FUNDING REMEDIATION AND REDEVELOPMENT OF FORMERLY USED DEFENSE SITES

by Shawna Bligh and Chris Wendelbo

Thousands of former military bases and Department of Defense (DOD) facilities throughout the United States have been transferred to private individuals, companies or local governmental units for redevelopment by statutory authority other than the Defense Base Closure and Realignment Act of 1990 (BRAC); many of these facilities were transferred pursuant to the Federal Surplus Property Act of 1944 (58 Stat. 765), 50 U.S.C. App. 1622(g). A significant number of these facilities contain residual environmental contamination that continues to pose a threat to public health and the environment. Additionally, residual environmental contamination often impacts the ability to redevelop these sites. While the BRAC program has adequate funding, the federal program established to address residual environmental contamination and the United States' liability for causing the release of hazardous substances for non-BRAC property transfers is grossly underfunded, and, thus, largely ineffective. These non-BRAC sites are currently managed by the U.S. Army Corps of Engineers (COE) under the Formerly Used Defense Sites (FUDS) program.[1] The result is that the recipients of these former DOD facilities are frequently left "holding the bag" for protection of public health and the environment and redeveloping the property with insufficient funds to do so. This article sets forth a strategy by which local entities struggling to redevelop former DOD facilities with residual environmental contamination can utilize local counsel, as augmented by environmental legal specialists, to recover sufficient funds to remediate FUDS contaminated by former DOD operations.

As reported in the "Defense Environmental Programs Annual Report" to Congress for fiscal year 2007, annual funding for the FUDS program was $262.1 million that was consistent with the annual funding in previous years.[2] In comparison, DOD estimates the cost of completing the remaining investigation and cleanup of more than 2,600 FUDS throughout the country (including response actions for munitions) to be $16.272 billion.[3] Thus, the U.S. Congress has appropriated a yearly budget that is approximately 2 percent of the total estimated cleanup obligation. This results in intense competition for the limited available funding. In the state of Missouri, there are 78 FUDS. These Missouri FUDS must compete with sites across the country for funding. The result is often that redevelopment projects are delayed until such time that the United States appropriates sufficient funds to address its liability and remediate these sites.

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The strategies set forth in this article may allow local entities redeveloping former federal facilities to: (1) break from the cycle of insufficiently funded federal environmental remedial obligations; (2) negotiate a favorable judicially-approved compromise settlement with the United States; (3) or, if necessary, obtain a judicial determination of the United States' past liability pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[4]; (4) obtain a declaratory judgment of the United States' CERCLA liability pursuant to Section 113(g)(2) of CERCLA for all future response costs that are necessary and consistent with the National Contingency Plan (NCP);[5] (5) address threats to human health and environment in a timely manner; and (6) possibly accelerate redevelopment efforts by local entities.

Under the FUDS program, the DOD is responsible for environmental restoration of properties that were formerly owned by, leased to or otherwise possessed by the United States, which fall under the jurisdiction of the Secretary of Defense. The United States Army is the federal executive agent for the program and the COE manages and directs administration of the FUDS program. The FUDS program is part of DOD's Defense Environmental Restoration Program (DERP) and remediates properties consistent with CERCLA and the NCP. The FUDS program is funded through annual congressional appropriations. Generally speaking, these annual funds are then allotted, by the COE, to individual FUDS based on a process that prioritizes the sites based on the degree of risk each site's contaminants or military munitions pose to human health and the environment relative to other sites in the FUDS program.

FUDS Program Policy

Because the FUDS program has been historically underfunded, local entities and private landowners that have obtained FUDS are often restricted on the use or redevelopment of the property due to the continued existence of residual contamination. Presumably in an attempt to address the lack of funding to complete remediation actions at FUDS, the COE instituted a policy of attempting to achieve compromise settlements of DOD's CERCLA-based liability with other potentially responsible parties (PRPs).[6] The FUDS Settlement Policy (Policy) goal is to negotiate a fair and equitable settlement with other PRPs who either have or will take the response action in exchange for a release of DOD liability under CERCLA, other applicable environmental laws, and rules of common law.[7] Pursuant to their FUDS policy, the COE recognizes

it is sometimes better to settle DOD's CERCLA liability with other PRPs rather than assume the obligation for conducting response actions at these sites.[8]

Under the Policy, the recipient entities can gain control of the remediation of a portion or the entirety of the site to better accommodate the needs of the local community or address threats to human health and environment in a timely manner. This is accomplished by the parties agreeing that the United States will settle its CERCLA liability at a given site by providing sufficient funding to pay the costs associated with past or future response activities in accordance with the United States' pro-rata share of the liability. For its part, the recipient entity will assume the responsibility of using those compromise settlement funds to complete the investigative and remedial activities and achieve regulatory closure.[9] In theory, under the compromise settlement agreement, the United States and the recipient entities each share in the risk, as well as obligations associated with addressing residual environmental contamination at these sites.

This Policy provides a unique funding opportunity for the more-timely remediation of residual environmental contamination by use of the U.S. Department of Justice Judgment Fund[10] rather than utilizing limited appropriated DERP FUDS funding. Congress established the Judgment Fund as a permanent indefinite appropriation for the payment of judicially and administratively ordered monetary awards against the United States and amounts owed under compromise settlement agreements negotiated by the U.S. Department of Justice in settlement of claims arising under actual or imminent litigation.[11]

In order to effectively navigate the complexity of this process, it is imperative that the local entities engage sufficient legal and technical expertise to: (1) make an accurate determination of the condition of the subject property; (2) ascertain the necessary investigative and remedial activities to address the residual environmental contamination; (3) develop a realistic cost estimate and implementation schedule; (4) negotiate a settlement with the United States; and (5) assist with the implementation of the remedial plan. While each site possesses its own unique characteristics, some of the critical overarching approaches to efficiently remediating and potentially redeveloping these sites include: (1) initiating discussions with the appropriate COE district; (2) review environmental investigative activities completed to date; (3) retain engineering, technical and legal support to evaluate site activities to date and to assess whether the site is appropriate for the local entity's intended objectives; (4) engage in technical discussions with the state regulatory agencies and EPA to review the known data sets to ascertain an appropriate remedial approach, the anticipated conceptual implementation timeline, and estimated cost to complete such implementation; (5) commence settlement negotiations with the assigned U.S. Department of Justice's attorney and/or COE counsel; and (6) finalize a settlement in the form of a judicially-approved consent decree.

Consequently, by reaching a compromise settlement agreement with the United States, a local entity may assume control of the entire remedial process, thereby relieving the COE of the funding obligation. The United States, in turn, can fund its obligation through use of the Judgment Fund.

Section 107(a) of CERCLA

If the local entity is unable to reach an agreement with the United States or if the United States is unwilling to negotiate, the recipient community that owns the real estate may always institute a CERCLA 107(a) cost recovery action against the United States. Section 107(a) of CERCLA authorizes the EPA, states, private persons and others who incur response costs necessary to respond to a release or threatened release of hazardous substances from a facility, to recover those response costs from parties responsible for these releases. 42 U.S.C. § 9607(a). Historically, it appears that few recipient communities have initiated cost recovery actions against the United States pursuant to CERCLA Section 107(a) at FUDS. However, after the decision in the *United States v. Atlantic Research Corporation* there is no question that Section 107(a) of CERCLA permits cost recovery by a private, potentially responsible party (PRP) that has itself incurred cleanup costs at a site.[12] Moreover, Section 113(g)(2) of CERCLA, provides that a party pursuing an action under CERCLA Section 107(a) is entitled to a declaratory judgment on liability for future response costs or damages to be incurred as a result of the release or threatened release of hazardous substances. 42 U.S.C. § 9613(g)(2). Consequently, if a recipient of a FUDS is unable to reach a negotiated compromise settlement agreement with the United States, cost recovery litigation against the United States for costs incurred or to be incurred in the remediation of residual environmental contamination may be initiated.[13] After obtaining judicial relief, the municipality may look to the United States' Judgment Fund to fund the United States' proportional share of the costs of remediating the property.

Conclusion

While the remediation and redevelopment of former DOD facilities presents unique opportunities for surrounding communities, it does present significant challenges, particularly from a financial perspective. Often the recipient communities lack sufficient funding to fully maximize any potential opportunities arising from the ownership of these FUDS. Waiting for the United States to address residual environmental contamination under the FUDS program is not a viable option given its anemic funding. Consequently, the strategies set forth in this article may assist recipient communities in breaking from the cycle of non-funded federal obligations and obtain the necessary funding to redevelop or utilize these sites in a timely manner.

This article was written by **Shawna Bligh** and **Chris Wendelbo** of the Session Law Firm in Kansas City, Mo.

Endnotes

1 10 USC 2701 et seq.; DOD Management Guidance for the DERP (28 September 2001).

2 10 USC 2706 (a) and (b); https://www.denix.osd.mil/portal/page/portal/denix/environment/ARC/FY2007DEP

3 Id.

4 Pub. L. 99-499, as amended; 42 USC § 9601 et seq.

5 40 CFR 300.

6 See, USACE Manual, ER 200-3-1, Environmental Quality, Formerly Used Defense Sites (FUDS) Program Policy, 10 May 2004.

7 Id. at 5-6 through 5-10.

8 Id.

9 Id.

10 31 U.S.C. 1304; See also, Treasury Financial Manual ("TFM") 6-3100, Part 6 – Chapter 3100 (September 2000).

11 Id.

12 United States v. Atlantic Research Corporation, 551 U.S. 128 (2007).

13 Id.