, remain subject to CERCLA section 120(h)’s warranties.⁹¹ In short, there have been literally thousands of parcels of real property transferred by the federal government to non-federal owners subject to the statutory covenant that the government will take all remedial actions necessary to protect human health and the environment, including additional cleanup required after transfer.

The government’s warranty under CERCLA section 120(h) has a solid track record over the last fifteen years. There are no reported

89. Table A (E-mail from Nichelle B. Shoats, GAO Realty Specialist, Office of Property Disposal, to Latham & Watkins) (Aug. 8, 2000) (on file with author).

90. U.S. DEP’T OF ENERGY, OFFICE OF ENVIRONMENTAL MANAGEMENT, TWELFTH ANNUAL REPORT TO CONGRESS: FISCAL YEAR 1998 PROGRESS IN IMPLEMENTING SECTION 120 OF CERCLA ES-1 (Apr. 2000), available at <http://www.em.doe.gov/rtc2000> (last visited Apr. 5, 2001).

91. 1998 GAO Report, *supra* note 3, at 6, 12, 51; 42 U.S.C. § 9620(a) (1994).

cases or enforcement actions where the non-federal owners asserted that the government breached its CERCLA section 120(h) warranty. The last fifteen years of government implementation of CERCLA section 120(h) demonstrate an encouraging commitment to the process of transferring federal properties to non-federal owners without concurrently transferring environmental liability. GAO reports no examples of transferees involuntarily sharing DoD cleanup costs.⁹²

Under the 1992 amendments to CERCLA section 120(h), a governmental remedial action is considered "complete" for purposes of transfer if (1) the construction and installation of an "approved" remedial design has been completed (e.g., pump-and-treat systems), and (2) the selected remedy has been demonstrated to EPA to be working "properly and successfully."⁹³ Thus, the expectation of long-term remedial activities at a GOCO facility does not necessarily prohibit a timely conveyance for economic redevelopment.⁹⁴

C. Courts Have Rejected Government Claims of GOCO Contractor Liability For Past or Future Cleanup Costs

At various divested GOCO facilities courts have held the U.S. government solely liable for cleanup costs.⁹⁵ In February 1997, the district court in *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*,⁹⁶ apportioned 100 percent of all past and future environmental

92. 1996 GAO Report, *supra* note 31, at 19-20.

93. 42 U.S.C. § 9620(h)(3)(B) (1994).

94. Pub. L. No. 104-201, § 334, 110 Stat. 2422, 2486 (1996). Of note, CERCLA section 120(h) was amended within the last several years by Public Law No. 104-201, authorizing the EPA or the governor of a State to approve transfer of contaminated federal property before completion of all remedial actions required under CERCLA (or the installation of all remedial equipment required by CERCLA), provided EPA or the State determines that the property is suitable for early transfer and there are adequate assurances that all remaining remedial actions will be undertaken by DoD following the transfer.

95. See Steven G. Davison, *Governmental Liability Under CERCLA*, 25 B.C. ENVTL. AFF. L. REV. 47 (1997); Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191, 1218 (1993) (discussing ownership liability attaching to the U.S. government that held legal title and leased equipment to American Viscose at Front Royal GOCO).

96. No. 83-7996 MRP (C.D. Cal. filed 1983).

cleanup costs against the government at a former federally owned rubber reserve plant in Los Angeles.⁹⁷

Similar to the DoD industrial reserve program, the rubber reserve program at issue in *Dow Chemical* was developed during World War II through the Defense Plant Corporation and Reconstruction Finance Corporation to supply the military with synthetic rubber.⁹⁸ The program once included in excess of fifty synthetic rubber plants. After the Korean War the reserve plants were either sold or closed.⁹⁹ The Los Angeles GOCO facility was owned by the government between 1942 and 1955.¹⁰⁰ Consistent with practices then in effect, synthetic rubber by-products were disposed of in on-site unlined lagoons, which led to extensive soil and groundwater contamination.¹⁰¹ On the combined weight of statutory authority imposing environmental liability on the United States, and contractual authority holding the GOCO contractor harmless for facility damages, the government was ultimately assigned all cleanup costs (in excess of \$50 million).

The government's liability at GOCO facilities for past releases arises from its dual role as the facility "owner" and "operator" (government control of manufacturing and industrial operations). Specifically, DoD invariably exercises sufficient control over the GOCO contractor and specifications for goods and services to create an agency relationship in the production of military equipment.¹⁰² Courts have recognized that the government can be deemed an "operator" under CERCLA at a federally owned industrial reserve plant, provided the government exercises sufficient supervision and control of plant operations. Government efforts to disclaim any agency relationship with GOCO contractors at government-owned plants have been consistently unsuccessful.

97. *Id.* at 54-55. The court's unpublished "Findings of Fact and Conclusions of Law" are dated February 19, 1997. The former facility contractor (Dow Chemical) was held harmless.

98. *Id.* at 7-8.

99. *Id.* at 32.

100. *Id.* at 8.

101. *Id.* at 6.

102. *See, e.g.,* Cadillac Fairview/Cal., Inc. v. Dow Chem. Co., No. 83-7996 MRP (C.D. Cal. filed 1983), at 44-45; *see also* FMC Corp. v. Dep't of Commerce, 29 F.3d 833, 843-44 (3d Cir. 1994) (en banc) (finding the requisite government control in the Los Angeles GOCO used to provide synthetic plastic during World War II).

The government occasionally relies upon *FMC Corp. v. Dep't of Commerce*¹⁰³ as support for its position favoring government cost sharing. The government is encouraged by the fact it was not assessed 100 percent responsibility by the court.¹⁰⁴ Properly read, however, *FMC* is actually favorable to contractors and undermines the governments cost recovery position at GOCO facilities. Despite the fact that CERCLA section 120(h)'s obligations and warranties do not apply to the privately owned facility in *FMC*, and no government contracts existed between *FMC* and the United States, the government was nonetheless assessed significant liability on the sole basis of its temporary control of a privately owned facility.¹⁰⁵

The 440-acre Virginia facility in *FMC* was owned by three companies at various times over forty-nine years (1940-89).¹⁰⁶ The government's War Production Board ordered production of high tenacity rayon at the facility for only six-years (1942-48).¹⁰⁷ Although the War Production Board controlled rayon production at the facility for only twelve percent of the facility's industrial life, the government was ordered to contribute over twenty-six percent of the cleanup costs.¹⁰⁸ Stated differently, the Virginia production facility was privately owned at all relevant times and was operated commercially eighty-eight percent of the time; however, despite the absence of any CERCLA section 120(h) requirement for the government to remediate a non-federal installation, the government was still required to contribute twenty-six percent of the costs to remediate the non-federal facility.

The Pennsylvania federal court in *FMC* assessed the United States between \$26-78 million in environmental cleanup costs as the "owner" and "operator" at a privately owned plant for the events surrounding the government's temporary takeover of the facility to manufacture high-tenacity rayon during World War II.¹⁰⁹ The United States was deemed to have exercised substantial control over the manufacturing facility and its operations during the war.¹¹⁰

103. 29 F.3d 833 (3d Cir. 1994) (en banc).

104. *Id.* at 841.

105. *Id.* at 846.

106. *Id.* at 836.

107. *Id.* at 836-37.

108. *Id.* at 838.

109. *FMC Corp. v. Dep't of Commerce*, 29 F.3d 833, 846 (3d Cir. 1994) (en banc).

110. *Id.* at 844.

In contrast, at the "contractor-owned, contractor-operated" National Defense Corporation Eau Claire, Wisconsin munitions facility, the Army agreed initially to fund 100 percent of cleanup (up to \$5 million), despite the fact that the Army owned the facility only between 1940-45.¹¹¹ For over four decades, the privately owned Eau Claire facility supplied munitions to the Army.¹¹² The facility, however, contained government-owned equipment and buildings.¹¹³ To avoid losing production at the Eau Claire facility, the Army agreed to fund past and future environmental cleanup activities, despite the lack of evidence that any releases occurred during the Army's ownership.¹¹⁴ The Army's reimbursement of past environmental costs under the applicable production contracts at a contractor-owned facility needed extraordinary contractual relief, which was granted by the Contract Adjustment Board in 1988 pursuant to Public Law 85-804.¹¹⁵ The Board acknowledged that, had the Eau Claire facility been government-owned, the Army surely would have financed the required environmental restoration.¹¹⁶

The Eau Claire contractor agreed to reimburse the Army fifty percent of the cleanup costs at its private facility through offsets in future production contracts.¹¹⁷ Technically, the contractor contributed nothing and was only forced to recognize fifty percent of cleanup costs as an allowable indirect charge ultimately paid by the government through forward pricing on production contracts. Of note, because Eau Claire was privately owned, the government had no obligations under CERCLA section 120(h) to warrant that it had cleaned up the privately owned property.

In *United States v. Shell Oil Co.*,¹¹⁸ the court apportioned to the government 100 percent of past and future cleanup costs attributable to the lawful disposal of the by-products of World War II-era

111. See Public Law 85-804 Application of National Defense Corporation Eau Claire, Wisconsin, Army Contract Adjustment Board, Case No. 1231 (Mar. 25, 1988), available at 1988 WL 404951.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at n.13.

117. Public Law 85-804 Application of National Defense Corporation Eau Claire, Wisconsin, Army Contract Adjustment Board, Case No. 1231 (Mar. 25, 1988), available at 1988 WL 404951.

118. 13 F. Supp. 2d 1018 (C.D. Cal. 1998).

aviation fuel by various oil companies at the McColl Superfund site.¹¹⁹ The case did not involve contamination at a GOCO facility, but it did address the proper apportionment of contractual risk between the government and a contractor for cleanup costs imposed under modern environmental laws. During World War II, the government required domestic petroleum companies to produce massive quantities of aviation fuel.¹²⁰ Over fifty years later, the court apportioned to the government 100 percent of the cleanup costs for the aviation fuel program despite the fact that certain commingled waste sent to the McColl site was generated by the oil companies in support of their commercial operations, and government approval of disposal at the McColl site in the 1940s was only “tacit.”¹²¹

The *Shell* Court apportioned all cleanup costs against the government on the basis of the contracts assessing production costs to the government and because of the “extensive” degree of government oversight of the petroleum industry during the war.¹²² The Court reasoned that the McColl cleanup arose from critical national defense programs and was a “cost of war” that should be borne by society as a whole.¹²³ The logic of *Shell* applies to the divestiture of all GOCO facilities, where cleanup relates to decades of production-related waste generation in support of critical national defense programs conducted at government-owned facilities.

In *Gould Electronics Inc. v. United States*,¹²⁴ the court held that private parties could assert claims of contribution against the United States for approximately \$4.5 million in damages incurred in connection with a former Army GOCO plant in Cold Spring, New York, which manufactured batteries for DoD.¹²⁵ The plant was built between 1951-53 and operated by Sonotone Corp. under traditional DoD facility use contracts from 1953 to 1962.¹²⁶ The plant’s industrial waste water system, designed by the government, contaminated the area’s groundwater.¹²⁷ The plant was sold to Sonotone in 1962 and operated privately thereafter until

119. *Id.* at 1026-27.

120. *Id.* at 1020.

121. *Id.* at 1023, 1026.

122. *Id.* at 1022.

123. *Id.* at 1027.

124. 220 F.3d 169, 173-74 (3rd Cir. 2000).

125. *Id.*

126. *Id.* at 174-75.

127. *Id.* at 175.

approximately 1979.¹²⁸ Area residents sued the private owners in state court and obtained a \$4.5 million settlement. In addition, EPA entered into a consent decree with the Army and the private owners of the former GOCO.¹²⁹ The Third Circuit held that the private owners could assert a contribution action against the United States in federal court for the \$4.5 million settlement arising from contamination released at the former Army GOCO.¹³⁰

No case law exists holding GOCO contractors, redevelopers, or local municipalities liable for environmental contamination released at GOCO facilities. The combination of favorable facility use contracts, the governments statutory obligations under CERCLA section 120(h), and favorable court authority all instruct that GOCO contractors, redevelopers and local municipalities are not required to indemnify the government for the operation of GOCOs under the Defense Industrial Reserve Program. Cleanup responsibility squarely rests with DoD, even after transfer to a non-federal owner.

V. DISPOSAL OF GOCO PLANTS UNDER FEDERAL REAL PROPERTY TRADITIONAL DISPOSAL RULES

Unless Congress exempts specific federal property, all federal real property disposals, including the conveyance of GOCO facilities, are governed by the Federal Property and Administrative Services Act of 1949 ("1949 Property Act").¹³¹ One notable category of property excluded from the 1949 Property Act includes "military installations" closed in accordance with the recommendations of the Base Realignment and Closure Commission.¹³² These DoD bases are subject to the unique disposal rules incorporated into the BRAC laws (e.g., "public benefit" and "economic development" conveyances).

Congress has expressly authorized DoD to dispose of excess defense industrial reserve properties and plants through the General Services Administration ("GSA"), applying the traditional property disposal rule to obtain for the government fair market value for the property.¹³³ Unless Congress directs otherwise, the disposal of

128. *Id.*

129. *Id.*

130. *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 192 (3d Cir. 2000).

131. *See, e.g.*, 40 U.S.C. §§ 471-544 (1994).

132. *See* 40 U.S.C. § 484(q)(9) (1994).

133. *See* 10 U.S.C. § 2535(b)(F) (1994).

GOCO facilities as either “excess” or “surplus” property is governed by the 1949 Property Act.¹³⁴ Of note, “excess” and “surplus” properties are not synonymous. “Excess” property remains federal property, although the particular federal agency responsible for the property may change. That is, “excess” property must be “screened” and, if possible, transferred to another federal agency before it is conveyed to non-federal parties. Only “excess” real property that is not needed by any federal agency is, after a certain period of time, declared “surplus” and prepared for transfer out of the federal government and into the hands of nonfederal owners.¹³⁵

GSA regulations outline the government’s process for the disposal of surplus real property.¹³⁶ The disposal process is triggered when agencies report “excess” real property to GSA, as required by regulation.¹³⁷ A brief one to three month federal “screening” process is then commenced to assess whether another agency needs the property.¹³⁸ Interagency transfers of “excess” real property must be at fair market value as conclusively determined by a GSA appraisal.¹³⁹

After the screening period, but before GSA may dispose of “surplus” federal property to the private sector for consideration through competitive bidding or negotiated sale, the agency must first notify the state of the intended disposal and advise the state of available programs to obtain the property at no cost.¹⁴⁰ The programs available under existing law are limited in scope and generally require prompt state action and federal agency “sponsorship.” Conceptually, the process is similar to a right of first refusal. For instance, under the Surplus Property Act of 1944, Congress authorized the Department of Transportation to “give” surplus federal property to a state, or political subdivision of a state, in order to develop, maintain or improve a public airport.¹⁴¹ Under current disposal regulations, however, the interested state (or local agency) has only twenty-nine days after GSA provides notice of its intent to

134. See 40 U.S.C. § 485(h)(1) (1994).

135. 41 C.F.R. § 101-47.204-1 (1999).

136. See, e.g., 41 C.F.R. § 101-47 (1999) (providing disposal rules for surplus real property).

137. *Id.* § 101-47.202-1.

138. *Id.* § 101-47.203-5.

139. 41 C.F.R. § 101-47.203-7(f)(1) (1999).

140. *Id.* § 101-47.303-2(b).

141. See 49 U.S.C. §§ 47151-47153 (1994).

dispose of surplus property to announce its commitment to submit an application for a sponsored public airport conveyance.

The 1949 Property Act contemplates several permanent disposal options for surplus GOCO property.¹⁴²

A. Competitive Auctions and Negotiated Sales

Auctions are preferred over negotiated sales and involve aggressive public advertisement to solicit competitive bids. Ironically, the reason auction sales are preferred is because Congress complained in 1958 of "unrealistic" low appraisals from local appraisers, which appeared designed to serve local interests to the detriment of the government in subsequent negotiated sales.¹⁴³ Congress apparently did not contemplate the possibility, decades later, of unrealistically high federal appraisals at GOCO plants. All competitive bids may be rejected if GSA considers them to be inadequate.¹⁴⁴

Negotiated sales are permitted in the event competitive bids are inadequate or 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."¹⁴⁵ The regulations require a GSA appraisal for most negotiated sales, but neither the government nor the private purchaser is bound by its outcome.¹⁴⁶ The negotiation is designed to be a competitive, arm's-length deal. The traditional process, however, assumes that a market for the government property exists and environmental liabilities and future cleanup costs can be fairly appraised.

B. Economic Development Conveyances

In 1988, the United States Air Force attempted to revitalize the inactive GOCO divestiture program at its remaining Air Force Plants through one of the following mechanisms: (1) sale of the plants to current contractors; (2) "excess" transfers of plants to other federal

142. See 41 C.F.R. § 101-47.3 (1999).

143. See H.R. REP. NO. 1763, at 2866, (1958), *reprinted in* 1958 U.S.C.C.A.N. 2861, 2866.

144. 41 C.F.R. § 101-47.304-7(a)(3) (1999).

145. *Id.* § 101-47.304-9(a)(3).

146. See *id.* § 101-47.303-4.

agencies; (3) conversion of no-rent “facilities use” contracts to rent-generating leases or; (4) closure of plants and surplus disposals.¹⁴⁷ At roughly the same time, the Navy sought to accelerate the divestiture of its nineteen remaining GOCO facilities, and the Army sought to reduce the number of its twenty-seven GOCO plants.¹⁴⁸ The specific Air Force GOCOs under scrutiny in 1988 included Air Force Plant 19 in San Diego, Air Force Plant 3 in Dallas, Air Force Plant 70 in Sacramento, and Air Force Plant 78 in Brigham City, Utah.¹⁴⁹ Five years later in 1993, the Air Force accelerated plans to divest Air Force Plant 6 in Marietta, GA; Air Force Plant 59 in Binghamton, NY; Air Force Plant 42 in Palmdale, CA; and Air Force Plant 44 in Tucson, AZ.¹⁵⁰ However, the Air Force did not enjoy much success in selling the facilities to the existing contractors and typically, as an interim revenue generating measure, converted no-rent “facilities use” contracts into rent-generating leases.¹⁵¹ However, as with other costs of doing business at GOCOs, the contractors were allowed to recapture their rent in the goods and services provided the government.

As a general proposition, Congress may at any time elect to dispose of specific DoD property outside the scope of the 1949 Property Act.¹⁵² In so doing, DoD property may be disposed of by the respective military departments without direct GSA involvement at below fair market value or for no consideration at all. Of note, at least nine GOCO facilities have been conveyed to counties, local municipalities or redevelopment authorities for purposes of economic redevelopment (or other reasons) pursuant to special Congressional legislation enacted between 1995-2000 and, notably,

147. John Chandler, *Air Force's Plant 42 May Face Closure: The Only California Facility is Among Eight Nationwide to be Studied*, L.A. TIMES, Oct. 14, 1993, available at 1993 WL 2263526.

148. 1994 GAO Report, *supra* note 9, at 3.

149. Tom Burgess, *Air Force Will Sell Defense Plant Here*, SAN DIEGO UNION-TRIBUNE, Apr. 7, 1988, available at 1988 WL 5899607.

150. *Id.*

151. See 1994 GAO Report, *supra* note 9, at 5-6. The Air Force planned to divest all GOCOs by 2000, yet it is still paying for Air Force Plant 36 in Ohio sold to General Electric in 1989.

152. Pub. L. No. 103-160, § 2903(a)(C)(i), 107 Stat. 1547, 1912 (1993); 40 U.S.C. § 474 (exemptions from Act, including certain DoD activities).

with limited conditions and reversionary rights.¹⁵³ The model for no-cost conveyances of these industrial reserve plants is the well-developed process for "Economic Development Conveyances" under the BRAC laws.¹⁵⁴

TABLE B
"NO-COST" GOCO FACILITY CONVEYANCES

	GOCO FACILITY	MUNICIPALITY	DEFENSE BUDGET AUTHORIZATION	CONTRACTOR
1	Air Force Plant No. 3, Tulsa, OK	City of Tulsa, OK	FY 1995 P.L. 103-337 § 2831	McDonnell Douglas Rockwell
2	Air Force Plant No. 59, Johnson City (Westover), NY	Broome County Indus. Dev. Agency, NY	FY 1995 P.L. 103-337 § 2832	GE, Martin Marietta
3	Naval Weapons Indus. Reserve Plant, Calverton, NY	Town of Riverhead, NY	FY 1995 P.L. 103-337 § 2833	Northrop Grumman
4	Indiana Army Ammunition Plant, Charleston, IN	State of Indiana	FY 1996 P.L. 104-106 § 2858	ICI Americas, Dupont
5	Naval Weapons Indus. Reserve Plant, McGregor, TX	City of McGregor, TX	FY 1996 P.L. 104-106 § 2868	Hercules
6	Air Force Plant No. 85, Columbus, OH	Columbus Municipal Airport Authority	FY 1997 P.L. 104-201 § 2853	McDonnell Douglas
7	Naval Weapons Indus. Reserve Plant, Bethpage, NY	County of Nassau, Long Island, NY	FY 1998 P.L. 105-85 § 2852	Northrop Grumman
8	Naval Weapons Indus. Reserve Plant, Dallas, TX	City of Dallas, TX	FY 2000 P.L. 106-65 § 2851	Northrop Grumman
9	Twin Cities Army Ammunition Plant, Arden Hills, MN	City of Arden Hills, MN and Ramsey County, MN	FY 2000 P.L. 106-65 § 2840	Alliant Techsystems

153. See *infra*, Table B, compiled by the author.

154. DEPARTMENT OF DEFENSE, DOD BASE REUSE IMPLEMENTATION MANUAL § 7 (Dec. 1997).

Congress has typically authorized no-cost conveyances of GOCO facilities through the annual defense budget. One or more of the following conditions have been attached to previous facility-specific legislation: (i) the GOCO property must generally be used for economic redevelopment; (ii) the United States shall retain a five-year reversionary interest to ensure the GOCO property is actually used for economic redevelopment purposes; and/or (iii) if the municipality sells the property to a private entity, the municipality may be required to pay the United States fair market value for the gifted property to discourage “flipping.”¹⁵⁵

VI. A CONSISTENT RECORD OF GOVERNMENT-FUNDED ENVIRONMENTAL CLEANUP AT GOCO FACILITIES

The remainder of this article examines successful no-cost GOCO conveyances where the government retained environmental liability.

A. Air Force Plant 3, Tulsa, Oklahoma

The land comprising Air Force Plant 3 (“AFP 3”) was originally purchased by the City of Tulsa. In 1940, the City of Tulsa purchased land adjacent to the municipal airport for an aircraft plant and, in 1941, Douglas Aircraft Company assumed operations.¹⁵⁶ A handwritten note that accompanied the warranty deed transferring the property to the U.S. government stated that ownership of the property would revert to Tulsa if the facility were no longer needed.¹⁵⁷

During World War II, the plant was used to assemble bombers for the Army Air Corps.¹⁵⁸ The plant was closed from 1945 to 1950 and used for storage,¹⁵⁹ but in 1950 it was reactivated for the manufacture

155. See National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 2851, 113 Stat. 512, 863 (1999) (Dallas NWIRP No. 387 special legislation).

156. See Curtis Killman, *City Ready to Take Over Bomber Plant*, TULSA WORLD, Nov. 29, 1999, available at 1999 WL 5421762.

157. *Id.*

158. *Id.*

159. See general information of Air Force Plant 3 and other Air Force Plants at website of AERONAUTICAL SYSTEMS CENTER, ACQUISITION ENVIRONMENTAL, SAFETY AND HEALTH DIV., ENGINEERING DIRECTORATE, WRIGHT-PATTERSON AFB, OHIO [hereinafter AERONAUTICAL SYSTEMS CENTER], at <http://www>.

of B-47 Stratojets.¹⁶⁰ In 1962, Rockwell International began leasing thirty percent of the plant to manufacture aerospace products.¹⁶¹ McDonnell Douglas Aircraft Company continued to operate the remaining seventy percent for maintenance of military and commercial aircraft as well as for the manufacture of aircraft components.¹⁶² McDonnell Douglas terminated its lease in June 1994, while Rockwell remained at the GOCO plant.

In 1993, both the City of Tulsa and the Tulsa Airport Authority became interested in AFP 3 after the Air Force dramatically increased McDonnell Douglas's facility rent from \$400,000 to \$5.4 million annually, which threatened to evict the contractor.¹⁶³ For years, city officials had sought ownership of the facility and were assisted in their effort by Senator Nickles.¹⁶⁴ In September 1994, the City of Tulsa became the primary tenant, subleasing twenty percent of the plant to Rockwell, the remaining eighty percent was mothballed.¹⁶⁵ The City of Tulsa subsequently subleased additional space to Rockwell (Boeing), and to airfreight and warehousing operations.¹⁶⁶ The City of Tulsa has responsibility for facility maintenance and environmental management of major systems and operations. Rockwell retained responsibility for permits and waste management activities relative to its production-specific operations.¹⁶⁷ A quitclaim deed transferring title of the property to Tulsa was executed on December 6, 1999. The City of Tulsa is now the owner and operator of the property.

The Air Force considered AFP 3 to be one of the least-polluted GOCO plants it managed. Still, the Air Force spent over \$6 million to remove low-level radioactive waste resulting from the disposal of radioactive instrument dials and vacuum tubes.¹⁶⁸ A \$1.2 million

engineering.wpafb.af.mil/esh/restoration/afp3.htm (last visited Apr. 5, 2001).

160. *Id.*

161. *Id.*

162. *Id.*

163. See Mitch Maurer & Jim Myers, *City, State Seek Suspension of Air Force-McDonnell Talks; Congressional Review Eyed*, *TULSA WORLD*, Oct. 19, 1993, available at 1993 WL 9657891.

164. See Killman, *supra* note 156.

165. See AERONAUTICAL SYSTEMS CENTER, *supra* note 159.

166. See Killman, *supra* note 156.

167. See AERONAUTICAL SYSTEMS CENTER, *supra* note 159.

168. See Killman, *supra* note 156.

wastewater treatment system, installed to clean solvent-laden groundwater, was closed because area groundwater had been degraded and any future development seemed unlikely. Rockwell and the City of Tulsa did not assume any cleanup costs. DoD paid all costs.¹⁶⁹ The quitclaim deed transferring the property to Tulsa specifically warranted that DoD had taken all remedial action necessary under CERCLA section 120 and would remain liable for any further necessary cleanup activities.¹⁷⁰

Tulsa has begun leasing areas of the plant not already occupied by Boeing. In December, 1999, Amtran Corp. announced plans to lease the property from Tulsa.¹⁷¹ Amtran's new school bus manufacturing plant will create more than 1,200 new jobs, generate \$3.2 million in tax revenues, and boost Tulsa's economy by over \$80 million annually.¹⁷² Redevelopment plans at Tulsa also include the construction of an air cargo warehouse on thirty-five acres of former AFP 3 property near the airport. To facilitate disposal, Air Force officials not only supported the no-cost conveyance, the government agreed to contribute up to \$10 million toward the modification of the plant for new business purposes.¹⁷³

B. Air Force Plant 85, Columbus, Ohio

AFP 85 is an aircraft manufacturing facility, adjacent to the Port Columbus International Airport, consisting of approximately 3.3 million square feet of building space located on 179 acres. Opened in 1941, AFP 85 was first owned by the Navy and operated by Curtiss-Wright Corp., which used the facility to build "Helldiver" bombers.¹⁷⁴ North American Aviation assumed plant operations in 1950 and operated the plant until the 1970s, when Rockwell began

169. *Id.*

170. Quitclaim Deed Conveying AFP 3 to City of Tulsa, Art. III.B, at pp. 3-4 (Dec. 1, 1999) (on file with the FORDHAM ENVIRONMENTAL LAW JOURNAL).

171. See Russell Ray, *Bus Plant to Bring Spin-Off Jobs*, TULSA WORLD, Dec. 8, 1999, available at 1999 WL 5422617.

172. *Id.*

173. See Mitch Maurer, *AF Plant Conveyance Pattern Eyed*, TULSA WORLD, Oct. 21, 1994, available at 1994 WL 8408373.

174. See Mike Pramik, *Flight Into the Future After a Half-Century Association with Aviation: The Old McDonnell Douglas Plant Might Have a Very Different New Life*, COLUMBUS DISPATCH, Jan. 19, 1997, available at 1997 WL 7350651.

using the plant to build tactical missiles. In 1983, the property was transferred to the Air Force. McDonnell Douglas operated the plant from 1988 until 1992.¹⁷⁵ DoD studies conducted from 1984 to 1990 identified ten sources of potential hazardous waste contamination, including chemical spills in nearby streams and soil contamination.¹⁷⁶

Ultimately 220 acres were conveyed to the City of Columbus at no cost, pursuant to 1997 special congressional legislation, with the generic requirement that the Columbus Airport Authority use the acreage for "public airport purposes."¹⁷⁷ Separately, approximately 180 acres of AFP 85 were sold through a closed-bid public auction to "4300 East Fifth Avenue Limited Liability Company of Columbus" in 1997 for \$15.3 million.¹⁷⁸ The Columbus divestiture was complicated by the fact that the GOCO property donated to the airport authority for the additional runway underlies, in part, several buildings included within the auction.¹⁷⁹ To resolve the situation, the Columbus Airport Authority has apparently agreed to alter or move the affected buildings for the benefit of the owners of the private parcels.¹⁸⁰

In 1997, Executive Jet Inc., which operates a time-share business jet service, began leasing part of the GOCO property.¹⁸¹ The City of Columbus was instrumental in promoting the plant's development. The city provided a sixty percent abatement on property taxes and a fifty percent job tax credit for ten years. The Columbus Department of Trade and Development also promoted the project, agreeing to fund infrastructure improvements such as road widening.¹⁸²

175. *Id.*

176. See National Priorities List for Uncontrolled Hazardous Waste Sites, 56 Fed. Reg. 5,600 (Feb. 11, 1991) (to be codified at 40 C.F.R. pt. 300).

177. See Pramik, *supra* note 174.

178. *Id.*; see also Brian R. Ball, *Tenants Line Up to Take Space at Former Plant 85*, BUSINESS FIRST-COLUMBUS, Oct. 31, 1997, available at <http://columbus.bcentral.com/columbus/stories/1997/11/03/story5.html>? (last visited Apr. 5, 2001).

179. Interview with various Columbus, Ohio officials.

180. *Id.*

181. See Mike Pramik, *Executive Jet to Lease Site Near Airport*, COLUMBUS DISPATCH, July 11, 1997, available at 1997 WL 12511818.

182. *Id.*

C. Air Force Plant 59, Johnson City, New York

AFP 59 was built in 1942 by the Defense Plant Corporation.¹⁸³ Remington Rand, the first manufacturer to occupy the plant, produced aluminum aircraft propellers from 1942 to 1945.¹⁸⁴ In 1948 the building was occupied by the Aeronautics and Ordnance Systems Division of General Electric (GE), which manufactured armament systems and engine controls.¹⁸⁵ During the 1970s and 1980s, production changed from manufacturing mechanical systems to producing electronic and computer systems, such as flight controls and internal navigation and guidance systems.¹⁸⁶ In 1993, Martin Marietta acquired GE Aerospace and took over operation of AFP 59.¹⁸⁷ Lockheed and Martin Marietta merged in 1995, and the plant is currently operated by Lockheed Martin Control Systems.¹⁸⁸ The facility was used to produce highly sophisticated avionics and electronic controls.¹⁸⁹

Historical manufacturing operations at AFP 59 generated a variety of waste products, and shallow groundwater beneath the plant has shown low levels of volatile organic compounds (VOCs).¹⁹⁰ However, even with intensive soil and groundwater monitoring, no source of contamination has been located at AFP 59.¹⁹¹ Since 1993, the Air Force has been financially contributing to the Johnson City groundwater treatment system while, concurrently, conducting investigations to locate the source of groundwater contamination and determine the most cost-effective remediation.¹⁹² The Air Force cooperated with the State of New York in upgrading Johnson City's Camden Street Water Treatment Plant, including a long-term groundwater monitoring program.¹⁹³

183. See Air Force Plant 59: Binghamton, New York (providing general information about the plant, which was formerly known as Air Force Plant 59, Johnson City, New York), at <http://www.ascenv.wpafb.af.mil/afp59.html> (last visited Apr. 5, 2001).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Air Force Plant 59, *supra* note 183.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

The Air Force demanded that GE purchase the facility from the Air Force, essentially as retribution for being able to use the GOCO facility rent-free to produce a variety of DoD military systems.¹⁹⁴ GE, however, declined to purchase the facility.¹⁹⁵ Subsequently, GE and the Air Force exchanged threats: the Air Force threatened to reduce reliance on GE in its production contracts, and GE threatened to close its Johnson City facility and relocate over one thousand jobs elsewhere.¹⁹⁶

Fearing that this situation would be devastating to Johnson City and surrounding Broome County, the Broome County Industrial Development Agency ("BCIDA") attempted to broker a solution that was mutually beneficial to GE and Johnson City.¹⁹⁷ BCIDA is a non-profit organization in Broome County with a long history of purchasing, managing, and redeveloping property within the County.¹⁹⁸ Consistent with these goals of industrial redevelopment, BCIDA became aggressively proactive at AFP 59. Because of a lack of resources, however, BCIDA was not in a position to purchase AFP 59 from the Air Force at the facility's "fair market value."¹⁹⁹

BCIDA approached Congressman Maurice Hinchey for assistance in proposing defense budget legislation to authorize a no-cost conveyance for the facility—the rationale being that congressional willingness to give away (at most, a nominal cost) enormous BRAC facilities should easily extend to much smaller GOCO facilities.²⁰⁰ Congressman Hinchey agreed, and in 1995 Congress authorized the no-cost conveyance of AFP 59 to the BCIDA.²⁰¹ This transfer has allowed Lockheed Martin Control Systems to keep its headquarters in Johnson City and provide the area with approximately 1,800

194. Telephone Interview with Richard D'Atillio, Broome County Industrial Development Agency, Binghamton, NY (July 13, 2000).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Telephone Interview with Richard D'Atillio, Broome County Industrial Development Agency, Binghamton, NY (July 13, 2000).

201. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 2832, 108 Stat. 2663, 3060 (1994).

jobs.²⁰² The parties subsequently entered into a ten-year lease with two ten-year options.²⁰³ Currently, BCIDA has all rights and powers over the property pursuant to a lease in furtherance of conveyance. AFP 59 will be deed transferred to BCIDA when the Air Force finishes its environmental remediation of AFP 59.²⁰⁴

D. Navy GOCO, Pomona, California

At the former GOCO facility in Pomona, the Navy funded 100 percent of the \$4.7 million, five-year environmental cleanup, which included extensive heavy metals, petroleum and solvent soil remediation.²⁰⁵ The 160-acre GOCO facility in Pomona was purchased by the Navy in 1951.²⁰⁶ The facility was operated by General Dynamics as a GOCO facility through 1992 and subsequently operated by Hughes Missile Systems Company through plant closure in 1996.²⁰⁷ Unlike certain other GOCO plants, the city agreed to pay consideration for the federal property.

In 1996, the Navy and GSA conveyed most parcels of the facility to the State of California and then to the City of Pomona for approximately \$13 million.²⁰⁸ The state also agreed to swap 50,000 acres of state land near Death Valley, California in support of the federal Desert Protection Act.²⁰⁹ Certain parcels were retained by the state and used for public benefit purposes, such as road construction,

202. See BAE Systems homepage, at <http://www.lmcontrolsystems.com/facilities.htm> (last visited Apr. 5, 2001).

203. Broome County Industrial Development Agency & Lockheed Martin Corporation, Lease Agreement, Air Force Plant 59 (Mar. 23, 1997) (on file with author).

204. Telephone Interview with Richard D'Atillio, Broome County Industrial Development Agency, Binghamton, NY (July 13, 2000).

205. Interview with Edward Robles, former Hughes Facility Manager for Pomona GOCO (Mar. 13, 2001).

206. NIRUP SITE INVESTIGATION & REMEDIATION REPORT (Mar. 1997).

207. *Id.*

208. Randyl Drummer, *Inland Empire Focus Laying Big Ghosts to Rest: Former Defense Sites Closed 3 Years Ago Finally Near Reuse*, THE BUS. PRESS/CALIFORNIA, Mar. 24, 1997, available at 1997 WL 7751544.

209. *San Gabriel Valley Conversion Work Begins at Missile Plant*, LOS ANGELES TIMES, May 13, 1997, available at 1997 WL 2210283.

recreation and a school extension.²¹⁰ Other city-owned parcels were used for redevelopment, such as furniture manufacturing operations.²¹¹ Two major furniture companies moved to the former GOCO facility, promising 1,850 local jobs immediately and up to 4,000 jobs over the next ten years.²¹²

E. Navy GOCO, Fridley, Minnesota

At the eighty-three acre Fridley industrial reserve facility, which is located north of Minneapolis and adjoins the Mississippi River, one parcel has been privately owned by FMC (now United Defense) since around 1964, and the other parcel has consistently been owned by the Navy.²¹³ The facility has been in operation since 1941 and has extensive groundwater contamination. The Navy is seeking to sell the GOCO property to the current contractor, United Defense.²¹⁴

Most of the Fridley facility's manufacturing activities are now devoted to Army artillery development and modernization.²¹⁵ Nevertheless, to date the Navy has spent approximately \$20-30 million in Fridley environmental cleanup costs and expects to spend another \$20 million to complete restoration.²¹⁶ Past and future cleanup costs are expected to exceed \$50 million. Because the site is on the Superfund list, the Navy has entered into a Federal Facilities Agreement with EPA and the State of Minnesota to accomplish cleanup.²¹⁷

In 1997, the Navy advised GAO that it would fund the \$40-50 million cleanup at Fridley.²¹⁸ Since then, the contractor and the Navy have been involved in on-again, off-again negotiations for the potential purchase of the GOCO. Until recently, the contractor agreed to be an anchor tenant for a future purchaser and for years

210. *Id.*

211. Drummer, *supra* note 208.

212. *Id.*

213. See 1997 GAO Report, *supra* note 29, at 28-31 (citing a report to the Subcommittee on National Security, International Affairs, and Criminal Justice, Committee on Government Reform and Oversight, House of Representatives).

214. *Id.* at 28.

215. *Id.*

216. *Id.* at 29.

217. *Id.* at 30.

218. *Id.* at 29-30.

declined to purchase the facility. To date, the contractor has not assumed, without reimbursement, any of the past or future environmental cleanup costs.

F. Navy GOCO, Bethpage, Long Island, New York

The Bethpage GOCO facility was established in the late 1930s and consists of non-contiguous Navy-owned and Northrop Grumman-owned parcels.²¹⁹ Of the 500 acres originally owned by Grumman at Bethpage, the contractor has sold most of this property. The contractor-owned parcels were used to support DoD related programs. The Navy currently owns a 105-acre parcel and a 5-acre parcel, which are listed on the state's Superfund list because of extensive groundwater contamination.²²⁰ Cleanup has been underway for the past two to three years.²²¹ The Navy expects to convey the government-owned parcels to Nassau County at no cost, pursuant to special 1998 legislation upon completion of the cleanup.²²²

Most heavy industrial manufacturing of DoD aircraft components assembled at Calverton and elsewhere took place at the Bethpage facility, more particularly the "Plant 3" complex that is the centerpiece of the Navy-owned 105-acre parcel. Grumman Aerospace was the only contractor to operate the Bethpage GOCO facility from the 1940s through the 1994 merger with Northrop Corporation. A regional plume of groundwater contamination exists, and an interim groundwater treatment system has been installed at Navy expense.²²³ Various regional manufacturing activities (non-Grumman) have also contributed to off-site groundwater contamination.²²⁴ Because of the mixed private and government ownership of property and buildings at Bethpage, cost allocation is

219. Alan J. Wax, *Nassau Expected to Get Navy's 105 Acres: Bethpage Site Would be Privately Developed*, NEWSDAY (May 10, 1999), available at 1999 WL 8171187.

220. NEW YORK STATE DEP'T OF ENVTL. CONSERVATION PROPOSED REMEDIAL ACTION PLAN FOR NWIRP BETHPAGE (July 2000).

221. *Id.*

222. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 2852, 111 Stat. 2008 (1997).

223. NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, PROPOSED REMEDIAL ACTION PLAN FOR NWIRP BETHPAGE 6-7 (July 2000).

224. *Id.*

conceptually complicated. Those allocation issues are currently the subject of discussions with Navy.

G. Allegheny Ballistics Laboratory, West Virginia

The 1,600-acre Navy-owned Allegheny Ballistics Laboratory in Mineral County, West Virginia has produced munitions and propulsion systems since 1945²²⁵ and has over 100 separate waste dumps.²²⁶ Accordingly, there is extensive on-site contamination.²²⁷ State inspectors cited the GOCO facility thirteen times between 1980 and 1993 for hazardous waste violations.²²⁸ Hercules Inc. operated the GOCO facility from 1945-95 and from 1967-68 as a "mixed use" DoD and commercial facility.²²⁹ Alliant Techsystems, Inc. currently operates the GOCO facility.²³⁰

Navy committed to the State of West Virginia that it would spend between \$2 and 3 million over the next five years at this GOCO facility for purposes of cleanup.²³¹ Despite the facility's uneven compliance record, the GOCO contractor has apparently not shared in the costs for facility cleanup.²³² Navy has advised GAO that it will likely fund the entire \$43 million environmental cleanup at Allegheny.²³³

H. PKJS Air Force GOCO, Jefferson County, Colorado

On February 28, 2001, GSA completed a negotiated sale of the 500-acre "PKJS Plant," a GOCO facility in Jefferson County, Colorado, to the existing contractor (Lockheed Martin).²³⁴ The Air Force GOCO is completely surrounded by 4,700 acres of property

225. See 1997 GAO Report, *supra* note 29, at 26. The GAO investigated the cleanup of the Allegheny Ballistics Laboratory.

226. Ken Ward, Jr., *Mineral Factory Site To Be Cleaned Up*, THE CHARLESTON GAZETTE, Jan. 14, 1998, available at 1998 WL 5927441.

227. See 1997 GAO Report, *supra* note 29, at 27.

228. Ward, *supra* note 226.

229. See 1997 GAO Report, *supra* note 29, at 26.

230. *Id.*

231. Ward, *supra* note 226.

232. See 1997 GAO Report, *supra* note 29, at 27.

233. *Id.* at 26-27.

234. Telephone Interview with Jerry Moore, General Services Administration, Ft. Worth, TX Regional Office (Mar. 13, 2001).

owned by the contractor.²³⁵ In 1957, the Air Force purchased its 500 acres from the contractor.²³⁶ According to GSA, the negotiated purchase price for the GOCO facility was \$3.68 million.²³⁷ In addition, a separate environmental matters agreement was negotiated, the product of binding arbitration between the government and contractor to apportion environmental costs in conjunction with the sale.²³⁸ The sale was complicated by adjoining private and Air Force parcels.²³⁹ The contractor is obligated to pay \$3.5 million over ten years in environmental cleanup costs.²⁴⁰ Air Force is obligated to pay the balance to complete the GOCO cleanup, which is estimated to be \$20 million.²⁴¹

CONCLUSION

In summary, a review of practices at other GOCO and non-GOCO facilities reveals that, subject to annual appropriation limitations, the federal government has historically appropriated the funding necessary to accomplish GOCO facility cleanup.

Neither contractors nor municipalities have been held involuntarily responsible for the cleanup of historical releases attributable to DoD manufacturing activities at GOCO facilities. As the military continues to divest itself of its former military bases and industrial reserve plants, these assets present significant opportunities for local economic redevelopment, job creation, and increased tax revenue. CERCLA section 120(h) provides statutory assurances of long-term, government environmental management. During the last fifteen years of section 120(h)'s existence, these statutory assurances have been effective and have not required private enforcement. In fact, of the thousands of parcels of federal

235. See general information of "Plant PJKS" at website of AERONAUTICAL SYSTEMS CENTER, ACQUISITION ENVIRONMENTAL, SAFETY AND HEALTH DIV., ENGINEERING DIRECTORATE, WRIGHT-PATTERSON AFB, OHIO, at <http://www.engineering.wpafb.af.mil/esh/restoration/afppjks.htm> (last visited Apr. 5, 2001).

236. *Id.*

237. Telephone Interview with Jerry Moore, General Services Administration, Ft. Worth, TX Regional Office (Mar. 13, 2001).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

property transferred by DoD and GSA for almost two decades, the government has not failed to ultimately fulfill its section 120(h) obligations. Nor have any lawsuits yet been filed by a nonfederal transferee of contaminated federal property because of governmental noncompliance with its statutory warranties.

No-cost GOCO conveyances are faithful to the objectives of BRAC, have grown in popularity, and present minimal environmental risk to the local municipalities and contractors. Congress has authorized the divestiture of nine GOCO facilities for no consideration during the last five years upon the request of affected local communities. Strong local municipal interest in obtaining a GOCO facility for redevelopment purposes is invariably the ingredient that distinguishes successful no-cost GOCO conveyances from less successful plant closures or higher-cost negotiated sales of plants to third parties. By statute, contract, and case law, the environmental liabilities arising from former DoD manufacturing activities at GOCO facilities remain squarely with the government.